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REPORTS

OF

All the Cases decided by all the Superior Courts

RELATING TO

MAGISTRATES, MUNICIPAL,

AND

PAROCHIAL LAW.

(REPRINTED FROM THE "LAW TIMES" REPORTS.)

EDITED BY

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REPORTS OF ALL THE CASES

DECIDED BY THE

Supreme Court of Judicature

RELATING TO THE

LAW ADMINISTERED BY MAGISTRATES

AND TO

PAROCHIAL AND MUNICIPAL LAW.

CT. OF APP.]

PENDLEBURY v. GREENHALGH.

[CT. OF APP.]

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT WESTMINSTER.

Reported by G. G. KENNEDY, Esq., Barrister-at-Law.

Monday, Nov. 8, 1875.

PENDLEBURY v. GREENHALGH.

Liability of surveyor — Altering highway — Dangerous place unprotected — Accident.

The defendant, surveyor of highways, was ordered by the vestry to raise the level of the highway. The vestry supplied the materials, the defendant set out the work, determined the levels, superintended and contracted with G. to do the work at 3½d. per yard. The plaintiff, who was driving along the highway in the dark, was upset by some repairs that were insufficiently lighted and fenced.

Held (upon these facts, reversing the decision of the Queen's Bench), that the defendant was responsible for the due performance of the work, that he might have divested himself of such responsibility by contracting for the whole work to be done, but that, as he only contracted for the mere labour, he remained responsible for the lighting and fencing.

THIS was substantially an appeal from the Court of Queen's Bench, in the case of *Taylor v. Greenhalgh* (ante, vol. ix., p. 201). In the present case the accident arose out of the same state of facts, but the action was brought by a different plaintiff, and the findings in the case were slightly different, as appears by the following facts.

The defendant was appointed surveyor of highways by the vestry of Tottington Lower-end, Lancashire, at a salary of 20*l.* a year. The vestry had by resolution ordered that part of the road leading from Tottington to Bury should be raised, and the defendant was ordered to employ men to do it. The vestry supplied the materials, and the defendant contracted with his brother, John Green-

halgh to do the work at 3½d. per yard. The defendant determined the levels and set out the work, but had nothing to do with the paving himself, except superintending on behalf of the vestry. The plaintiff, who was driving along the road in the dark, came to that part which was being repaired. Half of the road had been raised and the other half was left at the old level. The difference in level was about a foot, and there was neither light, fence, nor protection. The plaintiff with his horse and cart were upset.

Ambrose, Q.C., for the appellant, Pendlebury.—First, the judgment below proceeds upon the assumption that the defendant was a mere instrument acting under responsible authority. By the Highways Act, 5 & 6 Will. 4, c. 50, s. 6, the surveyor is to be elected annually, and is to keep the roads in repair. By sect. 18 there is power to appoint a board, but there is no authority giving the vestry power to order the surveyor to execute repairs. [The LORD CHANCELLOR.—Has an action ever been successfully maintained against a surveyor where he has not been personally negligent?] There has not. *Young v. Davies* (2 H. & C. 197; 9 L. T. Rep. 146) is a case for mere omission on the part of the surveyor to repair. The vestry had no right to raise the road; there is no authority to that effect. [The LORD CHANCELLOR.—Do you mean to say parishes may not raise the road?] They must have an order from justices to do so. The local government may do so, but the surveyor or highway board may not. Secondly, as to the point of leaving the road in this state. The jury have found somebody is liable, and that defendant did not personally interfere. The defendant employed John Greenhalgh as a workman; the defendant himself sets out the level, he does not lose control of the highway, and he himself superintends the work. It would be entirely different if he contracted with John Greenhalgh. John Greenhalgh was merely a workman under him, and it cannot be said that the labourer employed by John Greenhalgh should be joined as a *tortfeasor*. As to the lighting, he gave no directions. To leave a heap of stones or alter a level, and then not fence, is a complex action. First, he makes the heap; that may be law-

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ELLIOT (app.) v. THOMPSON AND OTHERS (resps.).

[Q.B. Div.]

ful or not, but the leaving it unfenced makes the whole act wrong: (*Newton v. Ellis*, 24 L. J., 337, Q.B.). [BRETT, J.—In that case the surveyor was contractor, as John Greenhalgh was in this case. The LORD CHANCELLOR.—Was the contract in writing?] No, it was not. Thirdly, the defendant acted without any authority from anyone. He set out the levels and authorised John Greenhalgh to do the work. *Foreman v. Mayor of Canterbury* (L. Rep. 6 Q. B. 214) is an authority for the proposition that the Board of Health, when surveyors of highways, are not relieved from responsibility for the negligence of their servants. *Couch v. Steel* (3 E. & B. 402), and *Atkinson v. Newcastle Waterworks Company* (L. Rep. 6 Ex. 404), were referred to.

Edwards, Q.C. (Pope, Q.C. and Ridley with him), for the respondent, the surveyor.—This is an attempt to render a surveyor for the first time liable when he has not interfered personally. This surveyor, though paid by salary, is precisely in the same position as a surveyor appointed under sect. 6 of 5 & 6 Will. 4, c. 50. This was not an unauthorised interference with the highway, and the duty of the surveyor is to ascertain what is to be done, and he sets it out. [The LORD CHANCELLOR.—Assuming here that the lighting should be done, if the contract shows that the defendant contracted with John Greenhalgh to light the place, John Greenhalgh would be liable. You must, therefore, show that defendant did so contract with John Greenhalgh.]

The LORD CHANCELLOR (Cairns).—In this case, although the conclusion at which I have arrived, and I believe the rest of the court have arrived, does not agree with the judgment of the Court of Queen's Bench, yet I am not sure there is any difference in point of law between our decision and theirs. The first question here is, as it generally is, one of fact. What were the steps taken by the defendant for the performance of this work? I will assume that this alteration of the highway was a perfectly lawful act, if done in a proper way. It is found in the case that, by a resolution of the committee of management for the highways appointed by the vestry, it had been ordered that a part of the road about 150 yards in length should be raised, and the defendant, as such surveyor, was directed to carry out such resolution. I will assume that, if the defendant could not carry out this resolution by himself, it was perfectly lawful for him to contract in a proper manner with any third party for the execution of the work, and that if he had contracted in a proper manner to have this work, with all its incidents, properly performed, he would not have been responsible for any negligence on the part of the person who contracted to perform the work. Did he then contract in proper manner with anyone for the performance of this work? For the performance of the whole work he certainly did not contract; he contracted only for a performance of a part of the work. What was the part he contracted for? The case finds as follows: "The defendant stated that he set out the work and determined the levels, but had nothing to do with the paving himself, except superintending on behalf of the committee." It has been very properly admitted in argument that, for the safety of the public during the night, this part of the road should be fenced off and lighted, and otherwise protected. This work was then of a complex kind, involving four component

portions—the materials to be provided for the work; the superintendence of the work; the labour; and the fencing and lighting during the night. I have looked with considerable anxiety to see what was contracted for; I cannot find anything was contracted for except the mere labour. The materials were provided by the vestry, the superintendence was provided by the vestry. By whom was the lighting and fencing to be provided? It might have been reasonable to have stipulated that the party who supplied the labour should also supply the lighting and fencing; but it does not appear that this was done. It seems that the surveyor did not contract for the lighting and fencing, and it seems to me that this part of the work remained with him, to provide for it as a part of the work to be done, from which not having divested himself, he therefore remains liable. On this short ground, without laying down any principle of law, and without interfering with any of the decisions, I am of opinion that the defendant continued responsible, and that, therefore, the judgment of the Court of Queen's Bench should be reversed.

LORD COLERIDGE, C.J., BRAMWELL, B., and BRETT, J. concurred.

Solicitors for appellant, *Shaw and Tremellen*, for P. and J. Watson, Bury.

Solicitors for respondent, *Clarke, Woodcock, and Rylands*, for J. A. and J. Grundy and Co., Manchester.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Reported by M. W. McKILLAR and J. M. LELT, Esqrs.,
Barristers-at-Law.

Friday, Nov. 5, 1875.

ELLIOT (app.) v. THOMPSON AND OTHERS (resps.).

Certiorari—Time—Quashing of order subject to special case—At what date time runs—13 Geo. 2, c. 18, s. 5.

By 13 Geo. 2, c. 18, s. 5, "no writ of certiorari shall be granted to remove any conviction, judgment, order, or other proceedings before any justices of the peace or quarter sessions, unless such certiorari be applied for within six calendar months next after such conviction, judgment, order, or other proceedings shall be had."

On 31st Oct. 1874, certain justices of the peace made an order that the appellant should pay a sum of money to the Middlesborough Local Board.

On 6th Jan. 1875, the order was quashed by the court of quarter sessions subject to a special case, which was signed by the chairman on the 1st July 1875.

Held, that an application on the part of the Middlesborough Local Board to bring up the proceeding on certiorari was out of time.

This was an application to bring up on certiorari all proceedings consequent upon a certain order of three of the respondents, being justices of the borough of Middlesborough, in the county of York, for the payment by the appellant to the Middlesborough Urban Sanitary authority of the sum of 57l., or thereabouts, for the paving, &c., of a certain street in the said borough. The appellant had refused to pay the above sum, the works having been required to be done by him by notice

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given under the 69th section of the Public Health Act 1848, and having been executed by the said sanitary authority on his failing to comply with such notice. On appeal to the court of quarter sessions, that court, on the 6th Jan. 1875, quashed the order of the justices, subject to the opinion of the Court of Queen's Bench upon a special case, which was signed on the 1st July 1875.

The order of the respondent justices bore date 31st Oct. 1874.

A. Glen for the Middlesborough Sanitary Authority (who had been made respondents to the appeal, as well as the justices) now moved for a *certiorari* to bring up the order of the justices, and the whole proceedings consequent thereupon. The order was quashed, subject to a case which was not signed until 1st July, so that the six months limit has not yet elapsed. The six months begin to run from the time at which the order becomes operative. [COCKBURN, C.J.—The ultimate decision is *nunc pro tunc*. MELLOR, J.—I do not see how you can get out of the words of the statute.] In Oke's Magisterial Synopsis, vol. 1, p. 47, it is said that the period of six months begins to run from the time when the order becomes operative, though more than six months may have elapsed since the actual making of the order, as where it has been the subject of an appeal, in which case the time would commence running from its determination. He also mentioned *Reg. v. Allen* (33 L. J. 98, M.C.).

Per CURIAM (Cockburn, C.J. Mellor and Quain, JJ.).—This application is out of time, and must be refused.

Rule refused.

Solicitors for the applicant, *Van Sandau and Cumming*, for *Dale*, York.

Friday, Nov. 5, 1875.

ETHELSTANE (app.) v. THE JUSTICES OF OSWESTRY (resps.).

Permitting drunkenness—Evidence—Licensing Act 1872, s. 13.

A licensed person may be convicted for permitting drunkenness on his premises upon evidence that a person who had been drinking on such premises was found drunk at some distance from them.

THIS was an application for a rule calling upon the respondents to show cause why they should not state a case for the opinion of the Court of Queen's Bench under 20 & 21 Vict. c. 43.

It appeared from the affidavit of the appellant's solicitor, that the appellant, being a licensed person, had been convicted by the respondents of permitting drunkenness on his premises within the meaning of the Licensing Act 1872, s. 13. The evidence in support of the information was this: A police constable found a labouring man drunk in a ditch, distant about 100 yards from the appellant's premises. The man himself was called as a witness, and admitted that he had visited three or four public houses upon the night in question, the appellant's house, where he had partaken of two or more glasses of whisky, being the last in order visited. The appellant was sworn, and admitted that he had served the man with liquor, but stated that he left the house, to all appearance sober, about three quarters of an hour previous to the time (11.30 p.m.) at which he was found drunk in the ditch. Upon these facts

the justices convicted the appellant, recorded the conviction upon the licence, and refused to state a case.

Willoughby, for the appellant, contended that the fact that a man was found drunk after having been on licensed premises was no evidence of his having been in a state of drunkenness on such premises, much less of the licensed person having "permitted" the drunkenness within the meaning of the statute. It might be that the man had quitted the premises before the drunkenness occurred. It was for the prosecution to prove affirmatively that drunkenness had been permitted. [COCKBURN, C.J.—If a man goes into a public house sober and comes out drunk, surely that is some evidence that he got drunk within the house, and that his drunkenness was permitted by the publican.] The case was no doubt a suspicious one; but there is a broad distinction between suspicion and legal evidence.

The COURT (Cockburn, C.J., and Mellor and Quain, JJ.) were of opinion that the question was one of fact and not of law. It could not be said that there was no evidence of drunkenness having been permitted by the appellant.

Rule refused.

Solicitor for the appellant, *C. A. Yorke*.

Wednesday, Nov. 10, 1875.

COULBERT (app.) v. TROKE (resp.)

Licensing Act 1874, s. 10—Bonâ fide traveller—Three mile distance—"Nearest public thoroughfare"—Ferry.

By sect. 3 of the Licensing Act 1874, no licensed person may open his premises on Good Friday before 12.30 p.m., and by sect. 9, any person who sells intoxicating liquors during prohibited hours is liable to a penalty. By sect. 10, nothing in the Act contained "shall preclude a person licensed" as therein mentioned "from selling liquor at any time to bonâ fide travellers;" and "a person shall not be deemed to be a bonâ fide traveller unless the place where he lodged during the preceding night is at least three miles distant from the place where he demanded to be supplied with liquor," the distance "to be calculated by the nearest public thoroughfare."

C.. being a licensed person within the meaning of sect. 10, supplied certain persons with liquor before 12.30 p.m. on Good Friday. Such persons had in their own boats crossed an arm of the sea, about one mile broad, to reach C.'s premises. If they had come by land they would have had to walk eight miles. The arm of the sea was usually crossed by an ancient ferry, worked by C., who took toll from all persons crossing it, whether in their own boats or in his.

Held, upon a case stated by justices that the arm of the sea was the "nearest public thoroughfare," and a conviction of C. under the Licensing Act 1874, affirmed.

THIS was a case stated under 20 & 21 Vict. c. 43, by two justices of the county of Southampton.

The respondent had laid an information against the appellant under sect. 9 of the Licensing Act 1874 (a), for that the appellant being licensed to

(a) Licensing Act 1874, s. 10, "Nothing in this Act or in the principal Act (the Licensing Act 1872) contained shall preclude a person licensed to sell any intoxicating liquor to be consumed on the premises from

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sell exciseable liquors by retail in the Ship Inn, at Eling, in the county of Southampton, did upon Good Friday, unlawfully open his house for the sale of intoxicating liquors before 12.30 p.m. to wit, at 11.15 a.m., the same not being for refreshment to any traveller, or to any lodger in the said house.

The following facts were either proved or admitted:

1. The persons to whom the refreshment was supplied resided and had slept the previous night in the town of Southampton.

2. The appellant's licensed house is situate at Crackmore Hard, on the western shore of the Southampton Water, and on the opposite shore to Southampton, and is distant from the town of Southampton, by water, rather over a mile, and by the nearest road, eight miles.

3. From Southampton to Crackmore Hard is an ancient ferry, appurtenant to and held with the appellant's house, plied at irregular intervals by his boats, and a toll is claimed by him from all passengers landing at the Hard from boats belonging to him.

4. All persons landing at the Hard in other than the ferry boats have to pay a toll to the appellant.

5. All persons walking, driving, or riding, from the town of Southampton to Crackmore Hard, must go round by road, a distance of eight miles.

6. The persons found in the appellant's house and supplied by him with refreshments on the Good Friday in question, had crossed the water from Southampton to the said house in their own boats.

On the part of the appellant it was contended that the persons to whom refreshment was supplied were *bonâ fide* travellers, as, unless by crossing the Southampton water, an estuary of the sea, the distance between the two places by the nearest public thoroughfare would very considerably exceed three miles. But the justices being of opinion that the persons supplied with refreshment by the appellant, having crossed the water and landed at a ferry at which the public were entitled to land on payment of a toll, had used a public thoroughfare for the purpose of reaching the appellant's house, convicted the appellant in the mitigated penalty of ten shillings and costs.

The question of law, therefore, is, whether persons crossing the Southampton water in their own private boats, and landing at a ferry, at which the public are entitled to land on payment of a toll, have come by a public thoroughfare within the meaning of sect. 10 of the Licensing Act 1874, the appellant's house being also accessible by a public highway. If the court be of opinion that the said conviction was legally and properly made, then the

selling such liquor at any time to *bonâ fide* travellers, or to persons lodging in his house. . . . A person for the purposes of this Act and the principal Act shall not be deemed to be a *bonâ fide* traveller unless the place where he lodged during the preceding night is at least three miles distant from the place where he demands to be supplied with liquor, such distance to be calculated by the nearest public thoroughfare." Sect. 8 of the Act fixes the closing hours for licensed premises, and sect 9 imposes a maximum penalty on any person selling liquor during such hours. It appears to be still law that the rejection of a *bonâ fide* traveller by an innkeeper is both actionable and indictable: (See *R. v. Juellin*, 12 Mod. 225; *R. v. Ivens*, 7 C. & P. 218; *Kirkmon v. Shawcross*, 5 T. B. 17; *Thompson v. Lacy*, 3 B. & Ald. 283; *Davies v. Strace*, L. Rep. 4 C. P. 172.)

said conviction is to stand, but if the court should be of opinion otherwise, then the said conviction is to be dismissed.

Bullen, for the appellant.—The "nearest public thoroughfare" in sect. 10 of the Licensing Act 1874, must mean the nearest available public thoroughfare—the nearest way open to all the public without payment, in the same manner as a public highway is. [*QUAIN, J.*—It cannot be said that the sea is not a public highway; and to cross the sea in a boat is just like driving along a road in a carriage]. If this conviction be affirmed, it will follow that persons who, not being able to afford to go by the ferry, have walked eight miles, will be deprived of refreshment.

No counsel appeared for the respondents.

The COURT (Mellor and Quain, JJ.) affirmed the conviction. The persons supplied with refreshment had come less than three miles by a public thoroughfare, so that they could not be deemed "*bonâ fide* travellers" within the meaning of the statute.

Conviction affirmed.

Solicitor for the appellant, *J. E. Cornwell*, for *W. Cornwell*, Lympington.

June 8 and Nov. 6, 1875.

OXFORD GUARDIANS (apps.) v. BARTON (resp.)

Liability for wife's maintenance—Protection order under 20 & 21 Vict. c. 85, s. 21—13 & 14 Vict. c. 101, s. 5.

Justices at petty sessions refused an application by the appellants to make an order, under 13 & 14 Vict. c. 101, s. 5, upon the respondent to maintain or contribute toward the maintenance of his wife, who was a lunatic chargeable to the appellants' Union, on the ground that a protection order, which she had obtained under 20 & 21 Vict. c. 85, s. 21, and which had not been discharged, absolved him from such liability.

Held, upon a case stated, that, under the circumstances, the respondent was liable, and that the justices were wrong.

THIS was a case stated by two justices of the peace in and for the City of Oxford, under the statute 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of the court on questions of law which arose before the said justices, as hereinafter stated.

At a petty sessions, holden at the Police Court, Town Hall, in the City of Oxford, on the 5th Jan. 1875, a complaint was preferred by the guardians of the poor within the city of Oxford, by Walter Thompson, their clerk, duly empowered by them in that behalf (the said guardians being hereinafter called the appellants), against Edward Barton (hereinafter called the respondent), under sect. 5 of the statute 13 & 14 Vict. c. 101, charging that, on the 1st Dec. 1874, one Harriet Barton, the wife of the said Edward Barton, of Friars Entry, in the parish of St. Mary Magdalen, in the city of Oxford, being a lunatic, and being then chargeable to the united parishes within the said city of Oxford, by a certain order in that behalf of Robert Pike, Esq., one of her Majesty's justices of the peace in and for the said city, bearing date the same 1st Dec., was on the same 1st Dec. conveyed and removed to the lunatic asylum, situate at Littlemore, in the county of Oxford, being an asylum for the maintenance of the pauper lunatics of the county of Oxford and city of Oxford,

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where she had been confined as a pauper lunatic from thence to the date of the said complaint; that she was then insane; and that the sum of 10s. 3d. was the weekly charge for her maintenance in the said asylum; and applying to the justices to make an order upon the respondent to maintain or contribute towards the maintenance of his said wife in such asylum.

The said complaint was heard and determined by the said justices, being then present, and upon such hearing the application was dismissed.

And the said justices, in compliance with an application of the appellants, and the provisions of sect. 2 of 20 & 21 Vict. c. 43, stated and signed the following case:

Upon the hearing of the said complaint, it was proved on the part of the appellants, and found as a fact, that the said Harriet Barton was, on the 1st Dec. 1874 removed to the said asylum, under an order of the said Robert Pike in that behalf, and that she was still an inmate of such asylum and chargeable to the united parishes within the said city of Oxford. It was also proved that the cost of maintenance of the said Harriet Barton, since her removal to the said asylum, had been at the rate of 10s. 3d. per week.

It was admitted, on the part of the appellants, that by an order under the hands and seals of two of her Majesty's justices of the peace in and for the said city of Oxford, dated the 23rd Dec. 1873, and made under sect. 21 of the statute 20 & 21 Vict. c. 85, after reciting that it had been proved to the said justices, upon oath and otherwise, that on the 12th Oct. 1861, the said Harriet Barton was duly married to the respondent, and that afterwards, on the 17th Aug. 1871, the respondent without reasonable cause deserted her, and that she was then maintaining herself by her own industry and property, it was ordered that the earnings and property of the said Harriet Barton, acquired or to be acquired by her since the commencement of such desertion as aforesaid, should thereafter be protected from the respondent, and from all creditors and persons claiming, or who might thereafter claim under him, and that all such earnings and property should belong and should be deemed to belong to the said Harriet Barton as if she were a *feme sole*. And it was further admitted on the part of the appellants that the said desertion had not ceased at the date of the removal of the said Harriet Barton to the said asylum, and that the said protection order had not been discharged.

It was admitted on the part of the respondent that the said Harriet Barton was his wife, but it was contended by him that the procurement by the said Harriet Barton of the recited order absolved him from all liability to maintain or to contribute towards the maintenance of the said Harriet Barton so long as the said order continued in force.

The justices were of opinion that the contention of the respondent was well founded, and they, therefore, dismissed the application of the appellants for the following, amongst other reasons:

First. That by sect. 21 of the statute 20 & 21 Vict. c. 85, in the case of any such order as that hereinbefore recited being made, "the wife shall, during the continuance thereof, be and be deemed to have been, during such desertion of her, in the like position in all respects, with regard to property and contracts, and suing and being sued, as she

would be under this Act if she obtained a decree of judicial separation;" and that by sect. 26 of the same statute, "in every case of a judicial separation the wife shall, whilst so separated, be considered as a *feme sole* for the purposes of contract, and wrongs and injuries, and suing or being sued in any civil proceeding; and her husband shall not be liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her." That these provisions of the said 21st section could not be intended exclusively for the benefit of the wife, leaving the husband's liabilities intact; for then he might be liable for the trade debts of his wife. That the wife's status generally was intended to be that of a married woman under a judicial separation, so long as the order continued, because the 21st section would not otherwise take away the husband's ordinary marital rights, such as cohabitation. That this right was intended to be taken away appears clear, for otherwise the provisions of the 21st section for the protection to the wife would be left to the husband's discretion, and could be put an end to at any time at his option, whereas there is provision expressly made for his applying for a discharge of the order by the justices. The words used are that the wife's position in all respects shall be that of a wife judicially separated, with regard to property and contracts, and suing and being sued; thus not limiting the protection to her property and contracts, or to her "suing and being sued." But the wife could hardly be in this position unless the husband was also, for otherwise the wife's creditors would be the parties benefited, for their rights would be doubled. They would have their old rights against the husband, in addition to their new ones against the wife as a *feme sole*. But if the Act renders this contention inapplicable to any creditors, it does so to all creditors; and if trade creditors could only sue her as a *feme sole*, creditors also who supplied her with necessaries would be in the same position. In other words, the usual common law as to the wife being the husband's agent for obtaining necessaries, does not apply to a wife with a protection order, living as a *feme sole*. And provision is expressly made that the protection order shall only be made in case "the wife is maintaining herself by her own industry or property." This provision would be unnecessary if the husband's liability continued; and if these continued he might be prosecuted as a rogue and vagabond for being of sufficient ability to support his wife, and yet not actually maintaining her. But this criminal liability was hardly intended to apply whilst the wife was living apart from her husband as a *feme sole*.

Secondly. That the equitable maxim that a man cannot take advantage of his own wrong does not prevent this interpretation, because it would apply even more strongly in cases of judicial separation, and would apply most strongly in cases of absolute divorce, where the liability of the husband would admittedly cease.

Thirdly. That on a judicial separation the husband is not liable to support his wife, or supply her with necessaries. In sect. 26 of the above Act it is provided, "That where, upon any judicial separation, alimony has been decreed or ordered to be paid to the wife, and the same shall not be duly paid by the husband, he shall be liable for necessaries supplied for her use;" clearly implying that unless alimony had been decreed or ordered,

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and was left unpaid, the husband would not be liable for necessities.

Fourthly. That the justices, under 13 & 14 Vict. c. 101, s. 5, having considered the circumstances of the present case, including their previous order for the protection of the wife's property, had power to decline, so long as such order continued, to make the husband pay any sum towards the maintenance of his wife, notwithstanding that his pecuniary position of itself might have justified such an order.

The question of law upon which this case is stated for the opinion of the court, therefore, is whether the justices had the power, so long as their previous protection order to the wife continued in force, to decline to make an order under 13 & 14 Vict. c. 101, s. 5, upon the husband, notwithstanding that his pecuniary position of itself might have justified such an order, and the court is humbly solicited, according to the power vested in it by statute, to remit the case to the justices, with the opinion of the court thereon, or to make such other order as to the court may seem fit.

This case came to be heard on the 8th June, before Lush and Quain, JJ.

Haselfoot argued for appellants, the guardians. —It has been held in *Ramsden v. Brearley* (32 L. T. Rep. N. S. 24; L. Rep. 10 Q. B. 147), that the 21st and 26th sections of this Act are to be read together, and that, for all purposes, a woman with an order of protection is in the same position as if she were judicially separated from her husband; but it does not follow that a husband, although not liable for his wife's necessities after a judicial separation, should be absolved from this liability, which is a question between the parish and the husband, and not between the wife and the husband or his creditors. [QUAIN, J.—It would be strange if the desertion by the husband could give him protection from liability for his wife's chargeability.] The wife, with a protection order, is in the position of a *feme sole* only, with respect to the matters mentioned in the statutes, viz., for the purposes of property and contract, wrongs and injuries, and suing or being sued in any civil proceeding. This is an application on behalf of the ratepayers, and is not touched by the statute concerning the position of protected and separated wives. Thus it appears from *Thomas v. Alsop* (L. Rep. 5 Q. B. 151), which was a decision upon 31 & 32 Vict. c. 122, s. 33, containing almost the same words as 13 & 14 Vict. c. 101, s. 5.

No one appeared for the respondent, but in consequence of some doubts expressed by Lush, J., the case was directed to be re-argued before the full court.

Nov. 6. —*Haselfoot* again appeared for the guardians; but, after reading the special case, and the sections of the statute upon which it depends, he was stopped by the court (Cockburn, C.J., Mellor and Quain, JJ.), who said the matter seemed too clear to be argued, and directed that the justices should make the order of maintenance upon the respondent.

Judgment for appellants.

Solicitors for appellants, *Clarks, Rawlins and Clarke*, for T. and G. Mullam, Oxford.

Saturday, Nov. 13, 1875.

MUNDAY (app.) v. MAIDEN (resp.)

Common assault—Subsequent indecency—Aggravated nature—24 & 25 Vict. c. 100, s. 43.

The appellant placed a girl of eight years old on his knees and kissed her. About a quarter of an hour afterwards, without asking her to do anything or again touching her, he exposed his person and abused himself in her presence. The justices sentenced him to six months' hard labour for an assault of an aggravated nature on a female, under 24 & 25 Vict. c. 100, s. 43.

Held, upon a case stated, that what took place after the assault was over could not be said to render the assault one of an aggravated nature within the words of this section, and that the conviction must be quashed.

This was a case stated by two justices of the peace for the borough of Hanley, in the county of Stafford, under 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of the court upon the question of law which arose before them as herein-after stated.

At a petty session of the peace, holden in and for the said borough of Hanley, on the 14th Nov. 1874, one Robert Munday, the above-named defendant, was brought before the said justices in custody, and charged upon the information of one Eliza Maiden, the informant, with having on the 12th of the same month of Nov., at the borough of Hanley, unlawfully assaulted one Martha Maiden, a child in the eighth year of her age; and the said parties respectively being then present, the said charge was duly heard by the said justices, and upon such hearing the said Robert Munday was duly convicted of the said offence; and they adjudged that the said Robert Munday, for his said offence, should be imprisoned in the House of Correction at Stafford, in and for the said county, and there kept to hard labour for six calendar months.

And the said justices, upon the request in writing of the said Robert Munday, who was dissatisfied with the said determination as being erroneous in point of law, and in pursuance of the said statute, stated and signed the following case:

At the hearing of the said information the following facts were proved:

The said Robert Munday was a lodger in the house of the said Eliza Maiden. The said Martha Maiden is her daughter, and is not quite eight years old. On Thursday, the said 12th Nov., the said Eliza Maiden left her house in the said borough about one o'clock in the afternoon, and remained away therefrom for two or three hours. She left the said Martha Maiden and the said Robert Munday together alone in the house, and the said Robert Munday knew that the said Eliza Maiden had gone out. When the said Eliza Maiden went out the said Robert Munday and Martha Maiden were in the sitting room of the house on the ground floor having their dinner. The said Robert Munday first finished his dinner; and when he had done so he sat down in an arm chair in the sitting room in front of the fire. Soon afterwards the said Martha Maiden finished her dinner, and then the said Robert Munday called her to him. She went to him and he cleaned her finger nails and had her on his knee. He kissed her four or five times, and she then got off his knee. About a quarter of an hour afterwards, the said Robert

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Munday, still continuing to sit in the said chair, and the said Martha Maiden standing by a table, the said Robert Munday unbuttoned his trousers, pulled out his person, and abused himself in the presence of the said Martha Maiden. Whilst doing so he called her attention to it, but he did not ask her to do anything, nor was it alleged that he again touched her. She stated that she told the said Robert Munday that what he did was naughty. When Eliza Maiden came home Martha Maiden made a communication to her, Robert Munday having left the house before Eliza Maiden's return.

The evidence of the said Martha Maiden was not in any way corroborated. In cross-examination by the attorney of the said Robert Munday, she stated that the said Robert Munday had never kissed her before, and had never cleaned her finger nails before.

It was contended on behalf of the said Robert Munday, that to constitute an assault there must have been either a hostile intention or some actual corporal injury towards the complainant; and that there was no evidence of such hostile intention as to justify a conviction, and that there was no assault in law.

The said justices, however, being of opinion that the conduct of the said Robert Munday in taking the said Martha Maiden on his knee, in cleaning her finger nails, and in kissing her, amounted in law, under the circumstances before stated, to an assault, and they, therefore, convicted the said Robert Munday as aforesaid.

The questions of law arising on the above statement for the opinion of this court, therefore, were, whether the said acts of the said Robert Munday, or any of them, constituted, under the circumstances aforesaid, an assault in law. If the court should be of opinion that the said conviction was legally and properly made, and the said Robert Munday is liable as aforesaid, then the said conviction was to stand; but if the court should be of opinion otherwise, then the said information was to be dismissed.

Bealey argued for the appellant.—There are two objections to this conviction, either of which, if valid, must be conclusive in favour of the appellant. First, this was not a common assault; and, secondly, even if by reason of the child's tender age her consent did not alter the legal effect of what might have been an assault, had she been kissed and placed on defendant's knee against her will, yet the sentence of six months' imprisonment with hard labour, being the utmost penalty for an assault of an aggravated nature, could not be applicable to the circumstances of this case; and in either event the conviction must be quashed. But, for what subsequently took place, which was considered, apparently, by the justices to show the indecent motive which prompted the defendant, there was certainly no assault in his first proceedings, so long as they were without any further intention. If their nature appeared to be different in consequence of what followed, the acts must constitute either an indecent assault or an indecent exposure of the person; both of which are punishable only by indictment. The justices cannot give themselves jurisdiction by holding an indictable offence to be a mere common assault. The sentence was imposed under sect. 43 of 24 & 25 Vict. c. 100: "When any person shall be charged before two

justices of the peace with an assault or battery upon any male child, whose age shall not in the opinion of such justices exceed fourteen years, or upon any female, either upon the complaint of the party aggrieved or otherwise, the said justices, if the assault or battery is of such an aggravated nature that it cannot in their opinion be sufficiently punished under the provisions hereinbefore contained as to common assaults and batteries, may proceed to hear and determine the same in a summary way; and if the same be proved, may convict the person accused; and every such offender shall be liable to be imprisoned in the common gaol or house of correction, with or without hard labour, for any period not exceeding six months, or to pay a fine." The previous section limits the imprisonment by justices for a common assault or battery to two months. This last point is concluded by the case of *Re Thompson* (6 H. & N. 193), which, although before this Act, was decided upon a provision *totidem verbis* in 16 & 17 Vict. c. 30, s. 1. It was there held by the whole court that the section applied only to common assaults, and not to an assault accompanied by any circumstances which make it a distinct offence recognised by the law as something more than a mere assault. [COCKBURN, C.J.—In that case the facts proved constituted a rape, which it was said was an offence of a different class from an assault. The difficulty here, as it seems to me, is to hold that what took place after the assault was entirely concluded, could possibly aggravate the previous assault.] That objection is quite sufficient for my purpose.

Latham appeared for the respondent.

COCKBURN, C.J.—It does not appear from the facts stated that the defendant's indecent behaviour a quarter of an hour after the assault proved, was connected with the assault. It could not, therefore, render the assault proved one of an aggravated nature.

FIELD, J., concurred.

Judgment for appellant.

Solicitor for appellant, *H. Tyrrell*.

Solicitors for respondent, *Johnson and Weatheralls*.

Saturday, Nov. 13, 1875.

VERRALL AND ANOTHER (apps.) v. CROYDON UNION (resps.).

Poor rate—Race course—Actual profits—Admissible evidence.

The appellants, at the hearing by quarter sessions of their appeal against the rate made upon their racecourse, proved the rent they paid, but were called upon to produce their books of account, showing their receipts and expenditure; and the respondents tendered other affirmative evidence of the profits made thereby. The quarter sessions refused to receive this evidence.

Held, upon a case stated, that the actual profits might be material in fixing the assessable value, and this evidence was therefore admissible.

THIS was an appeal by John Frederick Verrall and Henry Wright to the Easter Quarter Sessions for the County of Surrey, against a poor rate made by the Guardians of the Croydon Union, and affirmed by the Union Assessment Committee.

The court of quarter sessions gave judgment for the appellants, subject to the following case:

The appellants are the occupiers of certain land in the parish of Croydon, in the county of Surrey,

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in the Croydon Union. The respondents are the Guardians of the Croydon Union and the Union Assessment Committee.

The land occupied by the appellants in respect of the occupation of which the rate appealed against was made, consisted of 119a. 3r. 27p., of which 101a. 3r. 30p. were used by the appellants as a racecourse, and the residue for agricultural purposes.

The part of the land in question occupied as a racecourse is railed off from the other land, and there are erected thereon several stands for the use of persons coming to see the races, to wit, a grand stand having accommodation for 2000 persons, and a small stand for 600 persons. The appellants charge prices varying from 7s. 6d. to 3s. 6d. to each person using the stands, and the appellants also on days on which races are held let off at varying rentals portions of the land to be occupied by refreshment booths, &c. The appellants give stakes and cups to be run for at the race meetings, at some of which the added money amounts to 500l., which is paid by the appellants.

The appellants occupy the whole of the land in question as tenants of Mr. Lewis Lloyd, under a lease for ten years, from Christmas 1868, at a rental of 861l. 10s. Before Christmas 1868 the appellants had occupied the same land in the same manner, and with similar buildings on it, as tenants of the trustees of Archbishop Whitgift's Hospital at Croydon, under a lease which had not expired before Christmas 1868, at a rent of about 321l. per annum; this lease the appellants surrendered to Mr. Lewis Lloyd, who sometime in the year 1868 purchased the freehold of the land in question, and who thereupon granted the above-mentioned lease for ten years, at an annual rental of 861l. 10s. This surrender was in pursuance of an arrangement made at the time the said Mr. Lewis Lloyd purchased, that the appellants should surrender and take a lease at a per centage on the purchase-money.

The following is the entry in the valuation list and in the rate book of the rate appealed against:

		Estimated extent.	Gross estimated rental.	Rateable value.
J. F. Verrall and others	Land occupied as a racecourse, grand stand, refreshment rooms, &c., Woodside	...	£ 2200	£ 2000

On the hearing before the court of quarter sessions, the appellants called two land surveyors and auctioneers as witnesses, who put the rateable value of the land at 611l. These witnesses arrived at the estimated value of 611l. as follows: 81 acres at 3l. 10s. per acre, 287l.; 20 acres at 1l. 10s. per acre, 30l.; 14 acres at 2l. 5s. per acre, 32l.; 2 acres 12 perches, 2l.; homestead and two cottages, 60l.; total, 411l.; and 200l. in addition, being 10 per cent. on the estimated cost of construction of grand and other stands. These witnesses also stated that neither of them had ever before valued a racecourse, and that they had no information as to the receipts of this course, and no idea of its profits.

The respondents called for the production of the appellants' books of accounts, showing the receipts and expenditure in respect of the racecourse,

which books the appellants had received notice to produce. The respondents also proposed to give affirmative evidence of the profits derived from the land in question used as a racecourse, as being material in ascertaining its present rateable value.

The court of quarter sessions decided that the respondents were not entitled to call for the production of the said books of account, nor to give the said affirmative evidence.

The court of quarter sessions being of opinion that the above-mentioned evidence tendered by the respondents was inadmissible, gave judgment for the appellants, disallowing the rate appealed against, and made an order reducing the rate to 1000l. gross estimated rental, and 850l. rateable value, subject to the opinion of the Court of Queen's Bench as to the admissibility of the above-mentioned evidence.

If the Court of Queen's Bench shall be of opinion that the above-mentioned evidence, or any part thereof, was admissible, then the judgment of the court of quarter sessions and the order based thereon shall be void and of no effect, and the appeal remitted to the said court of quarter sessions in order that such evidence as aforesaid may be taken. Otherwise the judgment of the said court of quarter sessions to be affirmed, and their said order to stand.

Thesiger, Q.C. and Oppenheim, argued for the appellants.—The question here is, whether the rate is to be fixed by the profit of a particular tenant or by the rent which may be obtained generally for the land and premises. [COCKBURN, C.J.—Is not the best information as to the rent which the hypothetical tenant would pay to be obtained from the actual tenant's books?] It has been held over and over again in analogous cases, that the profits of a trade are no test of the rateable value of the premises upon which the trade is carried on. [COCKBURN, C.J.—Here the profits are derived from the possession of the land] The renting of a race course cannot be said to be property *suu generis*, so as to necessitate an inquiry into the actual profits in order to arrive at the assessment. The appellants are in a position similar to that of the lessee of a theatre who should not be assessed according to the run of a particular play, but at the amount any person would pay in order to perform any dramatic pieces. [COCKBURN, C.J.—We have to say whether this evidence would be material in arriving at the rateable value.] If admitted, it would not establish the rent at which another tenant would take it. Surely the best test is the rent actually paid.

Edward Clarke, contra, was not heard.

FIELD, J.—I desire it to be understood that I decide for the respondents only on the ground that this information, which the quarter sessions refused to admit, may be material to the proper assessment of the appellants. It does not follow that the rate is to be determined by the amount of the appellants' receipts.

Judgment for respondents.

Solicitor for appellants, *H. Parry*.
Solicitor for respondents, *A. G. Blake*.

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COURT OF APPEAL.

SITTINGS AT WESTMINSTER.

APPEAL FROM THE COMMON PLEAS.

Reported by GILBERT G. KENNEDY, Barrister-at-Law.

Monday, Nov. 22, 1875.

Before the LORD CHANCELLOR (Cairns), KELLY, C.B., BRAMWELL, B., and BLACKBURN, J.)

ABBOTT v. BATES.

*Apprentice—Necessaries—Evidence of custom to explain the terms of a deed.**Where in a deed of apprenticeship the master covenanted to find meat, drink, lodging, and all other necessaries, and certain wages :**Held, that he was not entitled to set-off the cost of clothes and washing supplied to the apprentice against the wages due to him, and a custom among masters to deduct the cost of clothes and washing from the wages paid to the apprentice could not be supported on the ground that clothes and washing being necessaries in the ordinary sense of the word, such a custom would contravene the terms of the deed.*

THIS was an action brought on an indenture of apprenticeship to recover wages payable under it. The defendant pleaded by way of set-off a claim for clothes and washing supplied to the apprentice during the service.

The action was tried before Quain, J., at the summer assizes held at Manchester, in 1873, when a verdict was given for the defendant. A rule was obtained, pursuant to leave reserved, to enter the verdict for the plaintiff for 30*l.*, or for a new trial, on the ground, that evidence as to custom was inadmissible, and that there was no evidence to go to the jury thereof; and that, upon the evidence given with regard to the alleged custom, the judge ought to have directed a verdict for the plaintiff; and on the ground of misdirection in admitting evidence as to custom, and leaving the same to the jury, and in directing them that such custom would control the contract; and also on the ground that the verdict was against the weight of evidence. This rule came on to be argued in the Common Pleas on 5th Feb. 1874, before Keating, Grove, and Honyman, JJ., and was made absolute (see the case reported 30 L. T. Rep. N. S. 99; 43 L. J. 99, C. P.); the defendant appealed against that decision.

The defendant was a horse trainer, and the plaintiff, Thomas Abbott, was bound to him as apprentice for five years from 31st Dec. 1867. By the apprenticeship deed the plaintiff put himself apprentice to the defendant to learn the defendant's trade and business of a horse trainer, and with him, after the manner of an apprentice to serve from the 31st Dec. 1867, until the full end and term of five years from thence next following, in the art of a horse trainer; and the defendant thereby covenanted with the plaintiff that he would among other things, find the under-mentioned yearly wages, lodgings, and all other necessaries during the said term, that is to say, for the first year the sum of 4*l.*, for the second year the sum of 5*l.*, for the third year the sum of 6*l.*, for the fourth year the sum of 7*l.*, and for the fifth year the sum of 8*l.*

When the boy had served his time, there was due to him according to the rate mentioned in the

deed, 30*l.* for wages, but the master refused to pay him anything, alleging that he had supplied him with clothes to the amount of 35*l.*, and that he was therefore entitled to retain the wages to recoup himself.

At the trial, the defendant, to explain the word "necessaries," under which the plaintiff contended he had a right to be found in clothes and washing by the master, called a number of other trainers, who all said that it was the custom for the boys to pay for their clothes and washing. It was admitted that ordinarily "necessaries" would include clothing, but contended that in the special trade of a trainer, it was by universal custom otherwise. The defendant objected to the admission of this evidence, but the judge received it, reserving leave to move as above stated.

Russell, Q.C. and Baylis Q.C. for the defendant, the present appellant.—The question is how far extrinsic evidence of a custom would be admitted to control what *prima facie* would be the meaning of the word "necessaries" in this indenture. [KELLY, C.B.—What is the custom?] To set-off from wages the washing and clothing supplied. By the usage it was customary to supply the clothes and washing, but the custom was to deduct the price of the clothes and washing from the wages. [BRAMWELL, B.—It is setting up a custom to alter the indenture.] But all the cases go to that extent, see *Wigglesworth v. Dallison* (1 Smith's Leading Cases 539), and cases there cited. It puts on the trainer the obligation to supply these necessaries, but gives the boy the right to get them for himself. [THE LORD CHANCELLOR.—If the word "necessaries" has the ordinary meaning, it includes clothing, can you escape that?] The clothing and washing are not "necessaries" in the sense in which meat and drink are "necessaries" in this indenture. The necessity for these necessaries arises before any wages are due; the effect of the indenture is, that the master is bound to supply clothing and washing; the wages may never become due. Where general words are used an incident may be annexed which would control those general words :

Grant v. Maddox, 15 M. & W. 737;

Brown v. Byrne, 3 E. & B. 703; 23 L. T. Rep. 154.

Herschell, Q.C. and Grantham, contra, were not called upon.

THE LORD CHANCELLOR (Cairns).—I am anxious, in expressing my opinion, to put aside all technical difficulties which may be in the way of the appellants, and to decide this case upon what is the real question and the question upon which the contest at the trial took place. The plaintiff is a boy who is apprenticed to the defendant, a horse trainer, and who in this action sues for the wages which are due to him under the apprenticeship, amounting to 30*l.* The defence raised against this claim is, that the master has supplied him with clothes and washing to the amount of 35*l.*, and that the master is entitled to deduct this from the boy's wages. Now that could only be supported by one of two points. The first, which was raised at the trial, is, that though this is a contract for necessaries, "the master finding unto the apprentice sufficient meat, drink, certain yearly wages, lodgings, and all other necessaries during the term," yet that the word "necessaries" has a limited meaning in that trade, and has not the general meaning which law and common understanding would give it. That would be a perfectly

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legitimate defence, and would go to establish that the master had not supplied the clothing and washing under this deed. But how does this now stand? The point is virtually given up, and, I think, rightly, since there was no evidence that in the trade the word "necessaries" has acquired that limited meaning. On the first point, therefore, I am of opinion there is no evidence to show that the word bears the restricted meaning which the defendant seeks to put upon it. Passing from that, I come to the second point on which the appellant claims to rest his case. It is next contended that under this contract there is an obligation on the master to supply the apprentice with clothing and washing, but that there is a custom which has grown up of deducting or stopping out, of the wages of the apprentice, the value of the clothes and the washing. Now it appears to me that, even if this had been proved to the letter, it would not have availed the defendant, as it would have been a custom in direct violation of the terms of the deed, and therefore invalid. The deed runs thus: "And the defendant thereby covenanted with the plaintiff that he would, amongst other things, find the undermentioned yearly wages, lodgings, and all other necessities during the said term, that is to say, for the first year the sum of £4," and so on. Now if these words mean anything, they mean a covenant by the master to supply meat, drink, lodgings, and other necessities gratis; and when in opposition to that, the custom says that the cost of some of the necessities supplied is to be deducted from the wages, it appears to me to be a custom at variance with the deed, and not in accordance with the cases which have been cited showing that a custom may be introduced into a contract.

KELLY, C.B., BRAMWELL, B., and BLACKBURN, J., concurred.

Solicitor for the plaintiff, *Hodgson*.

Solicitor for the defendant, *Mark Shepherd*.

HIGH COURT OF JUSTICE.

COMMON PLEAS DIVISION.

Reported by P. B. HUTCHINS and CYRIL DODD, Esqrs.,
Barristers-at-Law.

REGISTRATION CASE.

Tuesday, Nov. 16, 1875.

HARGREAVES (app.) v. HOPPER (resp.).

Parliamentary voter — County voter — Infant —
30 & 31 Vict. c. 102, s. 6—6 & 7 Vict. c. 18, s. 40.

H. came of age between the last day of July and the day for the revision of the lists of county voters. The revising barrister struck his name off.

Held by the Court (Lord Coleridge, C.J. and Archibald, J., Grove, J., dubitante) that though H. was otherwise qualified to vote, his name was properly struck off, on the ground that he was not of full age on the last day of July.

THIS was an appeal from the decision of the revising barrister appointed to revise the lists of Parliamentary voters for the north-eastern division of the county of Lancaster. The case stated for the opinion of the court was as follows:—

John Hopper, of, &c., duly objected to the name of Joseph Hargreaves, of, &c., being retained in the list of voters for, &c.

The name of the said Joseph Hargreaves was inserted by the overseer in the list of persons entitled to vote in the election of a knight or knights of the shire for, &c., in respect of his occupation as tenant of a house and shop at, &c., of the rateable value of 12*l.* or upwards.

It appeared by the evidence that the said Joseph Hargreaves had occupied the said shop for two years, or thereabouts, but that he only attained the age of 21 after the expiration of the qualifying year, namely, on the 16th Sept.

It was contended on behalf of the said John Hopper, that the said Joseph Hargreaves was not entitled to have his name retained in the said list under the 6th section of the Representation of the People Act 1867, because he had not as a person of full age occupied the said premises during the whole or any part of the qualifying year.

I concurred in this view, and struck off the name of the said John Hargreaves from the, &c.

If the court be of opinion that my decision was wrong, the register to be amended by restoring the name of the said Joseph Hargreaves on the list."

Gorst, Q.C., appeared for the appellant.—The appellant was an infant on the 31st July, but at the time of revision he was of full age. The qualification for a vote is defined in 30 & 31 Vict., c. 102, sect. 6 (the Representation of the People Act). This Act has to be construed together with the Registration Acts, to one of which, viz., 6 Vict. c. 18, it is necessary to refer. Sect. 40 of the Act, 6 Vict. c. 18 enacts: That after the objector has proved that he has given proper notice of objection "every" revising "barrister shall then require it to be proved that the person so objected to was entitled on the last day of July, then next preceding to have his name inserted in the list of voters in respect of the qualification described in such list; and in case the same shall not be proved to the satisfaction of such barrister, or in case it shall be proved that such person was then incapacitated by any law or statute from voting," such barrister shall expunge the name. By this section the claimant has to prove his property qualification, and then the objector has to prove that the claimant "was then" incapacitate. This does not refer to his capacity on the 31st July, but to his capacity at the time of the holding of the revision. If it were not so the words of the 6th section of 30 & 31 Vict. c. 102 would have to be treated as inoperative. The words are: "Every man shall be entitled to be registered as a voter, and when registered, to vote, who is qualified, as follows: 1. Is of full age, and not subject to any legal incapacity." Then follow certain property qualifications for all of which the 31st July is the time from which to reckon by reason of express words to that effect, whilst for the personal qualification of "full age," nothing is said as to the 31st July, but the word "is" is used, so that if a man is of full age when the revision takes place it is enough. The point, however, is governed by authority, in the case of *Powell v. Bradley* (11 L. T. Rep. N. S. 602; *Hop. & Phil.* 159; 18 C. B., N. S., 65; 34 L. J. 67, C. P.) *Erle, C.J.*, says: "That it is sufficient if the claimant is of full age at the time of claiming his vote," and "that the question for the revising barrister is, whether at the time of the claim before him to be put upon the register, the claimant would, if an election was at that moment being held, be a party qualified to vote." "Really and truly," he says, "the revising

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barrister's court is substituted for a discussion at the polling booth." This case of *Powell v. Bradley* is mentioned without disapproval, and is to a certain extent relied on by the court in *Lord Rendlesham v. Howard* (2 Hop & Colt. 175, 184; 29 L. T. Rep. N. S. 679; L. Rep. 9 C. P. 252, 256.), and the principle that the revising barrister's court is substituted for a discussion at the polling booth is expressly affirmed in that case. If my construction is incorrect the franchise is given by one Act and taken away by another, and persons of full age must be struck off the register, because at some anterior time when there was no election they were minors.

LORD COLERIDGE, C.J.—The revising barrister's decision must be affirmed. The short point is that the appellant was not a person of full age on the 31st July preceding the revision. The words of the Registration Act, 6 & 7 Vict. c. 18, sect. 40, are perfectly clear, "was entitled" and "was not then incapacitated;" the difficulty, however, is caused by the wording of the Representation of the People Act (30 & 31 Vict. c. 102). There it is plain that the word "is" in the second clause of sect. 6, must be read "was," for the revision is always some weeks later than the last day of July. This, therefore, affords assistance in construing the word "is" in the first clause of that section. I regard the section as standing thus: "Every man shall, &c., who is qualified as follows, be of full age according to the Registration Acts." We were properly pressed by Mr. Gorst with the dicta of Erle, C.J., in the case of *Powell v. Bradley*. The decision of the court there was not upon the present point, otherwise we might have felt some difficulty in departing from what had been decided. All that was there actually decided was that it was unnecessary that the claimant should have been of full age throughout the whole of the qualifying year, and in that I most fully concur. The claimant there was of full age on the 31st July, the claimant here was not. Erle, C.J., certainly thought, though it was unnecessary for the decision of the case before him to come to any conclusion on the question, that the revising barrister had only to study the age of the claimant on the day of the revision. I do not agree with him in that opinion, though I fully endorse the actual judgment in that case. The rest of the court do not, so far as I have seen, express any concurrence in these opinions of the Chief Justice; though agreeing in the actual decision come to. I was pressed, too, by the case of *Lord Rendlesham v. Howard*. It was the first judgment which I pronounced in this court, and though I do not for a moment desire to withdraw from that judgment, yet the observations which I am reported in 2 Hop. & Colt. 189, as making upon *Powell v. Bradley* are quite *obiter*, and do not carry that case any further.

GROVE, J.—I entertain the greatest doubt upon this matter. I hesitate to alter the words of Acts of Parliament. If it were possible to fulfil literally both Acts of Parliament, I could not concur in any decision which reads into either of the Acts words which are not there, but the second clause of the Representation of the People Act cannot be read as it stands; "is," must so far be construed as "was." I have not an opinion on the point sufficiently strong to induce me to differ from the rest of the court, but it is with the greatest doubt that I concur.

ARCHIBALD, J.—I think that when the two sections, section 6 of the Representation of the People Act, and section 40 of the Registration Act (6 & 7 Vict. c. 18) are read together as by section 59 of the Representation of the People Act they are to be, the conclusion to be arrived at is, that the word "is" in the Representation of the People Act must be construed to mean "is according to the Registration Act," and that consequently the decision of the revising barrister is correct.

Solicitors for the appellant, *Ridsdale, Craddock, and Ridsdale*, 5. Gray's Inn-square.

The respondent was not represented.

REGISTRATION CASE.

Tuesday, Nov. 16, 1875.

WOOD (app.) v. HOPPER (resp.).

County voter—Parliamentary voter—40s. freehold—8 Hen. 6.

The appellant claimed to vote for the county in respect of two freehold rentcharges, each of which was less than 40s. a year, but which together were more than 40s. a year.

Held by the Court (Lord Coleridge, C.J., Archibald, and Grove, JJ.) that he was entitled to vote.

This was an appeal from the decision of the revising barrister for the North Eastern Division of the county of Lancaster.

The facts as stated in the case were as follows:

Wood (the appellant) was seised in fee of two separate rentcharges arising from different plots of land and created at different times; one was of the yearly value of 1l. 5s., the other of the yearly value of 1l. 3s. 7d.

It was contended on behalf of the objector (the now respondent) before the revising barrister that Wood was not entitled to have his name retained on the said list of voters, inasmuch as neither of the said rentcharges was of the value of 40s. a year, whilst the language of the statute 8 Hen. 6, as to who shall be choosers says, "Whereof every one of them shall have free land or tenement of the value of 40s. by the year," from which it was argued that a rentcharge being a tenement, and the word tenement being used in the statute in the singular number, it was impossible to add two rentcharges or two tenements together to make up the requisite sum. That a rentcharge was so called because of the power of distress in the deed creating the same, and in each of the above cases the power of distress was confined to the particular plot from which the rentcharges issued respectively. The revising barrister expunged the name of the appellant from the list of Parliamentary voters, being of opinion the objections raised were valid; and the question for the Court was as to the correctness of this decision.

Gorst, Q.C. for the appellant.—The qualification by 8 Hen. 6 is that the elector shall have "frank tenement to the value of 40s. by year at least, above all charges," and then the Act goes on, "such as have the greatest number of them that may expend 40s. by the year" shall be returned. Thus showing that it was perfectly immaterial whether the money came from two plots or one, or whether the distresses would have to be separate or not.

J. Edwards, Q.C. for the respondent, submitted

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that the words in the original, "frank tenement," being in the singular number, could not be read as covering two separate tenements.

LORD COLERIDGE, C.J.—I am of opinion that the decision of the revising barrister was wrong. The question is whether it makes any difference that the qualification in respect of which the appellant claimed to vote as a county voter arose from two separate tenements, instead of from one single tenement. I place my opinion upon the statute 8 Hen. 6. It enacts that the knights of the shire shall be chosen by people, "whereof every one of them shall have free tenement to the value of 40s. by the year." This is explained by the next clause, by saying that the knight who is voted for by the greatest number of those "who may expend 40s. by the year and above as aforesaid," is to be deemed elected. Thus making it clear that all that is requisite is that the electors should have the value mentioned in freehold.

GROVE, J.—I am of the same opinion. There is nothing in the statute to render it necessary that the whole qualification should be from one single holding, and there is certainly nothing in reason to render it so.

ARCHIBALD, J.—I am of the same opinion.

Solicitors for the appellant, *Ridsdale, Craddock, and Ridsdale*.

Solicitors for the respondent, *Robinson and Preston*.

QUEEN'S BENCH DIVISION.

Reported by M. W. McKELLAR and J. M. LELY, Esqrs.,
Barristers-at-Law.

Tuesday, Nov. 9, 1875.

M'HOLE v. DAVIES.

Market Act, contravention of—Sale otherwise than in vendor's dwelling place or shop—Swansea Corporation Act, 1863, s. 38—Market and Fairs Clauses Act, 1847, s. 13.

By sect. 38 of the Swansea Corporation Act, 1863, every person exposing for sale in any place within the Borough, "except in his own dwelling place or shop," any articles in respect of which tolls are by the Act authorised to be taken in the market is liable to a penalty.

M. exposed for sale 200 sheep in an open yard, separated from his house by a small covered space, and extending about 160ft. from the street doors. The communication between the house and the yards was by stairs leading down into the covered space, the ceiling of which was partly formed by the floor of the house.

Held, upon a case stated under 20 & 21 Vict. c. 43, that M. was rightly convicted of a contravention of the Swansea Corporation Act.

This was a case stated for the opinion of the Court of Queen's Bench, under 20 & 21 Vict. c. 43, by the stipendiary magistrate for the Borough of Swansea.

1. (a) The information was laid by Mr. Evan Davies, who is the manager of the Cattle Market, and is in the employ of Mr. James Perry, the lessee and farmer of the tolls thereof under the

(a) The case as stated by the stipendiary magistrate was not divided into paragraphs. Upon observing this, the court was about to decline to hear the case, but, as it appeared that the appellant was not in fault, consented to do so.

Corporation of Swansea, and he is also one of the sureties of the said James Perry in a bond given by him to the Corporation as security for the due payment of rent and performance of the stipulations in the lease. The information was laid by the authority of the said lessee and farmer of tolls.

2. It was contended on the part of the appellant, as a preliminary objection, that it was not competent for the said Evan Davies to lay such information, on the ground that he is not an officer appointed by the corporation, or authorised by them in writing to do so. The statute under which the information was laid contains no enactment as to the mode of procedure in such cases, but it is incorporated with the Markets and Fairs Clauses Act, 1847, except sections 12, 13, 19, and 50; also the Lands Clauses Consolidation Act 1845, and the Lands Clauses Consolidation Act Amendment Act 1860. Again, the 32nd section of the Markets and Fairs Clauses Act incorporates with it the Railway Clauses Consolidation Act 1845, as to the recovery of penalties, and provides for the recovery thereof in the same manner as the Lands Clauses Consolidation Act above referred to, that is to say, under sect. 45. Every penalty or forfeiture may be recovered by summary proceeding before two justices, and on complaint made to any justice, he shall issue a summons requiring the party complained against to appear.

3. Having regard to these enactments and to the evidence, the magistrate overruled the above objection on the grounds that it was not necessary that the information should be laid by a party aggrieved; secondly, that if it were necessary, the said Evan Davies had a sufficient, though not a direct, interest in the market tolls, by reason of the said bond and suretyship to constitute him a party aggrieved by the alleged act of defendant; and thirdly, that the appearance of the defendant cured any defect in the summons and information.

4. The summons was as follows, omitting formal portions:

For that you, the said William M'Hole, on the 13th day of April instant, at the town of Swansea, did then and there unlawfully expose for sale 200 sheep in a certain place other than out of the Swansea Market there situate, that is to say, in a shed situate in Back-street, in the town of Swansea aforesaid, the said place not being a dwelling-house or shop in your occupation, against the form of the statute in such case made and provided.

5. The information and summons were founded on the 38th section of The Swansea Municipal Corporation Act 1863, which is as follows:

After the passing of this Act every person other than a licensed hawker, who shall sell, or expose for sale, in any place within the borough, except in his own dwelling place or shop, any articles in respect of which tolls are by this Act authorised to be taken in the market, shall for every such offence be liable to a penalty not exceeding 40s. Provided always that nothing in this Act contained shall subject any person to a penalty for exposing for sale any horse, mare, or gelding, at any stable within the borough, or for exhibiting any horse, mare, or gelding within a distance of 200 yards from any stable at which the same may be exposed for sale as aforesaid. (a)

6. It was admitted that the defendant resides in Back-street in the said borough, and that he occupies a large yard adjoining his residence, in which there are sheds and other places for sale of

(a) The Market and Fairs Clauses Act 1847, sect. 13, is *mutatis mutandis*, and with the exception of the proviso, identical with this section.

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cattle and sheep, and that on the day named in the summons he did expose for sale 200 sheep.

7. The entrance to the yard and sheds is from Back-street, through double wooden doors. After passing through the doors a person first enters a place about 30ft. by 20ft., covered in by beams and flooring. The defendant resides in a small house, supported by pillars on either side of this place, the floor of his house forming the ceiling of this underspace. The yard then extends further without a ceiling to the length altogether of about 158ft. from the street doors, and this part is filled with sheds for the accommodation of a considerable number of cattle and sheep. There is no communication between the dwelling house above and the sheds in the yard by covered way or through the house. In order to enter the yard and shed, the defendant descends stairs from his dwelling house above into the said covered spaces, and thence passes into the open yard and sheds.

Upon the facts admitted, and after a personal view, the magistrate convicted the defendant, and fined him 1s., together with 11. 9s. 6d. for costs. The opinion of the court was requested as to whether the conviction was correct or wrong.

Forbes for the appellant, cited

Fearon v. Mitchell, 41 L. J. 170 M. C.

No counsel appeared for the respondent.

COCKBURN, O.J.—This is rather a doubtful case, and there is much in the contention that the yard was part and parcel of the appellant's house. But, looking to the purpose of the Act, there can be no doubt that that purpose was to prevent persons from selling elsewhere than in the legitimate market—to prevent, in fact, the setting up of a rival market. Now, although in one sense this yard might be said to be part of the house, it could not be said to be so with reference to the true construction of the Act. The exceptions allowed by the section were meant to take in small and occasional sales; as, for instance, if a man should sell one horse or one calf in his own yard. The sales by the appellant were not of this character, and we should be neutralising the Act by allowing a rival market to be set up, if we did not affirm the conviction.

MELLOR, J.—I also think that the stipendiary magistrate was right. If we allowed the exception to extend in the manner claimed, the very object of the Market Act would be frustrated. Perhaps in a conveyance of the house the yard might pass, but a different construction is obviously the correct one as regards this particular statute.

QUAIN, J.—I am of the same opinion. This is not a case of a man selling in his own dwelling-place or shop within the meaning of the statute, but it practically amounts to the setting up a rival market.

Judgment for the respondent.

Solicitors for the appellant, *Bell, Brodrick, and Gray*.

Wednesday, Nov. 10, 1875.

THE SCHOOL BOARD OF LONDON (apps.), THE VESTRY OF ST. MARY, ISLINGTON (resps.)

Paving rate—Contribution from frontagers—Houses "forming part of street"—Whether buildings standing back from street are—Metropolis Management Act 1855, sect. 105, and Metropolis Management Amendment Act 1862, sect. 77.

By the Metropolis Management Act 1855, sect. 105 the parish vestry is, in certain cases, empowered to "well and sufficiently pave" any street within their district, and "the owners of the houses forming such street" are bound to pay to the vestry "the estimated expenses of providing and laying the pavement."

By the Metropolis Management Amendment Act 1862, where the powers of the above section are exercised "the owners of the land bounding or abutting on such street" are liable to contribute to the paving expenses as well as the owners of houses therein. Cottenham-road was a new street within the meaning of, and was paved by the respondents under the powers of the Metropolis Management Act 1855.

The appellants were the owners of about 30,000 square yards and of school buildings thereupon, the access to which was by a narrow passage about 70ft. long, leading out of Cottenham-road. Along the whole of the frontage of the appellants' land were houses, of which the appellants owned one only, abutting on the road.

The appellants having refused to pay towards the paving expenses,

Held, upon a case stated by justices under 20 & 21 Vict. c. 43, that access to the new street was the essence of liability, that the school buildings of the appellants "formed the street" for all practical purposes, and that judgment ought to be for the respondents.

This was a case stated by two justices for the county of Middlesex, under 20 & 21 Vict. c. 43.

A complaint had been made by the respondents against the appellants, that the appellants being the owners of the house No. 127 and of the schools in Cottenham-road, which said house and road abut on and form part of the said Cottenham-road, in the parish of the respondents, being a new street within the meaning of 18 & 19 Vict. c. 120 (the Metropolis Management Act 1855), and several Acts amending the same (i.e. 19 & 20 Vict. c. 112; 21 & 22 Vict. c. 104, and 25 & 26 Vict. c. 102), and within the jurisdiction of the respondents, which had been laid out by the orders of the respondents, had not paid to the respondents the sum of 261l. 1s., being the proportion of the estimated expense, as determined by the surveyor of the respondents, to be paid by the appellants as such owners as aforesaid.

The justices had ordered that the appellants should pay to the respondents the sum of 18l. 16s. 9d. in respect of the house and the sum of 250l. 6s. 3d. in respect of the school buildings. The following is the material part of the case thereupon stated upon the application of the appellants:

1. The complaint was made under the Metropolis Management Act 1855, s. 105, and the Metropolis Management Amendment Act 1862, s. 77. (a)

(a) Act of 1855, s. 105:—"In case owners of the houses forming the greater part of any new street laid out or made, or hereafter to be laid out or made, which is not paved to the satisfaction of the vestry or district board of the parish or district in which such street is situate be desirous of having the same paved as hereinafter mentioned, or if such vestry or board deem it necessary or expedient that the same should be so paved, then and in either of such cases such vestry or board shall well and sufficiently pave the same either throughout the whole breadth of the carriage way and footpaths thereof, or any part of such breadth, and from time to time keep such pavement in good and sufficient repair; and the owners of the houses forming such street shall on demand pay to such vestry or board the amount

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It was admitted that the appellants are the owners of the house No. 127, Cottenham-road, and land and school buildings, in the rear of the said house and other houses in that road. The house No. 127 is let to a tenant, and has connection with the school buildings.

[From a plan annexed to the case it appeared that the site of the school buildings covered an area of 29,500 square feet, and that the distance of the same from the street along the passage was about 70ft.]

4. In Dec. 1873, the respondents resolved that Cottenham-road should be laid out as a new street under the provisions of the said Acts, and the amount of the estimated cost thereof, as apportioned on the appellants, was 10*l.* 14*s.* 9*d.*, as the owners of the house No. 127 in that street, and 250*l.* 6*s.* 3*d.* as the owners of the land and school buildings in the rear, and the land forming the passage or entrance from the street to the school, as forming part of and abutting on the said street.

5. It was also admitted on both sides that the owners of the houses in Cottenham-road, Nos. 129, 131, 133, 135, 137, 189, 141, 143, 145, and 147, which are situated in the front of a portion of the school premises, have been assessed on the rateable value in similar proportions to the assessment on the house No. 127, belonging to the appellants, towards the cost of making the said street.

6. It was stated on behalf of the respondents, and admitted by the appellants, that the school building and land in question is assessed to the parochial rate as being in Cottenham-road, and that no appeal has been made against such assessment. It was contended on behalf of the respondents that, under the authority of sect. 105 of the Metropolis Management Act 1855, it was in the discretion of the surveyor of the vestry for the time being to determine the amount of the estimated expenses of making any new street, and in the discretion of the vestry to determine how the proportion into which such expense should be assessed on the owners of the different houses

of the estimated expenses of providing and laying such pavement (such amount to be determined by the surveyor for the time being of the vestry or board), and in case such estimated expenses exceed the actual expense of such paving, then the difference between such estimated expense and such actual expense shall be repaid by the said vestry or board to the owners of the houses by whom the said sum of money has been paid; and in case the said estimated expense be less than the actual expense of such paving, then the owners of the said houses shall on demand pay to the said vestry or board such further sum of money, as together with the sum already paid, amounts to such actual expenses."

Act of 1862, s. 77:—"Where any vestry or district board shall, under the powers given [by sect. 105 of the Act of 1855], have paved any new street, the owners of the land bounding or abutting on such street shall be liable to contribute to the expenses or estimated expenses of paving the same as well as the owners of houses therein, provided that it shall be lawful for the vestry or district board to charge the owners of land in a less proportion than the owners of house property, should they deem it just and expedient so to do."

By sect. 250 of the Act of 1855 the word "owner" shall mean the person for the time being receiving the rack-rent of the lands or premises in connection with which the said word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack-rent."

By sect. 110 of the Act of 1862, the two Acts are to be construed as one.

forming such street, or of the land abutting thereon shall be calculated, by resolving that the proportions in which each such owner should be assessed should be fixed, either by the amount of the assessment to the parochial rates, or by the length of frontage to the street of each house or piece of land, or by any other method that may appear equitable to the said vestry, according to the circumstances of each particular case, and that it was not within the power of the justices to interfere with or review the acts of the vestry or surveyor in that behalf.

7. It was admitted by both parties that, in the calculation of the proportion of the cost of making the said street, the same was made not on the length of the frontages to the street, but on the assessment of the respective properties to the parochial rates.

8. On the other hand, it was contended by the appellants that they were not liable for the rate levied on the said schools and land, as they were not, as owners of the said schools and land, owners of the houses "forming" the said street within the meaning of sect. 105 of the Metropolis Management Act 1855, and that if they were liable at all, they were only liable for a rate levied in respect of frontage.

9. Under these circumstances the justices considered that the appellants came within the provisions of the several sections above quoted, and that the respondents were entitled at their discretion to apportion the cost either in proportion to the assessment of the properties or according to frontage. They therefore made an order, as prayed, upon the appellants for the payment of the sum of 261*l.* 1*s.*, as the proportion of the estimated expense of providing and laying the pavement and making the road in the said new street in respect of the said house and schools.

10. The question for the court is whether the appellants, as owners of the land and school buildings, are, as owners of a house forming such new street within the meaning of sect. 105 of the Act of 1855, or, under sect. 77 of the Act of 1862, as owners of land abutting on such new street, liable to be rated for the making of the said new street; and if they are, whether the said rate or amount should be assessed at the discretion of the respondents upon the amount of the frontage or upon the rateable value of the land and school buildings.

11. If the court shall decide in the affirmative, the order made for the payment of the whole amount claimed by the respondents is to be carried into effect.

12. If the court shall decide otherwise, an order is to be made for payment of the sums offered to be paid by the appellants; that is to say, 10*l.* 14*s.* 9*d.* in respect of No. 127, Cottenham-road, and the sum of 10*l.* 14*s.* 9*d.* in respect of the adjoining piece of land or passage way, or such other to be made as directed by the court.

Sir H. James, Q.C., and Murriott, for the appellants, relied chiefly on *The Plumstead Board of Works v. The British Land Company* (L. Rep. 10 Q.B. 16 reversed on appeal, *ib.* 203). In that case the defendants, being owners of certain lands, had laid them out for building purposes, and made roads across them which were dedicated to the public as far as any act of the defendants was concerned. The plaintiffs, from time to time, paved the new streets formed by the houses on the

estate, and apportioned the costs among the owners of houses forming the streets, and the owners of land bounding and abutting on the streets; and in so doing they assessed the defendants in respect of the new streets and roads where bounding or abutting on the sides or ends of the streets paved, as being "lands abutting" on those streets under sect. 77 of the Metropolis Management Amendment Act 1862. It was held by the Exchequer Chamber, reversing the judgment of the Queen's Bench, that the defendants were not "owners." He also argued that the area occupied by the appellants was not land within the meaning of sect. 77 of the Act of 1862, and that the school buildings did not form part of the street within the meaning of sect. 105 of the Act of 1855. And he further referred to *Angel v. Paddington Vestry*, L. Rep. 3 Q. B. 714, and the remarks thereon of Lord Coleridge, C. J., in the Exchequer Chamber, in the *Plumstead case* (*ubi sup.*)

Theisiger, Q.C., *Besley* with him, for the respondents.—The true construction of sect. 105 of the Act of 1855 is strongly in favour of the respondents. The liability to the rate depends upon the advantage derived from the paving, and that advantage is not confined to houses actually looking over the street, but extends to all buildings which have their access from the street (*Baddeley v. Gingell*, 1 Ex. 319). That case is precisely in point. The case itself was decided upon the construction of The Metropolis Paving Act (57 Geo. 3, c. 29), s. 24. That section enacted that paving rates should be laid "upon all persons who shall inhabit, hold, occupy, be in possession, or enjoy any messuages, tenements, . . . or other buildings or hereditaments, situate or being within any of the streets or places within the parochial or other district." Communicating with the street by means of a covered gateway, there was a yard, around which were several dwelling houses, warehouses, and other buildings. The yard (with the exception of the width of the gateway) and all the dwelling houses, &c., round the same, were situate at the back of several houses which fronted the street. The entrance into the yard was through carriage gates, and along a covered gateway. It was held that the occupiers of the yard and houses therein were liable to the paving rate, such premises being for that purpose "within the street," inasmuch as they had a frontage on the street, and their sole communication was with the street. "The Act," said Pollock, C.B., "might have been more clear if the Legislature had used the words 'communicating therewith and abutting thereupon,' but I think the meaning is ascertained by viewing the question thus: was it the intention of the framers of this Act that a person like the defendant should wholly escape the rate? He clearly derives some benefit from the Act; as one of the public in the immediate neighbourhood he shares in the public advantage. . . . For every popular purpose these premises are 'within the street.' The meaning of the Act is, that the person whose premises directly communicate with the street shall be liable to pay." He also cited

Nesbit v. Greenwich Board of Works, L. Rep. 10 Q. B. 465;

Mayor of Manchester v. Chapman, 37 L. J. 73, M. C.; and, as conclusive of the ownership of the appellants,

Bowditch v. Wakefield Board of Health, L. Rep. 6 Q. B. 567.

Marriott, in reply, contended that the actual frontage of a street was for calculating the advantages to be derived from paving the essential part of it, and that it was upon the occupiers of the actual frontage that the paving expenses would equitably fall.

COCKBURN, C.J.—On the whole, I am of opinion that judgment ought to be for the respondents. I own that my mind has fluctuated much during the argument, and I do not mean to say that I am altogether free from doubt even now, but the conclusion which I have come to is that the reasons given for upholding this rate are good. The words of 18 & 19 Vict. c. 120, s. 105, are: "The owners of the houses forming such street shall pay to such vestry or board the amount of the estimated expenses of providing and laying such pavement." Now, it cannot be said that we have before us the case of a house forming, physically, part of a street. But, looking at what I cannot help thinking was the intention of the Legislature amid all this varying legislation, I must say that I think that, constructively, the house formed part of a street within the meaning of the statute. *Baddeley v. Gingell* (*ubi sup.*) is not directly in point, inasmuch as the statute on which that case was decided used the words "in the street." Still, "in the street" and "forming part of the street" are expressions substantially identical. And, looking to the justice of the case, and to the proper incidence of contributions to this paving rate, I observe that although the house does not front the street, it has access to it. Access, in fact, is the foundation of liability, and it is essential to access that a street should be well paved. If the street be well paved, and the owner of a particular house has access to it, then it matters little where the house is. A large and liberal construction should be put upon the statute. It is to be observed that for all practical purposes, such as postal purposes, the house forms part of the street. I was, I confess, much staggered by the argument that, upon the construction I now give to the statute, old courts which are distinct from the street, but to which the access is from the street, would come within the section, and be liable to be rated. But the answer to this argument seems to be that such courts are public property, whereas the house with which we are now dealing is private property. Upon all principles of equity and justice the rate ought to be allowed.

MELLOR, J.—I am of the same opinion. I think myself that this case is *à fortiori* to *Baddeley v. Gingell* (*ubi sup.*), but independently of that case, I should have come to the same conclusion as my Lord has done. Many of the arguments which have been urged before us might be considered by the vestry in estimating the amount of the rate, but there is no reason why the appellants should escape from payment of the paving expenses altogether. The appellants have the benefit of an open space between their school buildings and the street, and are practically in the same position as frontagers. As for the varying phraseology of the Acts, I think that only shows that the Legislature intended that different constructions should obtain according to the differences of the subject matter. It is reasonable and just that the rate should not fall upon frontagers only.

QUAIN, J.—I am of the same opinion. Unless this case be distinguishable from *Baddeley v.*

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SHILLITO v. THOMPSON—ATWOOD (app.) v. CASE (resp.).

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Gingell (*ubi sup.*), that case is almost conclusive. "Forming the line" of a street means constituting a street in the ordinary sense of the term. The appellants have direct access to the street, and that is the vital point.

Judgment for the respondents.

Solicitors for the appellants, *Gedge, Kirby, and Millett.*

Solicitor for the respondents, *John Layton.*

Wednesday, Nov. 17, 1875.

SHILLITO v. THOMPSON.

Sale of cheese unfit for food—Municipal Corporation Act 1835, s. 90, and bye-law made thereunder—Whether bye-law within powers of section—Whether sale a "nuisance."

A borough town council as such may make a bye-law for the punishment of persons selling provisions unfit for food.

By sect. 90 of the Municipal Corporation Act 1835, "It shall be lawful for the council of any borough to make such bye-laws as to them shall seem meet for the good rule and government of the borough, and for the prevention and suppression of all such nuisances as are not already punishable in a summary manner by virtue of any Act in force throughout such borough."

Under the above section the Town Council of D. made a bye-law by which "any butcher, dealer in meat, or other person," exposing for sale "any meat, fish, poultry, or other provisions" unfit for food or deleterious to health, was adjudged to pay a fine of forty shillings.

S. was convicted by justices under the bye-law of having in his possession cheese which the justices found as a fact to be decomposed and unfit for food.

Held, upon a case stated under 20 & 21 Vict. c. 43, that the bye law was legally made, and that the conviction ought to be affirmed.

THIS was a case stated under 20 & 21 Vict. c. 43, by two justices of the peace for the Borough of Doncaster for the opinion of the Court of Queen's Bench.

The respondent was inspector of nuisances for the borough, and as such inspector, laid an information against the appellant, being a grocer in the borough, for that he unlawfully had in his possession, with intent to sell, certain unwholesome victuals or provisions, to wit, cheese, unfit for the food of man, contrary to the bye-laws of the said borough.

By the Municipal Corporations Act 1835 (5 & 6 Will. 4, c. 76) sect. 90, it is enacted as follows:

It shall be lawful for the council of any borough to make such bye-laws as to them shall seem meet for the good rule and government of the borough, and for the prevention and suppression of all such nuisances as are not already punishable in a summary manner by virtue of any Act in force throughout such borough; and to appoint by such bye-laws such fines as they shall deem necessary for the prevention and suppression of such offences. . . .

Among certain bye-laws made under the above section, was bye-law No. 35, under which the information was laid. Such bye-law is as follows:

85. Exposing meat for sale.—If any butcher or dealer in meat, or any fishmonger, poulterer, or other person, shall expose or offer for sale in or upon his shop, stall, warehouse, or in any part of his premises, or otherwise, within the said borough, or have

in his possession, with intent to sell or expose for sale, the flesh of any diseased animal, or any unsound, putrid, or unwholesome meat, fish, poultry, or other victuals or provisions, unfit for the food of man, or which would be deleterious to the health of persons who might feed thereon (the unfitness or deleteriousness whereof shall be in the decision of the justices adjudicating on the complaint thereof), or shall kill any diseased animal for the purpose of sale for human food, every person so respectively offending shall for such offence forfeit and pay the fine or sum of forty shillings.

Under the above bye-law the appellant was convicted for selling cheese which the justices found as a fact was decomposed and unfit for human food. [The case set out the evidence in full, and such evidence was conflicting upon this point.] The points of law, as raised by the case, were these:—

1. Whether the Doncaster Town Council had power under the Municipal Corporations Act, sect. 90, to make bye-law No. 35, so as to give it the force of law within the borough of Doncaster.

2. Whether the Sanitary Acts subsequently passed had not virtually repealed the bye-law, if it ever had the force of law?

3. Whether cheese was an article of food within the meaning of the bye-law?

If the court should be of opinion that the bye law was legally and properly made, the conviction was to stand; if the court should be of opinion otherwise, the complaint was to be dismissed.

Lockwood, for the appellant.—It must be conceded that the sale of the cheese was within the words of the bye-law, but it is submitted that the bye-law is *ultra vires*. It cannot be said that the appellant's having the cheese in his possession amounted to a nuisance within the meaning of sect. 90 of the Municipal Corporations Act. A nuisance to be indictable must be a nuisance in fact (*R. v. Davey*, 5 Esp. 217). [*BLACKBURN, J.* referred to *Reg. v. Stephenson*, 3 F. & F. 106. In that case it was held that a meat salesman can be indicted and convicted at common law for knowingly exposing meat for sale in a public market as fit for human food, which, in fact, is not so. For *Willes, J.* asked the jury, "Did the defendant know when he sent up the meat that it was unfit for human food? and did he send it up to be sold for human food?"]

No counsel appeared for the respondent.

Per *CURHAM* (*Blackburn, Mellor, and Quain, JJ.*)—This conviction must be affirmed.

Judgment for the respondent.

Solicitor for the appellant, *R. Beldan*, for *E. G. Peagam*, Doncaster.

Wednesday, Nov. 17, 1875.

ATWOOD (app.) v. CASE (resp.).

Merchant Shipping Act 1854, s. 237, construction of—Going on board newly arriving ship, "before actual arrival."

By sect. 237 of the Merchant Shipping Act 1854, every person (except as therein accepted) who "goes on board any ship about to arrive at the place of her destination before her actual arrival in dock, or at the place of her discharge, without the permission of the master," incurs a penalty as therein mentioned.

O., without leave of the master, went on board a ship bound from a foreign port to Bristol, as she lay in the Cumberland Basin of Bristol Harbour.

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The ship (which the crew soon afterwards left) remained in the basin all night, but did not, nor was it intended that she should, discharge her cargo there. The next morning she was moored further into the harbour, and discharged her cargo at another quay in the port of Bristol.

An information having been preferred before justices against O. for contravening sect. 237 of the Merchant Shipping Act 1854, the justices dismissed the same. The informant having appealed, under 20 & 21 Vict. c. 43,

Held, that the ship had actually arrived in dock, and that judgment ought to be for the respondent.

THIS was a case stated for the opinion of the Court of Queen's Bench, under 20 & 21 Vict. c. 43, by two justices of the peace for the town and county of Bristol.

1. Upon the hearing of a certain information preferred by the appellant, a police officer and a person employed in the service of Her Majesty's Board of Trade, against the respondent, a sailor's boarding-house keeper, for that he, not being in Her Majesty's service, and not being duly authorised by law for the purpose, unlawfully did go on board a certain British ship, to wit, the *Lord Duncan*, about to arrive at her place of destination before her actual arrival in dock or at the place of her discharge, without the permission of the master of the said ship, contrary to the 237th section of the Merchant Shipping Act 1854, we dismissed the case.

2. The section referred to is as follows:

Every person who, not being in Her Majesty's service, and not being duly authorised by law for the purpose, goes on board any ship about to arrive at the place of her destination, before her actual arrival in dock or at the place of her discharge, without the permission of the master, shall for every such offence incur a penalty not exceeding £20; and the master or person in charge of such ship may take any such person so going on board as aforesaid into custody, and deliver him up forthwith to any constable or peace officer, to be by him taken before a justice or justices, and to be dealt with according to the provisions of this Act.

3. The said ship arrived from a foreign port on Sunday, the 4th July 1875, and passed through the gate of the Cumberland Basin in the port of Bristol, in the city and county of Bristol, about seven o'clock in the evening.

4. Immediately after the ship had entered the basin the appellant, who is specially employed by the Board of Trade for the purpose, went on board, introduced himself to the master, and remained on board with his permission. Very shortly afterwards, and while the ship was being moored, the respondent went on board her, his alleged object being to see one of the crew. He spoke to the master, but did not obtain permission to remain on board, the master telling him that he was not wanted. The respondent went away from the ship and returned on board again shortly afterwards, and he then refused to leave when requested by the appellant so to do.

5. The crew left the ship on arriving in the basin, which is usual, and the ship remained there all night.

6. The next morning she was moored further into the floating harbour, and afterwards discharged her cargo at another quay in the port of Bristol.

7. Cumberland Basin is divided from the river Avon by dock gates, and is a complete dock forming part of, but divided by other dock gates from the rest of the docks formed under and governed

by the Bristol Dock Act 1868, and other local Acts. There are quays on each side of the basin at which ships frequently discharge cargoes, but the *Lord Duncan* did not discharge, and it was not intended that she should discharge any of her cargo there.

8. On behalf of the respondent it was contended that the section, being penal, must be read strictly, and that the words were alternative, so that it was enough to take his actions out of the provisions of the statute if the vessel could be said to have arrived: (1) "At her place of destination," or (2) "In Dock," or (3) "At the place of her discharge."

But in this case, as to all three phrases, it was agreed, as a fact, that she had arrived at her place of destination, that she was in dock, and that she had also arrived at the place of her discharge.

9. On behalf of the appellant, it was contended that it was not sufficient that the vessel had arrived in port to exempt a person acting as the respondent had acted, from being amenable to the statute, that so long as she had not arrived "at the place of her discharge," he could not board without permission from the master, and that it was not until Monday the 5th July last that the *Lord Duncan* arrived at the place of her discharge.

The justices decided as follows:—(1) That the ship was not "about to arrive at the place of her destination" (which, having regard to the section, they considered a condition precedent to bringing the respondent within its words) as she had actually arrived there, that is to say, she had arrived at Bristol; (2) That she was in dock, that is to say, in the Cumberland Basin; and (3) That she had arrived at the place of her discharge, which was Bristol, although she was not then actually at the quay at which she was afterwards unloaded, inasmuch as that precise locality as to all ships depends more or less upon the Bristol Quay wardens' arrangements, and upon various circumstances over which owners and masters of ships have no control or foreknowledge.

A plan accompanied the case.

Bowen for the appellant argued that great stress was to be laid upon the word "actual" in the section. The arrival in the present case was only a constructive arrival. [QUAIN, J.—This is a penal statute and must, as such, be construed strictly.]

Cole, Q.C., for the respondent, was not called upon.

BLACKBURN, J.—I am of opinion that our judgment ought to be for the respondent, and that upon the second of the grounds mentioned by the justices. Neither the first or third grounds are supportable. It is idle to say that the port of Bristol was the place of destination of this ship. She was in dock when she was in Cumberland Basin, and that is enough. There was an actual arrival of the ship within the meaning of the section.

MELLOR, J.—I am of the same opinion and for the same reason.

QUAIN, J.—A strict construction should be put upon the statute. The ship had arrived in dock. The words "other place of her discharge" were, I think, put in to embrace the cases which might arise of a ship discharging elsewhere than in dock. On the other two grounds the justices were wrong.

Judgment for the respondent.

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REG. v. CHORLTON-UPON-MEDLOCK.

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Solicitors for the appellant, *Whites, Remard and Co.*, for *Henry Britten, Press, and Inskip*, Bristol.

Solicitors for the respondents, *Darby and Oum-berland*, for *J. H. Clifton*, Bristol.

Saturday, Nov. 13, 1875.

REG. v. CHORLTON-UPON-MEDLOCK.

Disallowance by Poor Law auditor—Charge for making a valuation—Consent of vestry—27 & 28 Vict. c. 39, s. 7.

An assessment committee required the overseers of one of their townships to make out and copy a valuation list under 25 & 26 Vict. c. 103, s. 26. The board of overseers passed a resolution that their clerks and collectors had no time to do the work required, and that certain persons should be employed for the purpose. The overseers obtained a resolution of the vestry that the expense of this employment, which had then been defrayed, should be charged upon the poor rates. The Poor Law auditor disallowed this charge on the ground that the overseers' ordinary clerks and collectors ought to have done the work themselves.

Held, upon a rule for a writ of certiorari to bring up this disallowance, that by 27 & 28 Vict. c. 39, s. 7, when a vestry consents to such a charge, even after the expense has been defrayed, the auditor has no power to disallow it.

THIS was a rule nisi granted on behalf of the defendants, the overseers of the poor of the township of Chorlton-upon-Medlock, upon an application for a writ of certiorari, calling upon the prosecutor, W. Roberts, auditor of the South Lancashire and Cheshire Audit District, which comprises the above-named township, to show cause why a certain item of disallowance of the sum of 14*l.* 10*s.* made by him in the accounts of the defendants for the half year ended 29th Sept. 1874 should not be quashed.

The said item of the accounts was:—

Account of expenses incurred by the board of overseers of the township of Chorlton-upon-Medlock, in revising the rateable hereditaments of the township, and in making out a new valuation list, and copy of the rateable hereditaments in the township as required by an order of the Chorlton Union Assessment Committee, dated 14th May, 1874, viz.:

	£ s. d.
24th Sept. 1874.	
Paid to Messrs. Herald and Walker, printers for paper upon which to write the valuation list and copy, ruling and printing heading to same	4 9 6
Paid to J. W. Taylor, for writing valuation list, and assisting at examination thereof	7 15 0
Paid to J. Johnson for writing copy of valuation list ..	6 0 0
Paid to W. Goes for assisting at the examination of assessments in valuation list and copy	0 15 0
Paid to Messrs. Herald and Walker, printers, for printing notices for church and chapel doors of deposit of valuation list for public inspection	0 6 0
Paid to J. B. Hartley, bill poster, for posting notices upon thirty-seven church and chapel doors of deposit of valuation list for public inspection	0 2 6
Paid to Messrs. Herald and Walker, printers, for binding of valuation list	0 12 6
Paid to Messrs. Herald and Walker, printers, for printing notices of vestry meeting for allowances of overseers, expenses in and about the making of valuation list and copy	0 6 0
Paid to J. B. Hartley for posting notices upon thirty-seven church and chapel doors of vestry meeting	0 2 6
Paid to A. J. Bennett, chief clerk of the board of overseers for the services in connection with the preparation of the said list, and copy deposit and transmission of same, preparation of this account, calling, &c., attending vestry meeting, and for attending to the requirements of the statutes in that behalf	15 0 0
	35 9 0
Disallowed	214 10 0

The items disallowed are the 2nd, 3rd, and 4th, in the above account.

The following were the reasons for this disallowance signed by the said W. Roberts, the district auditor:

My reasons for disallowing the above sum of 14*l.* 10*s.* paid by the overseers of the township of Chorlton-upon-Medlock for writing a valuation list and a copy for Union Assessment Committee are: First, because there being in this township collecting clerks appointed under a local Act of Parliament to collect the rates for the relief of the poor in this township, it was in my opinion the duty of such collectors, without any additional charge upon the poor rates, to have discharged the duties for which the payments were made, having reference to Articles 6 and 60 of the general order for accounts of the Poor Law Board, dated 14th Jan. 1867, in force in the Chorlton Union and in the townships therein comprised, and which includes the township of Chorlton-upon-Medlock. Secondly, because in disallowing these payments I followed the decision of the Local Government Board on an appeal to them respecting a disallowance of a similar payment in the accounts of the overseers of the poor of the township of Hulme in the same union (and to which township the said local Act also applied, as expressed in a letter from the Local Government Board, dated 16th June 1874, No. 1442 C., and addressed to the then late overseers of the said township of Hulme, disposing of an appeal against such disallowance. Thirdly, it was stated before me by the collecting clerks above referred to that at the particular time when this valuation list was required they were fully occupied either with the preparation of a new rate or some other ordinary and accustomed duties of their office, but as I understand the law of the Local Government Board to be that when officers are appointed they undertake, in consideration of their specified salaries or other remuneration, to perform or cause to be performed all the legal duties appertaining to their office, I was, therefore, of opinion that it was the duty of these officers to have made all requisite arrangements and discharged their duties as far as related to the copying of such valuation list without any additional charge upon the poor rates, and that the overseers of the poor of this township, in employing additional persons to perform this duty incurred unnecessary and improper expenses; and, fourthly, because the collecting and other clerks appointed in any township to which the above local Act relates being appointed at salaries or other remuneration sanctioned by the Local Government Board, I was also of opinion that on this ground it is not within the discretion of the overseers to relieve such officers from the performance of any duties that they have undertaken in consideration of their salaries by appointing other persons to discharge any of such duties, and thereby increase the burden upon the poor rate.

Dated the 6th day of Jan. 1875.

It appeared from the affidavits of the several overseers and collectors of the township of Chorlton-on-Medlock that on the 21st May 1874 the board of overseers received a letter from the Clerk of the Chorlton Union Assessment Committee requiring a new or supplemental valuation list to be made for the said township, within three months from the 14th May, the date of the said letter; that during the period within which the said valuation list had to be made the clerks and collectors forming the ordinary staff in the employ of the board were fully occupied from day to day during the business hours of the day and frequently until late at night, upon the business of the said board; that it was deemed by the board inexpedient, and it would certainly have been in the highest degree inconvenient to take those officers from the business upon which they were engaged in order to write out and copy the valuation lists, for the performance of other duties of the utmost importance would have been thereby interfered with and prevented from being carried out; that under these circumstances the board of overseers did not direct the collectors or other

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officials to write out the valuation list and copy thereof, but they authorised the clerk to the board to employ writers to write out the list and copy; and a formal resolution employing two writers named therein was passed and put upon the minutes of the board.

It was also stated on affidavit by the several clerks and collectors of the overseers of Chorlton-upon-Medlock that they all commenced their said employments before the date of the order of the Poor Law Board of 1867; that it formed no part of the duties they undertook to make out or copy such valuation list as that required by the assessment committee; and that they had no time to accomplish that work as well as their regular duties.

The account of expenses incurred in making out the said list and copy as aforesaid, with vouchers of payment, were laid before a vestry meeting convened by the overseers of the said township after due notice in accordance with the requirement of the 27 & 28 Vict. c. 39, s. 7, and held on the 24th Sept. 1874, and the same was allowed by such meeting; and the said overseers were authorised by the vestry by express resolution to charge the said sum of 35l. 9s. upon the poor rate of the said township, as follows:—

Resolved, that the overseers, having incurred the expense of 35l. 9s., in making out a valuation list and copy under the provisions of the Union Assessment Committee Act 1862, this vestry, under the powers and provisions of the Union Assessment Committee Act Amendment Act 1864, consents unto and allows such sum of 35l. 9s., and certifies the same to be due to the overseers, and authorises them to charge the said sum of 35l. 9s. upon the poor rate of this township.

Herschell, Q.C. and *Forbes* showed cause on behalf of the auditor.—This is an application under 7 & 8 Vict. c. 101, s. 35, the following section (the 36th) providing another remedy under similar circumstances by application to the Poor Law Commissioners. These Commissioners have given a decision on this very point directly in favour of the auditor's disallowance in this case. [*Cockburn, C.J.*—That does not prevent our considering the matter on its merits.] By sect. 46 of 4 & 5 Will. c. 76, the Poor Law Commissioners were empowered to issue orders and rules regulating the duties of overseers and their clerks and collecting officers, and by Article 6 of the orders dated the 14th Jan. 1867, and issued in pursuance of that section, "Every collector appointed for a parish shall enter up so much of any books or forms of the overseers relating to the valuation list, or to the collection of the poor rates, as he may be directed to enter up by the overseers for the time being, and shall enter in the rates' book all such particulars of every assessment as he shall be directed by such overseers to enter therein; and every such collector shall attend before the auditor at the same time as the overseers of the parish for which he acts." And by Article 60, "The term 'collector' in the construing of this order shall be taken to apply to any person appointed under any Act of Parliament, or any order of the Poor Law Board, to collect the rates for the relief of the poor in any parish or parishes, whether such person shall be designated collector of poor rates or assistant overseer, or be called by any other name whatever, or the collector of the guardians, as the context shall require." Before these orders, however, by the Manchester Overseers' Act 1858 (21 & 22 Vict. c. lxiii., s. 6) the overseers of each township

in Manchester were incorporated separately to a qualified extent, and the section concludes: "Such overseers may, from time to time, appoint such clerks, surveyors, and servants to aid them in the discharge of their duty, with such salaries as the Poor Law Board shall, from time to time sanction, and pay the same out of the poor rate, all such clerks, surveyor, and servants being liable to the same responsibility as officers appointed under the Act of 4 & 5 Wm. 4 c. 76." The work here required by the assessment committee is authorised by sect. 26 of the Union Assessment Committee Act 1862 (25 & 26 Vict. c. 103); but any extra expense incurred in completing it can only be paid out of the rates, if the vestry authorise the work to be done at extra expense. The words of 27 & 28 Vict. c. 39, s. 7, are: "When the overseers of any parish incur any expense in making out any valuation list or supplemental list, or in revising or valuing any of the rateable hereditaments of such parish, under the provisions of the Union Assessment Committee Act 1862, with the consent of the vestry given by express resolution, after due notice, they may charge such expense as far as the same may be authorised by the vestry, upon the poor rate; and if no vestry meeting be held, or no decision arrived at on the subject, then to the extent which the assessment committee shall allow. Provided that, as regards the valuation of the property, no expense shall be so charged upon the poor rate, unless the consent of such committee to the procuring of such valuation by the overseers shall have been given previously to the same being made." Here the authority of the vestry was not obtained till after the expense was incurred.

Maule, Q.C. and *Lumley* supported the rule.—The effect of that 7th section of the Act of 1864 is not to require any consent of the committee previously to the copying of valuation lists: the words "with the consent of the vestry given by express resolution" refer to the power to charge the expenses upon the poor rate, not to the right to incur the expense. [*Cockburn, C.J.*—There is little in the language of the provision to show which way it is intended to be read.] It cannot mean that the previous consent of the vestry is to be obtained before the overseers incur any expense. [Stopped by the court.]

Cockburn, C.J.—There is a duty imposed upon the overseers by the Legislature to make or copy a valuation whenever the assessment committee requires it. No provision is made as to how this duty should be carried out, nor as to the payment of any expense it may require, except by the 7th section of the Union Assessment Committee Act Amendment Act 1864. The words of that section are ambiguous, but I think Mr. Maule's interpretation is right. The effect of it is that, if the vestry are of opinion that any expense of this kind incurred by the overseers should be paid out of the rates, a resolution to that effect may be passed, and the overseers then have a right to charge such expenses upon the rates. I do not think the auditor is competent to interfere with the due exercise of the power of a vestry.

Field, J.—I am of the same opinion.

Judgment for the Overseers.

Solicitors for the Auditor, *Shaw and Tremellen* for *W. Roberts and Son*, Rochdale.

Solicitors for the Overseers, *Bower, Son, and Cotton*.

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BOSLEY (app.) v. DAVIES (resp.).

[Q.B. Div.]

Saturday, Nov. 20, 1875.

BOSLEY (app.) v. DAVIES (resp.)

Gaming on licensed premises—Knowledge of licensed person—Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 17.

A party of gentlemen were playing cards for money in a room of the appellant's licensed premises, and were disturbed by a police constable who had heard them from outside. The appellant's manager knew nothing about it, and it did not appear that any waiter came into the room whilst they were playing. The justices convicted the appellant under the Licensing Act, 1872, s. 17, for suffering gaming to be carried on on his premises.

Held, upon a case stated, that, although no actual knowledge on the appellant's part was necessary, it must appear that there was gross negligence or wilful ignorance on the part of the persons who had authority to prevent the gaming before he could be convicted. The case was remitted accordingly.

THIS was a case stated by three justices of the peace, acting in and for the city of Hereford, under the statute 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of the Court on a question of law which arose before them as hereinafter stated.

At a petty sessions holden at the Guildhall in and for the said city of Hereford, on the 29th July, 1875, an information preferred by John Davis, superintendent of police for the said city (hereinafter called the respondent) against John Bosley, a person duly licensed for the sale of intoxicating liquors by retail under The Licensing Acts 1872 and 1874, as the managing director of the Green Dragon Hotel Co., Hereford (hereinafter called the appellant), under sect. 17 of the Licensing Act, 1872, charging for that he the said John Bosley on the 1st July then instant, at the parish of St. John Baptist, in the said city of Hereford, then being a person duly licensed for the sale of intoxicating liquors by retail, did unlawfully suffer gaming on his licensed premises, was heard and determined by the said justices, and upon such hearing the appellant was convicted before them of the said offence, and they adjudged him to pay a penalty of 1*l.* and 10*s.* 6*d.* costs, or in default of payment to be imprisoned for fourteen days.

And whereas the appellant, being dissatisfied with their determination upon the hearing of the said information as being erroneous in point of law, had, pursuant to sect. 2 of the said statute, 20 & 21 Vict. c. 43, duly applied to them in writing to state and sign a case setting forth the facts and grounds of such their determination as aforesaid for the opinion of this Court, and had duly entered into a recognisance as required by the said statute.

The said justices, in compliance with the said application and the provisions of the said statute, stated and signed the following case:—

Upon the hearing of the information it was proved on the part of the respondent that George Barroll, a police constable, about half-past twelve in the morning of the 1st July, was on duty in Broad-street, Hereford (in which street the appellant's licensed premises called the Green Dragon Hotel are situate) and heard laughing and shouting proceeding from the Green Dragon Hotel; he then went opposite the Green Dragon and heard

noises and voices in a room with three windows facing the street. Two of the windows had the blinds up a part of the way so that the constable saw three of the gentlemen who faced the street, and from what he heard knew that there were several gentlemen playing at cards. He waited about a quarter of an hour, when the front door was opened by one of the waiters who came out, and the constable entered and went upstairs direct into the room where the gentlemen were, and he there found six gentlemen round a table playing at cards, with a lot of money on the table, and also drink. He asked them for their names; some of them refused, but at length they all gave their names. When the constable came downstairs he met Miss Clarke, the manageress, who, he stated, was angry with him, and told him he had no right to go upstairs without first coming to her, and took his number, and said she should report him. She said she did not know they were playing at cards, and that they did not have the cards of her. The constable said they were making a great noise, and it could be distinctly heard in the street that they were playing at cards.

Mr. Gwillim, the appellant's attorney, admitted that the gentlemen were playing at cards, and that they were playing for money, but contended that it was necessary that the gaming should be carried on with the knowledge of the appellant, or the manageress, or other persons employed in the hotel, and quoted the case of *Avardo v. Dances* (26 J. P. 437). The respondent, however, drew the attention of the justices to the circumstance that the 17th section of the Licensing Act 1872, did not include the word "knowingly," as did the repealed statute, and as do some of the sections of the present statute with reference to other offences. Mr. Gwillim afterwards called in defence two witnesses: First, Mr. Beaumont Thomas Featherstone, of Warwick, one of the gentlemen in question, who stated that he and the other gentlemen were staying at the Green Dragon Hotel, having come to Hereford engaged in a game of cricket, and they had a private room and dined there that evening; that cards were produced by a Mr. Walker, one of the gentlemen; and that they played for money, and that he did not think that anybody in the house knew they were playing at cards; but in cross-examination he said as follows: "I did not see the waiter come in. I never saw a waiter. I will not swear that he did not come in. We had all our drinkables. He came in just after the police constable came in. I fancy it was a short waiter. I don't recollect that any brandies were brought in. Just before we commenced playing our brandies and sodas came in." Secondly, Miss Elizabeth Clarke, the manageress, was called, and proved that she did not supply the cards, and that she had no knowledge of the card playing until she saw the policeman.

No waiter was called nor the gentleman who produced the cards, nor any other person who might have had access to the room, and on the above facts the justices convicted the appellant.

The question of law arising on the above statement is whether under the 17th sect. of the Licensing Act 1872 it was incumbent on the part of the respondent to prove actual knowledge on the part of the appellant, or some authority of the hotel, of the fact of gaming, so as to render the appellant liable under that section.

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If the court should be of opinion that proof of such knowledge was not necessary, then the said conviction is to stand; but if the court should be of opinion that proof of such knowledge was necessary, then the said information is to be dismissed.

Poland argued for the appellant.—By the 17th section of the Licensing Act 1872 (35 & 36 Vict. c. 94), "if any licensed person (1) suffers any gaming or any unlawful game to be carried on on his premises; or (2), opens, keeps, or uses, or suffers his house to be opened, kept, or used in contravention of the Act, 16 & 17 Vict. c. 119, intituled 'an Act for the Suppression of Betting Houses,' he shall be liable to a penalty not exceeding for the first offence 10*l.*, and not exceeding for the second and any subsequent offence 20*l.* Any conviction for an offence under this section, shall, unless the convicting magistrates shall otherwise direct, be recorded on the licence of the person convicted." [QUAIN, J.—Has not the necessity for the actual knowledge of the licensed person in offences under this Act been determined by *Mullins v. Collins* (L. Rep. 2 Q. B. 292)?] That was a decision under the 16th, the previous section, the effect of which was that a licensed person, without knowledge on his part, was liable for the act of his servant in knowingly supplying liquor to a constable on duty. Here there is no knowledge on the part of anybody connected with the hotel.

Sawyer, for the respondent.—The only question reserved for the court is whether actual knowledge on the part of some authority of the hotel is requisite for a conviction. The distinction between offences against the tenor of the licence, under 9 Geo. 4, c. 64, s. 21, which must all be committed "knowingly," and some of the offences against public order which in the Licensing Act of 1872 are described without that word, was discussed in *Mullins v. Collins*. It was held that it could not be implied in those clauses of the 16th section where it is not expressly used, and it follows that in this 17th section, where it does not appear, that the offence is complete if gaming be carried on on the premises, even without the knowledge of the authorities. It is not unreasonable that the Legislature should exact from every licensed person the duty to prevent gaming on his premises, and should inflict a penalty upon any omission to carry out that duty. In *Mullins v. Collins*, Archibald, J., said that the series of clauses, of which the 16th and 17th are both a part, must "be construed in the way most effective for maintaining public order." Here there was undoubtedly a breach of public order. [COCKBURN, C.J.—All the judges in that case guard themselves from expressing an opinion that the liability would attach if the servant were ignorant of the constable being on duty. The servant's knowledge might be constructively that of the licensed person, but here there is no evidence even of constructive knowledge.] Similarly under the Adulteration Act of 1872, it was held in *Fitzpatrick v. Kelly* (L. Rep. 8 Q. B. 337), that under the 2nd section no actual representation that an article was unadulterated was necessary to constitute an offence.

Poland in reply.—There is nothing in that case of *Fitzpatrick v. Kelly* which can assist us in the solution of this difficulty. I admit that if a constructive knowledge in the licensed person of such acts as these could be proved it would be

sufficient ground for a conviction, but such knowledge cannot be inferred from the facts stated in the case. [COCKBURN, C.J.—There must be, to justify a conviction, either actual knowledge by the licensed person or somebody authorised to manage the licensed premises, or constructive knowledge to such an extent that there was manifest negligence or intentional blindness as to what was going on in the house.] The effect of the justices' decision is that if any gaming takes place under any circumstances, the licensed person is liable to be convicted.

COCKBURN, C.J.—We can direct the magistrates to convict only if they are satisfied that there was gross absence of care or wilful abstinence from knowledge on the part of the persons managing the hotel. I think the conviction, as it stands, is very unsatisfactory, although I cannot say, in answer to the question reserved for us, that actual knowledge is necessary. The effect of the statute will be carried out if we convey to the magistrates this expression of our opinion, in order that they may inquire if anything occurred from which it must be necessarily inferred that the authorities knew, or ought to have known, of this gambling. We cannot say that there was no evidence on which to base such an inference, but as the case is stated I cannot come to that conclusion myself.

MELLOR, J.—My impression is that a licensed person may be liable under this section, even without knowledge of any gaming going on in the house, if the waiters or persons whose duty it is to enter these rooms and to attend to the wants of the guests occupying them omit to report their knowledge to the managers of the premises. A constructive knowledge on the part of the managers might justify a conviction, but in our opinion this case as it stands does not establish such a constructive knowledge.

QUAIN, J.—I am of the same opinion.

The following was the order of the Court: "It is ordered that this case be remitted to the justices who stated and signed the same with the opinion of this court that actual knowledge on the part of the licensed person is not necessary, but that constructive knowledge on his part must be proved. That although the word "knowingly" is not in sect. 17 of the Licensing Act, 1872, it is not sufficient merely to prove that persons gambled in the hotel, but that proof must be given that the manageress or servants in attendance on the guests in the room knew of the gambling. That wilful ignorance of the persons in authority at the hotel would not be an excuse. That this court is of opinion that the evidence set out in the case is not sufficient to justify a conviction; but the said case is hereby remitted with the opinion of this court as to the law."

Solicitor for appellant, *Thos. Fortune*, for *John Guillim*, Hereford.

Solicitor for respondent, *G. F. Cooke*, for *J. Carless*, Hereford.

Tuesday, Nov. 16, 1875.

PREST v. ROYSTON UNION.

Poor law auditor—Recovery of certified deficiency—Auditor's costs—7 & 8 Vict. c. 101, s. 32.

The plaintiff, a poor law auditor, certified a deficiency in the accounts of the defendants' overseer who failed to pay the amount to the defendants'

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treasurer within the seven days required by 7 & 8 Vict. c. 101, s. 32. The plaintiff applied, as required by that section, to the justices for a distress warrant, but as the overseer had by that time paid part of the certified deficiency, the justices declined to issue a warrant for more than the unpaid part. The plaintiff refused to accept this, and applied without success to this court for a mandamus. Upon appeal by the overseer, the Local Government Board under 11 & 12 Vict. c. 91, s. 4, consented to remit the disallowance on condition that the overseer would pay the plaintiff's costs incurred before the justices and this court. The plaintiff having failed to obtain the performance of this condition by the overseer, brought this action for his costs against the defendants.

Held that under the circumstances the defendants were liable.

This was an action brought to recover the sum of 59l. 2s. 2d., the amount of the plaintiff's taxed costs, charges and expenses in endeavouring to enforce a certain surcharge made by him on the 8th Jan. 1873 when auditing the accounts of the overseers of the parish of Ashwell. The plaintiff also, pursuant to the Common Law Procedure Act 1854, s. 68, claimed a writ of mandamus commanding the defendants to pay to the plaintiff the said sum of 59l. 2s. 2d., and to make a rate if necessary for the purpose of repaying it. In pursuance of an order dated the 17th July 1874, the facts have been stated in the form of the following special case for the opinion of the Court of Queen's Bench:

The plaintiff is the poor law auditor of the Cambridge and Huntingdonshire poor law audit district.

The defendants are the guardians of the Royston Poor Law Union.

John Goffage was at the times hereinafter mentioned, and at the date of the commencement of this action, the assistant overseer of the parish of Ashwell.

The parish of Ashwell is comprised in the Royston Union, and the said union is comprised in the Cambridge and Huntingdon Audit District.

On the 8th Jan. 1873, the plaintiff duly held his audit for the Royston Union, and the parishes comprised therein, of the accounts for the half year ending Michaelmas 1872. On auditing the accounts of the parish of Ashwell he surcharged the said assistant overseer of the said parish, John Goffage, with the sum of 139l. 9s. 10½d., which sum was made up of two sums of 36l. 2s. 2d. and 103l. 7s. 8½d.

The plaintiff duly certified this surcharge on the face of the accounts, and forthwith reported to the Local Government Board that he had so certified.

The amount surcharged was not paid within seven days from the date of the certificate, and the plaintiff, under 7 & 8 Vict. c. 101, s. 32 proceeded to enforce the payment of the same.

For this purpose the plaintiff caused an information to be laid on the 17th Jan. 1873 before the Justices of the Odsey Division, in the county of Hertford, against the said John Goffage, charging him with not paying to the treasurer of the guardians of the union of Royston the sum so certified within seven days after the same had been certified by the auditor to be due, nor within three clear days of the laying of the information.

At the hearing of the information it was proved,

as required by 11 & 12 Vict. c. 91, s. 9, that the plaintiff was the auditor and duly held his audit. The entry of the certificate at the time of the audit by the plaintiff and the non-payment of the amount, except as hereinafter mentioned, were also proved. The justices before whom the case was heard admitted evidence on the part of John Goffage of a payment 84l. 18s. 1d. made by him on 16th Oct. 1872, that is seventeen days after the date on which the half yearly account was closed, and to which date the certificate referred, but before the certificate was made, and declined to issue their distress warrant against his goods to levy the amount certified to be due as aforesaid except to the extent of 54l. 11s. 9½d., for which sum they were willing and offered to issue a distress warrant, but this the plaintiff declined to do, and made no application to the justices for costs.

The plaintiff was dissatisfied with the said decision of the said justices, and applied to the Court of Queen's Bench for a rule calling upon the justices to show cause why they should not issue their distress warrant, as aforesaid, for the full amount surcharged by him.

A rule nisi was granted on the 9th May 1873, which was argued on the 16th June 1873, and the rule was discharged. The case is reported under the name of *Reg. v. Fordham* (L. Rep. 8 Q. B. 501).

After the granting of the said rule nisi and before the argument thereon the said John Goffage appealed to the Local Government Board under 7 & 8 Vict. c. 101, s. 36; 11 & 12 Vict. c. 91, s. 4, against the disallowance of the sum of 103l. 7s. 8½d. The plaintiff being desirous that the said appeal should be considered by the Local Government Board before the argument of the rule before-mentioned, moved the Court of Queen's Bench to enlarge the said rule, but the said court refused to enlarge the same. The decision of the said Local Government Board upon the said appeal was as stated in the following letter from the secretary of the said Local Government Board to the said John Goffage:

No. 61802.
1873.

Local Government Board,
Whitehall, S.W.,
21st Nov. 1873.

SIR,—I am directed by the Local Government Board to inform you that they have considered your appeal against the disallowance of the sum of 103l. 7s. 8½d., which was made by Mr. Prest, district auditor, at his audit for the half year ending at Michaelmas 1872 of your accounts as assistant overseer of the parish of Ashwell, together with his reason for making such disallowance, and the correspondence which has taken place in reference to the appeal.

The Board find that the auditor has stated his reason for this disallowance in the following memorandum:

"103l. 7s. 8½d. taken credit for as paid to overseer on 28th Sept. disallowed because such deposit is not vouched by the initials of the overseer entered against the sum stated to have been so deposited."

It appears that in your collecting and deposit book you took credit for the sum in question as paid to the overseer on 28th Sept. 1872, but on reference to the book the Board find that the overseer has not placed his initials against the entry as vouching for the payment, although the initials are placed against an entry under the same date of an amount paid to the treasurer. It further appears that no such sum of 103l. 7s. 8½d. was, in fact, paid to the overseer on the date above-mentioned, but that the overseers having refused to receive it on the 10th Oct., you paid it to the treasurer of the union on the 16th of the same month as part payment of the next order for contribution to the funds of the union.

Under these circumstances the Board are of opinion that the auditor's decision with respect to the disallowance of

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PREST v. ROYSTON UNION.

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the sum of 103*l.* 7*s.* 8½*d.* was lawful. They will be prepared to remit the disallowance in the exercise of the equitable jurisdiction conferred upon them by 11 & 12 Vict. c. 91, s. 4. They learn, however, that the auditor has incurred law costs in taking proceedings before the justices, and in the Court of Queen's Bench, with a view to recover the amount which he certified to be due from you, and as under sect. 4 of the statute referred to they can only exercise their equitable jurisdiction upon payment of the costs, if any, which may have been incurred by the auditor, or other competent authority, in the enforcing of such disallowance, it will be necessary that the costs incurred by the auditor in the present case, after they have been duly taxed, should be paid by you before the Board issue their certificate in pursuance of 29 & 30 Vict. c. 113, s. 5, directing the remission of the disallowance in question.—I am, Sir, your obedient servant,

(Signed) JOHN T. HIBBERT, secretary.

To Mr. J. Goffage, assistant overseer of the parish of Ashwell, Ashwell-Baldock.

The said John Goffage although applied to by the plaintiff did not pay the amount of the plaintiff's said costs or any part thereof.

The plaintiff in thus endeavouring to enforce payment of the money so certified by him to be due as aforesaid incurred costs and expenses which were subsequently taxed by a master of this court at the sum of 59*l.* 2*s.* 2*d.*, consisting of 12*l.* 5*s.* 6*d.* costs of the proceedings before the justices, and 46*l.* 16*s.* 8*d.* costs of the proceedings in this court.

By 7 & 8 Vict. c. 101, s. 33 the expenses attending proceedings to enforce a sum certified by an auditor to be due shall (except so far as the same may be paid by the person against whom the proceedings have been taken) be repaid to such auditor by the guardians of the parish or union to which the proceedings may respectively relate. No part of the expenses incurred by the plaintiff, as above-mentioned, were paid by the said John Goffage, and application was made by the plaintiff to the defendants, as guardians of the Royston Poor Law Union, to pay to the plaintiff these expenses.

The clerk to the defendants thereupon wrote to the secretary of the Local Government Board the following letter:

Royston, 23rd April 1874.

SIR,—I am directed by the Board of Guardians of this union to forward to you a bill of costs by E. B. Prest, Esq., the auditor, for proceedings taken by him against Mr. Goffage, the assistant overseer of Ashwell, and certain justices of Herts, together with copies of Mr. Prest's letter and a resolution passed at their last meeting. The circumstances of the case were as follows: At his audit held on 8th Jan. 1873, Mr. Prest certified that 139*l.* 9*s.* 10½*d.* was due from Mr. Goffage; previous to the audit, but subsequent to Michaelmas, viz. on the 16th Oct. 1872, Mr. Goffage paid to the treasurer the sum of 84*l.* 18*s.* 1*d.* In Feb. 1873 Mr. Prest applied to the justices for a distress warrant against Goffage for the sum of 139*l.* 9*s.* 10½*d.*, and they, after hearing the evidence, declined to issue a warrant for the whole amount, but offered to grant one for 54*l.* 11*s.* 8½*d.*, the balance due, after allowing for the 84*l.* 18*s.* 1*d.* which Goffage had paid; the auditor refused to accept this, and applied to the Court of Queen's Bench for a mandamus, which was refused, as appears by the case of *Reg. v. Fordham and others, Justices of Herts* (L. Rep. 8 Q. B. 501).—I have the honour to be Sir, your obedient servant,

H. THURNALL.

To H. Heming, Esq., Secretary, Local Government Board.

To which the assistant secretary of the said Board replied as follows:

Local Government Board,

Whitehall, S.W., 1st May 1874.

SIR,—I am directed by the Local Government Board to acknowledge the receipt of your letter of the 23rd ulto., and in returning the bill of costs forwarded therewith to state that they have no authority to interfere as regards its payment. Should the guardians pay the bill, the Board

will have to determine how it is to be charged, but they have no power to act beforehand in the matter.—I am, Sir, your obedient servant,

DANBY P. FREY.

To H. Thurnall, Esq., clerk to the guardians, Royston Union.

The defendants refused to pay the said expenses or any part thereof on the ground that they were not justified in so doing, and this action was brought to recover the said sum of 59*l.* 2*s.* 2*d.* and to enforce payment thereof. The question for the court is whether the defendants ought to pay the said sum of 59*l.* 2*s.* 2*d.* or any part thereof to the plaintiff. If the court should be of opinion in the affirmative judgment is to be entered for the plaintiff for that amount and the plaintiff's costs of action, and a peremptory mandamus is to issue directed to the defendants commanding them to pay the said sum together with the plaintiff's costs of action, and to make a rate if necessary for the purpose of paying the said sum and his costs of action to the plaintiff. If the court are of opinion that the plaintiff is not entitled to have the said sum or any part thereof paid to him by the defendants, judgment is to be entered for the defendants with costs.

Lumley Smith argued for the plaintiff.—The appointment and duties of poor law auditors are regulated by 7 & 8 Vict. c. 101, s. 32. by which, after providing for the auditor's certifying deficiency or loss, "all moneys so certified to be due by such auditor shall be recoverable as so certified from all or any of the persons making or authorising the illegal payment, or otherwise answerable for such moneys, and shall be recovered on the application of such auditor, or of any such auditor subsequently appointed, or by any person for the time being entitled or authorised to receive the same, in the same manner as penalties and forfeitures may be recovered under the provisions of the said first recited Act; and the expenses attending such proceeding or recovery shall (except so far as the same may be paid by the person against whom the proceedings have been taken) be repaid to such auditor by the guardians of the parish or union, or by the district board of the district to which the proceedings may respectively relate, and shall be charged in their accounts in such manner and in such proportions as the said commissioners may direct." It is clear that this is not a case within the exception in the parenthesis, and therefore the defendants are liable.

Arthur Wilson, for defendants.—The plaintiff must show that he is entitled to these costs from the defendants in any event, and he ought to show that they were reasonably and properly incurred. The justices offered him a distress warrant against Goffage for the amount really due, and if he had accepted it he would have thereby obtained all the costs to which he had any claim at that time. He abandoned his remedy against Goffage, and thereupon he cannot avail himself of his further remedy against the guardians. As to the expenses of the proceedings on the *mandamus*, this court held that he was wrong.

Lumley Smith was not heard in reply.

COCKBURN, C.J.—I think our judgment must be in favour of the plaintiff. The Act of Parliament by the 32nd section enables the commissioners to define audit districts, and to select auditors; it sets out the powers and duties of the auditors, especially with regard to the recovery of any deficiency or loss they may certify in the overseers' accounts.

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REG. v. THE JUSTICES OF HUDDERSFIELD (SYKES'S CASE).

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It then prescribes the mode of recovery and the repayment to the auditors of all expenses they may incur thereby. The language is peremptory and positive, "the expenses attending such proceeding or recovery shall (except so far as the same may be paid by the person against whom the proceedings have been taken) be repaid to such auditor by the guardians of the parish or union, or by the district board of the district to which the proceedings may respectively relate, and shall be charged in their accounts in such manner and in such proportions as the said commissioners may direct." Here it is clear that the auditor's expenses have not all been paid by the person against whom the proceedings were taken; and although they might have been so paid long ago if the auditor had taken advantage of the order he obtained from the justices, yet I think that under the circumstances the enacting part of the section must be taken to operate upon this claim rather than the exception, and on the whole the auditor can recover in this action from the guardians. Although the court feel bound to give this effect to the section, they decline to hold that it was wise on the auditor's part to refuse the justices' order. Goffage was entitled to credit for this part of the overcharge which he had paid, and it would have been far better if the auditor had been contented with the distress warrant for the amount offered by the justices. So with respect to the proceedings in this court, they ought not to have been brought; but although not wise it is impossible to say that these acts of the auditor were either of them altogether unreasonable. It is not suggested that he entertained any fraudulent or improper motive in what he did, and although mistaken he committed errors of judgment only. The intention of the Legislature clearly was that such an officer should not suffer the costs incurred by his *bonâ fide* discharge of duties imposed upon him. Our judgment, therefore, is for the plaintiff.

MELLOR, J.—I have come to the same conclusion, although I have had some doubt as to the liability of the guardians for costs which the auditor would have avoided if he had acted prudently. It would, however, be hard upon that officer if he were to lose his costs because he did not take the most judicious course in performing his duties. There is nothing in the case to show he was not doing his best, and nothing to disentitle him from recovering judgment in this action.

QUAIN, J.—I am of the same opinion. It is admitted that there has been nothing improper on the auditor's part. He was clearly right in making application to the justices. They said, We will give you a warrant for less than you demand. Whatever his reason for refusing this offer, he does not seem to have known that he was not adopting the best course.

Judgment for plaintiff.

Solicitors for plaintiff, *Sharpe, Parkers, and Co.*
Solicitors for defendants, *Church, Son, and Clarke, for Thurston and Nash, Royston.*

Monday, Nov. 22, 1875.

REG. v. THE JUSTICES OF HUDDERSFIELD
(SYKES'S CASE).

*Licence for sale of beer to be drunk off premises—
Refusal of—How far justices must give reasons for
refusal—Wine and Beerhouse Act 1869, s. 8.
If justices refuse to grant a licence for the sale of*

*liquor to be drunk off the premises they are bound
to state their reasons for refusal.*

*By the Wine and Beerhouse Act 1869 (32 & 33 Vict.
c. 27), s. 8, no application for a licence for the sale
of beer not to be drunk on the premises shall be
refused except on one or more of four grounds
therein specified, viz. (a) that the applicant has
not produced satisfactory evidence of good char-
acter; (b) that the applicant's house is disorderly;
(c) that the applicant has forfeited a licence pre-
viously held; and (d) that the applicant or his
house is not legally qualified.*

*S. applied for a licence to sell beer not to be drunk
on the premises, and produced evidence of good
character. No evidence adverse to the application
was either offered or given, but the licensing
justices refused the licence without reasons as-
signed, and declined to state reasons when called
upon on behalf of S. so to do;*

*Held, that the justices were bound to state their
reasons, and a rule for a mandamus to hear and
determine the application of S. made absolute.*

THIS was a rule calling upon D. Sykes, Esq., and other licensing justices for the borough of Huddersfield, to show cause why a *mandamus* should not issue commanding them to hold an adjourned licensing meeting, and there hear and determine the application of Mr. Sykes for a licence to sell beer by retail not to be drunk on the premises.

The material facts were these: The applicant had attended at the general annual licensing meeting, and had there produced certain evidence to character with which the chairman had expressed himself satisfied. No evidence against the applicant was offered. The justices retired, and when they came back intimated that they had determined to refuse all applications of a character similar to that of the applicant's. But upon being asked to state reasons for their refusal they declined. Upon showing cause, however, they made affidavit that they had not refused Sykes's application upon the fourth of the grounds specified in the Wine and Beerhouse Act 1869 (a),

(a) This enactment is as follows:

All the provisions of the said Act (the Licensing Act 1828) as to the terms upon which and the manner in which and the persons by whom grants of licences are to be made by the justices at the said general annual licensing meeting, and as to appeal from any act of any justice, shall, so far as may be, have effect with regard to grants of certificates under this Act, subject to this qualification, that no application for a certificate under this Act to sell by retail beer, cider, or wine, not to be drunk on the premises, shall be refused, except upon one or more of the following grounds: viz.

(1) That the applicant has failed to produce satisfactory evidence of good character.

(2) That the house or shop in respect of which a licence is sought, or any adjacent house or shop, owned or occupied by the person applying for a licence, is of a disorderly character, or frequented by thieves, prostitutes, or persons of bad character.

(3) That the applicant having previously held a licence for the sale of wine, spirits, beer, or cider, the same has been forfeited for his misconduct, or that he has through misconduct been at any time previously adjudged disqualified from receiving any such licence or from selling any of the said articles.

(4) That the applicant, or the house in respect of which he applies, is not duly qualified as by law is required.

Where an application for any such last-mentioned certificates is refused on the ground that the house in respect of which he applies is not duly qualified as by law is required, the justices shall specify in writing to the applicant the grounds of their decision.

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and they further referred to a case of *Ex parte Stone* (not reported) as justifying the acts complained of by the applicant.

Nov. 3. — *Waddy*, Q.C. moved, before Cockburn, C.J., and Mellor and Quain, JJ., for a rule for a *mandamus* to the justices, stating the facts as above.

COCKBURN, C.J. — For the justices to refuse to state their reasons would seem to be an arbitrary and high-handed exercise of their functions. (a) But it is hard to see how you are entitled to a *mandamus* to hear and determine. Would not the answer to such a *mandamus* be that the justices have heard and have determined? However, as the justices distinctly refused to state their reasons, you may take a rule nisi.

A rule having been granted accordingly.

Nov. 22. — *Muile*, Q.C. (with him *Ewins Bennett*) for the justices, now showed cause. — The justices are entitled to refuse this licence upon any one or more of the four grounds specified in the 8th section. It is not incumbent upon them to state upon which of the four grounds they proceed, unless they happen to proceed upon the fourth — i.e., "that the applicant or his house is not duly qualified as by law required." In this latter case they must state their grounds in writing. *Expressio unius exclusio alterius*. In any of the three other cases, therefore, they are not bound to state their grounds. [MELLOR, J. — Not in writing, I admit.] The statute has not made the distinction, and the inference cannot be drawn that, because they must write their reasons in one case, they must state them orally in the three others. [FIELD, J. — How is an unsuccessful applicant to appeal if he has no information as to the reason after the failure of his original application?] The right to appeal from the refusal to grant a new licence, such as the appellant's was, is now taken away. (b) The case of *Ex parte Stone* heard in the Court of Queen's Bench on April 26th, and the note of Blackburn, J., thereon was now referred to, but it was found not to bear the construction put upon it by the justices as stated in their affidavit.

Manisty, Q.C. (with him *Waddy*, Q.C.) for Mr. Sykes, the applicant, was not called upon.

MELLOR, J. — I am of opinion that this rule ought to be made absolute. I think that the justices ought, at any rate, to declare on which of the grounds they proceeded, and that they are bound to justify their refusal. This application is rightly made for a *mandamus* to the justices to hear and determine.

QUAIN, J. — I am of the same opinion. If we did not make this rule absolute the justices might

(a) See *R. v. Young*, 1 Barr. 557, in which Lord Mansfield, C.J., said (at p. 559), "If they (the justices) have no reasonable objection to the man they ought to license him; and if they have any reason they ought to give it. For, though they have, it is true, a discretion in these cases, yet it must not be permitted to them to exercise an arbitrary and uncontrolled power over the rights of other people." As to the grant of new licences for the sale of liquor to be drunk on the premises, see *Reg. v. Lancashire* (L. Rep. 6 Q.B. 93), in which case it was held by Hannon and Lush, JJ., that in granting such licences the justices both may and ought to consider the number of houses in the neighbourhood already licensed.

(b) See Licensing Act 1874 (37 & 38 Vict. c. 49), s. 27, which enacts that no appeal shall be had to quarter sessions from any act of any justice with respect to the grant of new certificates under the Wine and Beerhouse Acts, 1869 and 1870.

evade the Wine and Beerhouse Act as they pleased. The Legislature has said in that Act that a licence shall not be refused except on one or more of four specified grounds. There are still certain rights of appeal against refusal of licences mentioned in this 8th section, and a party wishing to exercise those rights cannot freely do so without knowing upon which of the four grounds the refusal against which he appeals proceeded.

FIELD, J. — I am of the same opinion. As for *Ex parte Stone*, I have no recollection of this 8th section of the Act of 1869 being brought to the attention of the court, and I am quite certain that the decision in that case did not proceed upon a review of the section in question.

Rule absolute.

Solicitors for the applicant: *Learoyd and Co.*, for *Learoyd*, *Learoyd*, and *Morris*, Huddersfield.

Solicitors for the justices: *Van Sandau and Cumming*, for *C. Mills*, Huddersfield.

Wednesday, Nov. 17, 1875.

STRINGER v. THE JUSTICES OF HUDDERSFIELD.

Licence, renewal of—Enlargement of premises—Form of renewal—Restriction of licence to original premises—Whether restriction may be endorsed on renewal licence—Licensing Act 1872, ss. 42, 48.

By s. 48 of the Licensing Act 1872, "every licence granted after the commencement of the Act shall be in such form as may from time to time be prescribed by the Secretary of State," and "a renewal of a licence may be made by an indorsement on the licence or by the issue of a copy of the old licence." For some time previously to Feb. 1874, an inn called "Newill's Hotel" was kept by N., part of the ground floor being let off as a shop. In Feb. 1874, N. transferred the licence of "Newill's Hotel" to S., who had become tenant of the whole house, including the shop.

In July 1874, S. took in the shop to the inn, and in August applied for a renewal of his licence. The renewal was not opposed, nor was S. required to attend at the licensing meeting. The justices renewed the licence, but described the licensed premises thereon as "Newill's Hotel," consisting of such parts of the premises as were lately in the occupation of N., "and used by her under and for the purposes of the licence granted to her in renewal of which this licence is granted."

S. appealed to quarter sessions against the insertion of the description.

Held, upon a case stated by quarter sessions, that the licence was not irregular, and that judgment ought to be for the respondents.

This was an appeal against the form of certificate of renewal of the licence of the appellant (Stringer) by the respondents, being justices of the peace for the borough of Huddersfield, and against the refusal of the respondents to grant a renewal in the alleged legal and proper form. (a)

(a) The following enactments are material:—

Licensing Act 1872, s. 42.—"Where a licensed person applies for a renewal of his licence the following provisions shall have effect:

(1) He need not attend in person at the general annual licensing meeting, unless he is required by the justices so to attend.

(2) The justices shall not entertain any objection to

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The Court of Quarter Sessions at Wakefield had confirmed the order of the respondents, subject to the opinion of the Court of Queen's Bench upon the following

CASE.

The following facts were found and ascertained by the Court:

1. [Correctness of plan of premises, which accompanied case.]

2. James Weller Newill had been tenant and held a licence for sale of excisable liquors from 1862 until his death in 1873, after which his widow, Elizabeth Newill, became the tenant of the whole of the premises known as Newill's Hotel, until the 6th Feb. 1874. The said J. W. Newill, during his lifetime, and after his death the said E. Newill, was, until the said 6th Feb., in the possession of all the said premises, and had for some part of this period let off one room therein to one James Waller, a hosier, as her sub-tenant.

3. The said E. Newill was the holder of a licence for the sale of excisable liquors upon the said premises so occupied by her on and prior to the 10th Oct. 1873. The following is a copy of the renewal licence granted to her in Oct. 1873:—

Renewal licence—Innkeeper's.

Borough of Huddersfield, in the West Riding of Yorkshire.

At the General Annual Licensing Meeting. . . . We, being the majority of the justices, hereby grant unto Elizabeth Newill, a licensed victualler, the renewal licence authorising her to apply for and hold. . . .

Any of the Excise licences that may be held by a publican for the sale by retail at a house . . . known by the sign of the Newill's Hotel, of intoxicating liquor, to be consumed either on or off the premises.

The owner of the premises in respect of which this licence is granted are the executors of E. L. Hesp.

This licence shall be in force from the 10th Oct. next until the 10th Oct. then next ensuing, and no longer. . . .

4. At the time the said renewal licence was so granted the premises in respect of which the

the renewal of such licence, or take any evidence with respect to the renewal thereof, unless written notice of an intention to oppose the renewal of such licence has been served on such holder not less than seven days before the commencement of the general annual licensing meeting. . . .

Subject as aforesaid, licences shall be renewed, and the powers and discretion of justices relative to such renewal shall be exercised as heretofore."

By sect. 26 of the Licensing Act 1874, the requisition mentioned in the first paragraph of the above section is not to be made "save for some special cause personal to the licensed person to whom such requisition is sent."

Licensing Act 1872, sect. 48.—"Every licence granted after the commencement of this Act shall be in such form as may from time to time be prescribed by a Secretary of State. . . . A renewal of a licence may be made by an endorsement on the licence or by the issue of a copy of the old licence."

Forms under the above section have been issued by the Home Office. The official form of description of a licence of the character renewed to the appellant appears to be as follows: "This general licence authorising him [the holder] to apply for and hold any of the Excise licences that may be held by a publican for the sale by retail at a house situated at . . . , known by the sign of the . . . , of intoxicating liquor, to be consumed either on or off the premises." It is to be observed that in the case of the general public house licence the discretion of justices, both in granting, transferring, or renewing it (subject to the enactments of 1872 and 1874 above set out), is absolute. See Licensing Act 1828, s. 1, and *R. v. Walsall Justices* (3 C. L. E. 100), as to the grant and renewal of such a licence; and Licensing Act 1828, ss. 4, 14; 5 & 6 Vict. c. 44, s. 1; and *Reg. v. Rowell* (26 L. T. Rep. N. S. 732), as to the transfer of it.

licence was held did not include the room let off as in par. 2 mentioned.

5. The licence so held by the said E. Newill was duly transferred by her to the appellant on the 6th Feb. 1874. The following is the transfer of such licence:

Transfer of Licence.

Borough of Huddersfield, } At a Petty Sessions of her
in the West Riding of } Majesty's Justices of the
Yorkshire to wit. } Peace acting in and for
for the Borough of Huddersfield, in the West Riding of the
County of York, holden at the Court-house in Hudders-
field aforesaid, on Friday, the 6th Feb. 1874, whereas
no special session for the transfer of licences of inns,
alehouses, and victualling houses in the said division is
now being holden therein; and whereas application is
now made at this Petty Session by Elizabeth Newill
(Newill's Hotel), Huddersfield, keeping the inn, alehouse,
or victualling house, situate in the said division, and
mentioned in the licence hereunto annexed, and granted
pursuant to the statute in that case made and provided at
the General Licensing Meeting in the said licence men-
tioned, to transfer the said licence to John Stringer, of
Huddersfield, innkeeper. We, therefore, the under-
signed, being the majority of the justices present at this
Petty Sessions, by this authority under our hands and
seals to the said licence hereunto annexed so granted as
aforesaid, by virtue of the power vested in us by the
statute in such case made and provided, after examining
upon oath all necessary parties, do authorise the said
John Stringer, being a person not disqualified by the
statute in such case made and provided, and to whom it is
proposed by such application to transfer such licence, to
use, exercise, and carry on the business of a licensed
victualler and beer retailer at the same house and at the
same premises mentioned in the said licence hereunto
annexed, and there to sell such excisable liquors and beer
as might heretofore have been sold and retailed therein;
the same being a case where justices of the peace
assembled at a Special Session are empowered by the
statute in that case made and provided to transfer or
grant licences before the expiration thereof to sell
excisable liquors and beer by retail in the same house
or premises in respect of which any person had been
theretofore duly licensed. The authority hereby granted
to continue and be in force until the now next ensuing
session for transferring and granting such licences, which
shall be holden for the said division within which such
house and premises are situated, and no longer.

6. The appellant became the tenant of the whole of the premises, including the shop let off as in par. 2 mentioned, on the 6th of Feb. 1874, and on the 1st July 1874, the lease of the said premises was renewed to him by the owners, the trustees of Mr. Hesp, and under such renewed lease the appellant became the tenant and occupier of the whole of the premises, including such shop previously occupied by Waller, and has, since the 1st July 1874, been in possession and occupation of the whole of such licensed premises, including such shop.

7. The shop has always had and still has an internal communication opening immediately into the interior passage which forms part of the licensed premises of the appellant, and one part of that shop has not hitherto been used as part of the licensed premises.

8. Since the year 1870 some portions of Waller's shop have formed part of the appellant's licensed premises called Newill's Hotel, and have been used and occupied therewith under the said licence.

9. Prior to the Brewster Sessions held at Huddersfield for that borough on 26th Aug. 1874, and adjourned to the 30th Sept. 1874, no notice of any intention to oppose the renewal of the appellant's licence had been served on him nor had any requisition been made by the justices upon him

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pursuant to sect. 42 of the Licensing Act 1872, or sect. 26 of the Licensing Act 1874.

10. No objection was made at the said sessions held on the 26th Aug. 1874, to the renewal of appellant's licence, and no evidence was given before the licensing justices on the application for the renewal of the appellant's licence at the said original or adjourned sessions of any matter or special cause personal to the appellant.

11. The following licence was granted to the appellant on the said 30th Sept. 1874, in respect of which the appeal was brought.

Renewal licence—Innkeeper's.

Borough of Huddersfield, in the West Riding of Yorkshire.

At the adjourned general annual licensing meeting of her Majesty's justices of the peace acting in and for the borough of Huddersfield, in the same riding, holden at the Court House in Huddersfield, in the said borough, on the 30th day of September 1874, we, being the majority of the justices of the said borough at the said meeting assembled, hereby grant unto John Stringer, of the township of Huddersfield, in the said borough, a licensed victualler, this renewal licence authorising him to apply for and hold any of the Excise licences that may be held by a publican for the sale by retail at a house situated in the township aforesaid, known by the sign of Newill's Hotel, of intoxicating liquors to be consumed either on or off the premises (consisting of such parts or portions of the block of buildings called Heap's-buildings in Westgate, and John William-street, as were lately in the occupation of Elizabeth Newill, deceased, and used by her under and for the purposes of the licence granted to her in renewal of which this licence is granted. The owners of the premises in respect of which this licence is granted are the executors of the late Mr. Edward Lake Heap.

This licence shall be in force from the 10th day of October next until the 10th day of October then next ensuing, and no longer.

12. Part of the room on the first floor of the appellant's said premises extends over Michael Hirst's draper's shop, but that shop has never formed any part of the premises leased to the appellant, and had never had external or internal communication therewith.

Upon the hearing of the appeal it was contended on behalf of the appellant that, as he had not been required by the licensing justices to attend in person at the said General Annual Licensing Meeting, or at the said adjourned General Annual Licensing Meeting, and as no requisition whatever had been made by them to that effect, or sent to him for any special cause personal to him as a licensed person, pursuant to the provisions of the Licensing Act 1872, and the Licensing Act 1874, respectively, the said justices were bound, under the provisions of the first-named statute, to renew the appellant's licence, according to the form at the time of the same renewal prescribed by the Secretary of State, either by an indorsement of such renewal on the existing licence or by issuing a copy of the old licence, and that the respondents, as such licensing justices, under the state of the law as then in force, and under the circumstances found in the case, had no power to add to the form so prescribed as aforesaid and then in force, by inserting in the licence then granted as the renewal of the old licence, the following passage set forth in the case, and which was not contained in the then existing licence, viz.:

Consisting of such parts or portion of the block of buildings called Heap's-buildings, in Westgate and John William-street, as were lately in the occupation of Elizabeth Newill, deceased, and used by her under and for the purposes of the licence granted to her in renewal of which this licence is granted.

And that this passage added to the licence either a condition or limitation unauthorised by law, and was an alteration of the licence in substance and form as prescribed by law. And, further, it was objected on behalf of the appellant that no written notice of an intention to oppose the renewal of his licence having ever been served on him as the holder of a licence before the commencement of the said General Annual Licensing Meeting, nor any such notice whatever having been served on him stating in general terms the grounds on which the renewal of his said licence was to be opposed, it was not competent to the respondents as such licensing justices to entertain any objection to the renewal of such licence, or to take any evidence with respect to the renewal thereof, or to vary the form of the licence then to be renewed. And that upon the adjournment of the said licensing meeting, and of the granting of the said renewal of appellant's licence above stated, there having been no objection made to its renewal, and no consequent requisition by the said licensing justices to the appellant to attend on the day of the adjournment, that no other step could be legally taken by the said respondents, but the renewal of the then existing licence, either by indorsement of the said licence, or by issuing a copy of the same, it was contended on behalf of the respondents that the justices did not entertain any objection to the renewal of the appellant's licence, but that what they did was to entertain a question as to the form, and that they had power to insert the said passage in the form of the licence, such passage not being in the nature of a condition, but merely descriptive of the licensed premises as they stood at that date.

The questions for the opinion of the court are:

(1) Whether the respondents, as licensing justices, under the circumstances above stated, were justified in refusing to grant either a copy of the old licence or an indorsement of renewal upon such licence, and whether they could legally insert the passage objected to. If the court shall be of opinion that the justices could not legally insert the same, then the said certificate or licence is to be amended by the court by striking out the said passage, or the said licence shall be returned to this court to be mended or quashed, and a fresh certificate issued; (2) If the court shall be of opinion that the justices had the power to grant the renewal of the licence or certificate in the form in which it now stands, then the order of sessions is to be confirmed.

Campell Foster, Q.C. (Forbes with him) for the justices.—It will be contended on the other side that the words inserted by the licensing justices amounted to a condition, but it is submitted that they are merely words of definition, and that the justices had a right to insert them. He was then stopped.

Maule, Q.C. (Tennant with him) for the appellant Stringer.—The 48th section is explicit that licences must be in the form prescribed by the Home Office. The licence was granted to the predecessor of the appellant in such a form as to include in the licensed premises that portion of the building which the justices by the words complained of have sought to exclude. [BLACKBURN, J.—Ought not the appellant to have applied for a new licence?] It is submitted not, inasmuch as, notwithstanding the taking in of the shop, the premises, for licensing purposes, remained the

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same: (*Reg. v. Albert Smith*, 15 L. T. Rep. N. S. 178). In that case the occupier of a licensed house added to his premises the adjoining house, and made them all one establishment. Upon his applying for a renewal of his licence the justices refused, upon the ground that the premises were not the same and that no notices had been given as for a new licence. Upon an appeal to quarter sessions against the refusal the quarter sessions renewed the licence, subject to a case as to whether, under the circumstances, the notices were necessary. It was held by Mellor and Lush, JJ., that the quarter sessions were right in renewing the licence. "It certainly seems to me," observed Mellor, J., "That this is an objection which is not made in the interest of any one except some rival publican. As far as the public are concerned, the house is a better one than before."

The COURT (Blackburn, Mellor, and Quain, JJ.) gave judgment for the respondents.

Judgment for the respondents.

Solicitors for the appellant, *Learoyd and Co.*

Solicitors for the respondents, *Van Sandau and Cuming.*

Saturday, Nov. 20, 1875.

WALKER (app.) v. HORNER (resp.).

Highway—Wilful obstruction—Trees over a bridleway—5 & 6 Will. 4, c. 50, s. 72.

The respondent was summoned under the 72nd section of the Highway Act 1835 for wilfully obstructing the free passage of a highway, to wit, a bridleway. It was proved that this alleged bridleway passed through a wood which had belonged to and been occupied by the respondent since 1869, and that of late years the trees and underwood had so grown over and across it as to be an obstruction to foot passengers, and to render it impossible for persons on horseback to pass along it.

Held that the justices were right in dismissing the summons, for this was not a wilful obstruction, even if the path were a highway.

This was a case stated by two justices of the peace in and for the county of Surrey, under the statute 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of the court on a question of law which arose before them as hereinafter stated.

The respondent was summoned under sect. 72 of the Highway Act 1835 (5 & 6 Will. 4, c. 50), at the instance of the Godstone Highway Board, for wilfully obstructing the free passage of a highway—to wit, a bridleway.

The case was heard at the petty sessions, on the 8th March 1875, and the further hearing was adjourned to and took place on the 26th April following, when the justices dismissed the complaint.

The appellant being dissatisfied with their determination upon the hearing of the said complaint as being erroneous in point of law, pursuant to sect. 2 of the said statute 20 & 21 Vict. c. 43, duly applied to them in writing to state and sign a case setting forth the facts and the grounds of their determination as aforesaid, for the opinion of this court, and recognisances have been duly entered into as required by the statute in that behalf, the said justices in compliance with the said request stated and signed the following case:

During the last year or two the surveyor of the Highway Board on several occasions complained to the respondent of the obstruction hereinafter mentioned, and called upon him to lop or cut the trees, but he refused to do so, alleging that he did not admit the way to be a public one, and on the 20th Feb. 1875, the clerk of the Highway Board sent him the following letter:

20th Feb. 1875.

Sir,—I am directed by the Highway Board of this district to request that you will be good enough to remove the obstruction in the Nobright bridleway, which runs through your property in the parish of Godstone by lopping the trees and underwood in order that the same may be rendered passable for persons riding along it, and the present great inconvenience to foot passengers thereby removed. I am also to state that in the event of your not complying with the above request within ten days from this date, the Highway Board will be compelled to take such proceedings in the matter as they may be advised. I am, Sir, your obedient servant,

(Signed) EVELYN A. HEAD.

J. T. Horner, Esq., Sunnyside, Godstone.

To which the following reply was received

Nobright, Godstone,
2nd March 1875.

Sir,—In reply to your note, as I do not acknowledge the existence of the bridleway you allude to, I am unable to comply with the request of the District Highway Board. I am, yours obediently,

(Signed) JAMES THOMAS HORNER.

E. A. Head, Esq.

The summons before mentioned was thereupon issued, and came on for hearing as above-mentioned.

At the hearing, witnesses were called on behalf of the appellant, and gave evidence of the facts before stated, and also to the effect following:

That respondent, in or about the year 1869 purchased a freehold estate formerly called the Nobright, over which estate and adjoining lands the way in question passes; that in one part of its course the way passes through a wood belonging to the respondent and in his occupation; that the trees and underwood growing on the land of the respondent and in his occupation on each side of the way in question, had of late years so grown over and across the way in places as to be an obstruction to the free passage along the same, and in one place the boughs met so as to render it almost impossible for persons on horseback to pass along it.

The respondent, while not admitting either the right of way or the obstruction as matters of fact, objected at the adjourned hearing, that whether or not the way was a public bridleway, and an obstruction thereto had been caused in the manner alleged by the appellant, such obstruction was not a wilful obstruction within the meaning of sect. 72 of the Highway Act 1835, and that the remedy of the appellant, if the way was a public bridleway and the passage of it was obstructed in the manner alleged, was by indictment or action, or at all events, not by summary proceedings under the 72nd section of the Highway Act 1835; and the said justices, being of opinion that even if the way were a public bridleway, an obstruction caused by suffering the trees and underwood to grow up over or across a public bridleway as alleged, is not a wilful obstruction within the meaning of the said sect. 72, dismissed the complaint.

The question of law for the opinion of the Court of Queen's Bench is whether the decision of the said justices, was right in dismissing the complaint on the ground above stated?

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WALKER (app.) v. HORNER (resp.).

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Lumley Smith argued for the appellant.—The 72nd section of the Highway Act 1835 (5 & 6 Will. 4, c. 50) provided for all offences not previously mentioned, "That if any person shall wilfully ride upon any footpath or causeway by the side of any road made or set apart for the use or accommodation of foot passengers; or shall wilfully lead or drive any horse, ass, sheep, mule, swine, or cattle, or carriage of any description, or any truck or sledge, upon any such footpath or causeway; or shall tether any horse, ass, mule, swine, or cattle on any highway, so as to suffer or permit the tethered animal to be thereon; or shall cause any injury or damage to be done to the said highway, or the hedges, posts, rails, walls, or fences thereof; or shall wilfully obstruct the passage of any footway; or wilfully destroy or injure the surface of any highway; or shall wilfully or wantonly pull up, cut down, remove, or damage the posts, blocks, or stones fixed by the said surveyor as herein directed; or dig or cut down the banks which are the securities, and defence of the said highways; or break, damage, or throw down the stones, bricks, or wood fixed upon the parapets or battlements of bridges, or otherwise injure or deface the same; or pull down, destroy, obliterate, or deface any milestone or post, graduated or direction post or stone, erected upon any highway; or shall play at football or any other game on any part of the said highways, to the annoyance of any passenger or passengers; or if any hawker, higgler, gipsy, or other person travelling shall pitch any tent, booth, stall, or stand, or encamp upon any part of any highway; or if any person shall make or assist in making any fire, or shall wantonly fire off any gun or pistol, or shall set fire to, or wantonly let off, or throw any squib, rocket, serpent, or other firework whatsoever, within fifty feet of the centre of such carriage way or cart way; or bait or run for the purpose of baiting, any bull upon or near any highway, or shall lay any timber, stone, hay, straw, dung, manure, lime, soil, ashes, rubbish, or other matter or thing whatsoever upon such highway, to the injury of such highway, or to the injury, interruption or personal danger of any person travelling thereon; or shall suffer any filth, dirt, lime, or other offensive matter or thing whatsoever to run or flow into or upon any highway from any house, building, erection, lands, or premises adjacent thereto; or shall in any way wilfully obstruct the free passage of any such highway; every person so offending in any of the cases aforesaid shall, for each and every such offence, forfeit and pay any sum not exceeding 40s., over and above the damages occasioned thereby." The effect amongst others of this section is to impose a summary penalty for all kinds of wilful obstructions in any kind of highway, a previous section giving a special remedy when trees grow over a carriage or cartway. By sect. 65, it is enacted "that if the surveyor shall think that any carriage-way or cartway is prejudiced by the shade of any hedges or by any trees, except those trees planted for ornament or for shelter to any hop-ground, house, building, or courtyard of the owner thereof, growing in or near such hedges or other fences, and that the sun and wind are excluded from such highway, to the damage thereof, or if any obstruction is caused in any carriageway or cartway by any hedge or tree, it shall be lawful for any one justice of the peace, on the application of the said surveyor, to summon the owner of the land on

which such hedges or trees are growing next adjoining to such carriageway or cartway to appear before the justices at a special sessions for the highways to show cause why the said hedges are not cut, pruned, or plashed, or such trees not pruned or lopped, in such manner that the carriage way or cartway shall not be prejudiced by the shade thereof, and that the sun and wind may not be excluded from such carriageway or cartway to the damage thereof, or why the obstruction caused in such carriageway or cartway should not be removed." The justices may direct either of these things to be done; or in default a penalty may be imposed, together with the expenses of the surveyor's carrying out the justices' direction, upon the owner disobeying. It appears from Hawkins's Pleas of the Crown Book, I. Ch. 32, sect. 13 that it is an indictable nuisance "to suffer the boughs of trees growing near the highway to hang over the road in such a manner as thereby to incommode the passage." This is in accordance with the rule of law that a person is responsible for the natural consequences of his neglect. It was held in *Williams v. Adams* (2 B. & S. 312) that the question whether highway or not, under the 73rd section, and such a question under the 72nd section, is exactly the same, was within the jurisdiction of justices. The case of *Croasdill v. Ratcliffe* (5 L. T. Rep. N. S. 834) may be relied upon as an authority for the respondent, but it can be distinguished from the present case in that allowing rain water to flow upon a highway, which was the complaint there, is not an indictable nuisance.

Bulwer, Q.C. (with him *Athawes*) for the respondent.—By sect. 5 of the Highway Act the word highway is defined to include a bridleway, therefore, the Legislature if it had intended to give the same remedy against the growth of trees over a bridleway as it has in the case of a carriage or cartway by the 65th section, it might easily have used the word highway in that section. The omission of a bridleway and a footway from that specific remedy is a strong ground for holding that the Act was not meant to apply to obstructions upon them—at all events, not to obstructions the nature of which cannot be said to be wilful. The only authority near the subject is *Croasdill v. Ratcliffe*, in which Crompton, J., after referring to the provision in this 72nd section about permitting filth to run on to the highway, said "And the other parts of the section show that the obstruction must be wilfully caused."

Lumley Smith in reply.—"There is no doubt" says Hawkins's Pleas of the Crown, Book 1, Ch. 32, sect. 10. "but that all injuries whatsoever to any highway, as by digging a ditch, or making a hedge overthwart it or laying logs of timber in it, or by doing any other act which will render it less commodious to the king's people, are public nuisances at common law." The 72nd section is wide enough to include all indictable nuisances.

Bulwer referred the court to *Small v. Bickley* (32 L. T. Rep. N. S. 726), in which it was held that refusing to go half a mile to open his shop was not preventing, obstructing, or impeding an inspector of nuisances, under 26 & 27 Vict. c. 117, s. 3.

COCKBURN, C.J.—Certainly this case is not free from doubt, but my own impression is that this comes within the section, and that the justices had jurisdiction to hear this complaint. My reason for

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saying so is that according to the authorities a man may be convicted upon an indictment for not lopping his trees which obstruct a highway. An indictment would not lie unless such an obstruction were a wilful act in the consideration of the law, and if so in that case I do not see why it should not be a wilful obstruction within the words of this section which provides a summary remedy. I entertain no very strong view on the subject and my learned brothers both think otherwise; so the decision of the justices will be affirmed.

MELLOR, J.—It seems to me that an obstruction must imply some active measure of a character to cause an interruption, and I do not think that the words of the 72nd section of the Highway Act were intended to include all indictable offences. I consider that I am fortified in this conclusion by sect. 65, the clause which provides a summary remedy "if any obstruction is caused in any carriageway or cartway by any hedge or tree." I cannot think that it was intended to leave to the magistrates the power to interfere with an obstruction like this, which is not expressly included in the offences created by the Act.

QUAIN, J.—I am of the same opinion. We must see the kind of offences in which a summary jurisdiction is given under the 72nd section. It is not given over all offences, but only over those of the kind the section particularly describes. The acts which are made by that section offences for which penalties are incurred are of an active character, such as riding on a footway, causing damage to a highway, playing games, letting off fireworks on the highway, &c. I cannot think that merely to suffer trees to grow so as to interrupt passengers can be said to be wilfully obstructing the passage of the highway. The 65th section which provides for such a proceeding under certain circumstances does not relate to the obstruction of a bridleway or footpath.

Judgment for respondent.

Solicitor for the appellant, *W. Alston Head, Jun., for W. A. Head and Sons, East Grinstead.*

Solicitors for the respondent, *T. N. Cross.*

Tuesday, Nov. 23, 1875.

Ex parte MAUGHAN.

Licence to sell spirits by retail—Excise licence—Second application—Licensing Act 1872 (35 & 36 Vict. c. 94), ss. 68 and 69.

The applicant was refused at a general licensing meeting a licence for the sale of spirits by retail not to be consumed on his premises under the Licensing Act 1872, s. 69, on the ground that he had no excise licence as required by the previous sect. 68 before he can sell spirits. At the adjourned licensing meeting he applied again, having obtained an excise licence and given new notices. The justices refused to hear the application on the ground that they had already determined it.

Held, upon mandamus, without consideration of the validity of the first refusal, that the second application, being on new facts was a different case from the first, and ought to have been heard by the justices.

This was a rule calling upon the licensing justices in and for the Kirkdale Division of the county of Lancaster to show cause why a writ of mandamus should not issue directed to them commanding

them to hold within a reasonable time a further adjournment of the general annual licensing meeting holden in and for the said division on the 27th Aug. 1875, and by adjournment on the 30th Sept. 1875, and to issue their precept to the high constable or other proper officer to cause notice to be given of the time and place for holding such further adjournment pursuant to the statutes in that behalf, and at such further adjournment to proceed, to hear, and determine pursuant to the statutes in that behalf the matter of an application by the said John Maughan for a licence to sell spirits, by retail, to be consumed off the premises, situate in Liverpool-road, in the township of Great Crosby, in the said county.

It appeared from the affidavit of John Maughan, the applicant, that he caused notices to be duly served in the mode prescribed by The Wine and Beer House Act 1869 and The Licensing Act 1872 of his intention to apply at the general annual licensing meeting to be held at Kirkdale, for the division of Kirkdale, in the county of Lancaster, on the 27th Aug. last for a licence to sell by retail wine, spirits, and beer to be consumed off the house or premises thereunto belonging, situate in Liverpool-road, in the township of Great Crosby, in the county of Lancaster.

He attended at the general annual licensing meeting held for the said division of Kirkdale, and made application for the licence specified in such notices, when the chairman of the court informed him that the court had no power to grant to him a licence to sell spirits to be consumed off the said house or premises in Liverpool-road, but they were willing to grant and did grant to him a licence to hold an excise licence to sell beer and Foreign and British wines by retail to be consumed off the said house or premises.

He was subsequently informed and verily believed that the cause and ground of refusal to grant to him the licence to hold an excise licence to sell spirits by retail to be consumed off the premises was that he did not hold a dealer's licence to sell spirits.

The court adjourned the said general annual licensing meeting from the 27th Aug. last to the 30th Sept. last.

The applicant caused fresh notices to be duly served in the mode prescribed by the Wine and Beer House Act 1869 and the Licensing Act 1872 of his intention to apply at the adjourned licensing meeting to be held on the 30th Sept. last for a licence to sell by retail spirits to be consumed off the said house or premises in Liverpool-road aforesaid.

On the 15th Sept. last he paid to the Commissioners of Inland Revenue the sum of 10*l.* 10*s.* for a licence to exercise and carry on the trade of a dealer in spirits at the house or premises in Liverpool-road aforesaid, commonly described as a "dealer's licence."

He attended at the said adjourned licensing meeting held at Kirkdale aforesaid on the 30th Sept. last, and made application through his solicitor to Robert Neilson, Gilbert Winter Moss, Peter Thomson, Peter Silvester Bidwill, and George Gordon Macree, Esquires, justices of the peace for the county of Lancaster (who formed the court which then sat) for a licence to sell spirits by retail to be consumed off his said house or premises in Liverpool-road aforesaid, and he produced to the said justices his said "dealer's licence;"

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but the said justices refused to grant to him the said licence, on the ground that he had already made an application of a similar nature at the general annual licensing meeting held as aforesaid on the 27th Aug. last, and had been refused; and that it was not competent to him to make a second application at the same annual licensing meeting.

The applicant stated that it was competent in law for him to make such application, by the 69th section of the Licensing Act 1872, and that it was not competent for the said justices to refuse to grant to him the said licence "except upon one or more of the grounds on which a certificate in respect of a licence to sell by retail beer, cider, or wine not to be consumed on the premises may be refused," and no objection was made to his said application upon any of the said grounds.

Gully showed cause against the rule.—The regulations concerning these licences are contained in sects. 68 and 69 of the Licensing Act 1872 35 & 36 Vict. c. 94) by the former of which "No person shall (a) sell by retail liqueurs or spirits under the authority of any retail licence which such person shall have obtained as a wholesale spirit dealer from the Commissioners of Inland Revenue, except in premises occupied and used exclusively for the sale therein of intoxicating liquor, and which premises have no communication with the premises of, nor are in any way occupied by a person who is carrying on any other trade or business, unless such person shall have obtained from the licensing justices a licence authorising such sale on premises not exclusively so occupied and used." By sect. 69 "a licence for the sale of liqueurs or spirits by retail not to be consumed on the premises may, where such licence is required by this Act, be granted in the same manner in all respects in which a licence for selling wine not to be consumed on the premises may by law be granted, and an application for such a licence shall not be refused except upon one or more of the grounds on which a certificate in respect of a licence to sell by retail beer, cider, or wine not to be consumed on the premises may be refused." By 24 & 25 Vict. c. 21, s. 2, "Any person duly licensed as a dealer in spirits in England may take out an additional licence authorising him to sell by retail Foreign or British spirits in any quantity not less than one reputed quart bottle, or as to foreign liqueurs, in the bottles in which the same may have been imported, not to be drunk or consumed upon the premises; and any licensed dealer taking out such additional licence may send out or deliver any such spirits without the certificate required by law in such cases, if the quantity does not exceed one gallon at a time, and such spirits are not sent to the stock of any dealer or retailer." The justices came to a determination concerning this application at the meeting in August; therefore, during the whole of those sessions it was *res judicata*, and could not be disturbed. [QUAIN, J.—Do you say he could not come again until the next August? Yes: that is the effect of the decision of this court in *Reg. v. The Justices of the West Riding of Yorkshire (Drake's case)*, L. Rep. 5 Q. B. 33, in which, although the second applica-

tion concerning the particular house was good at the adjourned sessions, it was expressly so held on the ground that the previous application was refused for a reason personal to a different applicant from the second, and therefore it was not *res judicata*. Lush, J. said at p. 39 "I wish to add, with respect to the second objection, that if the justices' decision at the general annual licensing meeting had turned upon the bad character of the house, as at present advised, I should have thought that they could not be required to determine the matter a second time. But their decision did not pass upon that ground; it turned upon the personal qualifications of Boocock. The application by Drake for a certificate is totally different from that by Boocock." It cannot be said here that a second application by the same man for the same purpose is totally different from the first. [MELLOR, J.—The applicant here says he has acquired a different character altogether since his previous application. He has obtained the necessary qualification, given new notices, and made an entirely fresh application.] A fresh application with new notices was made at an adjourned licensing meeting for a beerhouse certificate in *Ex parte E. W. Rushworth* (23 L. T. Rep. N. S. 120), the justices refused to hear the application, and this court held their refusal to be justified. Blackburn, J. said "No doubt the application may be made in the first instance at the adjournment day, but it would be strange to hold that when a certificate has been refused at the original meeting, a party may renew his application at an adjourned meeting." And Cockburn, C.J. in his judgment said "If we granted this rule we should be establishing the principle that a second application may be made in all cases where the first has been refused."

Munisty, Q.C. and *Hodgson Bremner* appeared to support the rule, but were not heard.

MELLOR, J.—This was, in fact, a new application. The applicant was on the second occasion clothed with a different character from that in which he appeared on the first. It being admitted that there would have been no ground for refusing his application if his first appearance had been at the adjourned meeting, I do not see that the previous refusal, which was based on a ground no longer existing, should have prevented his being heard.

QUAIN, J.—I am of the same opinion. The magistrates are not bound to hear and determine the same case twice over during the same licensing period; but the second application was here made upon a different state of facts from those which existed when the magistrates had refused the certificate, and it cannot be said to have been the same case.

FIELD, J.—I am of the same opinion.

Rule absolute.

Solicitors for the applicant, *Bremner and Son*, Liverpool.

Solicitors for the justices, *R. M. and F. Lowe*.

Tuesday, Dec. 14, 1875.

SMITH v. COOK.

Duty of agister of cattle—Scienter—Liability for injury by trespassing animals.

The defendant undertook to agist a horse of the plaintiff, which he put into a large field with some heifers. The field was part of a marsh, and was separated from another field, in which a bull was

(a) This licence seems to be a condition precedent only to the sale of liqueurs and spirits, not to the justices' licence of the next section. The first refusal of this application was, therefore, illegal, but the point was not raised on the argument.

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kept, merely by a ditch, which the bull was known by the defendant frequently to cross, in order to get to the heifers. The bull was exceptionally quiet, and had never been known to injure any animal, but the horse was found gored to death by him. A verdict was found for the plaintiff for the value of the horse.

Held, that the doctrine of *scienter* was not to be imported into an action upon a bailment; and that the only question of the defendant's liability turned upon the fact whether he had used reasonable and proper care, which fact was rightly determined by the jury.

This was an action tried in London before Blackburn, J., when a verdict of 50*l.* was found for the plaintiff, leave being reserved to the defendant to move for a nonsuit.

Plaintiff was the owner of three horses, which he entrusted to the defendant for agistment. The defendant placed the horses in a field belonging to him on Plumstead Marshes, where there were some cows and heifers. The fields there situated are divided only by ditches, which are kept in order by commissioners having charge of the marshes. In a neighbouring field, divided from the defendant's only by one of these ditches, another agister of cattle, named Russell, had placed a bull and some cows. This bull was frequently in the habit of wandering across the ditches, and into the neighbouring fields, and the defendant was aware of his keeping occasional company with the cows in his field. The bull's character, however, was exceptional for quietness, and he had never been known by his owner, or anyone who had the management of him, to show vice of any kind against men, horses, or other living creatures. One of the plaintiff's horses, however, was, after being about two months in the defendant's field, discovered to be dead, and, as the jury found, gored to death by this bull. The jury also found that the defendant had not, under the circumstances proved, taken reasonable and proper care in agisting the plaintiff's horse, and estimated the plaintiff's damage at 50*l.*

A rule *nisi* was obtained calling upon the plaintiff to show cause why this verdict should not be set aside, and a nonsuit entered instead thereof, pursuant to leave reserved by the learned judge, on the ground that there was no evidence of *scienter*, and that such evidence was necessary to maintain the action; and why a new trial should not be had between the parties on the ground that the verdict was against the weight of evidence.

Bray showed cause for the plaintiff.—Proof of *scienter* is necessary in various cases of torts, but here a relation of contract exists between plaintiff and defendant, and the jury have found that the defendant was guilty of negligence in the performance of the duty he undertook for the plaintiff. Without negligence, the defendant's liability might come within the rule laid down by the Privy Council in *The Madras Railway Company v. The Zemindar of Carvatenagarum* (L. Rep. 1 S. C. 364). The liability here, however, was a question of fact, which has been decided by the jury. In *Lee v. Riley* (18 U. B., N. S., 722), the question was as to the defendant's liability for the death of the plaintiff's horse caused by a kick of the defendant's mare, which had strayed from the defendant's into the plaintiff's adjoining field. There was no evidence of the mare's vice, but the

defendant was held responsible, the damage not being too remote. That case is stronger than the present, because here was a contract between plaintiff and defendant that the latter should take reasonable care of the horse. It also shows that defendant would have a certain remedy over against the neighbouring agister who had charge of the bull. [FIELD, J.—Has not the plaintiff the same remedy directly? QUAIN, J.—*May v. Burdett* (9 Q. B. 101) decided that the owner of an animal accustomed to attack and bite mankind is liable *prima facie* for injury done by the animal even without negligence. Is there authority for saying that a bull's propensity for goring horses should be common knowledge? BLACKBURN, J.—In a case of trespass or negligence the owner's liability exists whether the animal be vicious or not.] And by *Ellis v. Loftus Iron Company* (L. Rep. 10, Q. B. 10), a kick through an iron fence is a sufficient trespass. Although there seems to be no English authority, it has been held in America that the owner of a bull is liable for damage done by him to a horse without any knowledge of vice. In *Dolph v. Ferris* (7 Watts and Sergeant's Reports of the Supreme Court of Pennsylvania, 367, Kennedy, J., at p. 370, "Injuries committed by bulls or horses occur so frequently that it is difficult to avoid coming to the conclusion that every owner of a bull ought to be held answerable in an action of trespass for his bull in killing or injuring, when running at large either by his negligence or permission, the horse of another, though it be the first offence of the kind that the animal was ever known to commit." And *Barnes v. Chaplin* (4 Allen (Massachusetts) 444) decided that "If a sucking colt, while following its dam, which is led by her owner in a highway, is kicked and killed by a horse which has been turned loose in the highway without a keeper, the owner of the colt, if found by the jury to have been in the exercise of reasonable care, may recover damages of the owner of the horse, although the horse was not vicious." It may be taken generally that a mere propensity on the part of one animal to injure another is sufficient to make the owner liable, without proof of actual vice. [Stopped by the court on the second ground of the rule, as to the weight of evidence.]

Powell, Q.C. and Shaw supported the rule.—*Buxendin v. Sharp* (2 Salk. 662) and *Cox v. Burdidge* (13 C. B., N. S., 430) have long determined the rule of law that the owner's knowledge of an animal's vice is necessary to make him liable for injury done by the animal. [FIELD, J.—But you have to show that this doctrine of *scienter* should be imported into a contract of this kind.] When an owner has no reason to guard against damages by an animal in his possession, surely a stranger need not do so. There could not have been negligence on the defendant's part unless he had some knowledge of this bull's propensity to gore horses. No evidence was adduced that any bull was ever known to do such a thing, and there was evidence that this bull had never done so. According to *Corbett v. Packington* (6 B. & C. 268) this is an action in *assumpsit*. [QUAIN, J.—It is brought upon a bailment, and may be either in contract or tort.] The same rules of evidence apply to either.

BLACKBURN, J.—I think in this case we must discharge the rule upon both grounds. The plaintiff brings a charge against an agister of

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horses of neglecting to take due and proper care of a horse whose custody the plaintiff entrusted to him, and in consequence the horse was killed. In point of fact the defendant, having charge of this horse, turned it into a marsh with heifers ready for bulling, being well aware that a bull was in the habit of straying from another part of the marsh, which was separated only by a ditch, which the bull could easily cross. The evidence was sufficient that the plaintiff's horse, whilst in the place where the defendant had put it, came by its death by being gored by this bull. The first question is, was it negligence to put the horse into a field where it was known a bull was in the habit of going to visit heifers? There was evidence that it is dangerous to do so; and that whether mischief ensued or not it is negligent to do so. There was also contrary evidence. One man said he had thirty bulls in the same field with horses and heifers. The jury, however, found it was negligence, and I do not quarrel with the verdict. The point of law which arises has been settled from early times, more on authority than on reason, that in the case of domesticated animals, such as horses, dogs, bulls, &c., which are not mischievous by nature, the owner is entitled to suppose they will not do mischief until he has express knowledge to the contrary; that is to say, he is not liable unless a *scienter* be proved. It is otherwise, of course, with respect to animals whose nature is admittedly well known to be injurious to men or other animals; but this doctrine is laid down as early as Henry VIII.'s time, in Dyer's Reps. (Vol. 1, 25 b, pl. 122, ed. 1794), where reference is made to authorities in the Book of Exodus and the Year Books. It is clearly settled, at all events, that to show a man keeps a bull at his peril there must be proof that he had knowledge of the bull's specially mischievous nature. It is not enough to show that bulls sometimes gore other animals. There was no evidence here that this animal was mischievous, and therefore the owner, perhaps, could not be made liable, at all events without trespass. But does it follow that the defendant could, without negligence, put a horse he was agisting where he knew a bull, however quiet, was in the habit of coming? Was such a proceeding consistent with the reasonable care which the plaintiff, the owner of the horse, had a right to expect of him? It seems to me that the doctrine of *scienter* does not govern this case at all. There is no authority for extending it to cases of contract, and I am not inclined to import a rule of this very artificial kind into matters not included by authority. The cases do not throw much light upon the question. *Lee v. Riley* is the strongest in favour of the plaintiff, but it appeared there that the defendant was negligent in not keeping up a fence. It may, however, be inferred that the same liability would have occurred if the two horses had been put in the same field. If so, *a fortiori*, should the defendant here be liable for putting the plaintiff's horse where a bull was known to have access? I think the rule should be discharged.

QUAIN, J.—I am of the same opinion. I agree that the action is founded on negligence. There was a bailment to agist the plaintiff's horse, and the only question for us is whether the defendant took proper and reasonable care of the animal. Mr. Powell says he could not be guilty of negligence unless he knew this bull was mischievous; but it is a mere question of fact whether there

was negligence or not. Although the authorities are clear that *scienter* is necessary to establish an owner's responsibility, there are none for importing that doctrine into cases of contract. I think there was ample evidence to justify the verdict in this case.

FIELD, J.—I am of the same opinion. I think the evidence was sufficient, and the only other question is whether the defendant's ignorance of this bull's having gored horses before entitles him to a verdict. This is not a case which involves the doctrine of *scienter*; it is an action upon a bailment, and the only question is whether the defendant took reasonable and proper care of the plaintiff's horse. The facts were that he took the horse into a field where he knew this bull would probably come, and the result was what he ought to have expected. The jury have found that his proceeding in the matter was not reasonable, and that he ought to have known the risk to which he put the horse, even although the bull was particularly quiet.

Rule discharged.

Solicitors for plaintiff, *May, Sykes, and Batten*.
Solicitors for defendant, *S. W. Johnson*.

Monday, Dec. 20, 1875.

REG. v. THE JUSTICES OF GLAMORGANSHIRE.

Licence for sale of liquor to be drunk off premises—Whether residence of licensee necessary—"Duly qualified as by law required"—Mandamus to licensing justices—Wine and Beerhouse Act 1869, s. 8—3 & 4 Vict. c. 61, s. 1—23 Vict. c. 27, s. 3—24 & 25 Vict. c. 21, s. 2—26 & 27 Vict. c. 33, s. 1.
By 1 Will. 4, c. 64, s. 2, any person "being a householder" may apply for and obtain an excise licence for the sale of beer by retail, and by 3 & 4 Vict. c. 61, no licence to sell beer by retail, under Will. 4, c. 64, "shall be granted to any person who shall not be the real resident holder and occupier of the dwelling-house in which he shall apply to be licensed."
By 23 Vict. c. 27, s. 3, every person keeping a shop for the sale of other goods than foreign wine, or holding a wine dealer's licence, is entitled to take out a licence for the sale of wine by retail, not to be drunk on the premises.
By 24 & 25 Vict. c. 21, s. 2, any person holding a wholesale spirit dealer's licence may take out an additional licence for the sale of spirits by retail, not to be drunk on the premises.
By 26 & 27 Vict. c. 33, s. 1, any person holding a wholesale beer dealer's licence may take out an additional licence for the sale of beer not to be drunk on the premises, "and such additional licence shall be granted without the possession of any other qualification" than the wholesale beer licence.
By the Wine and Beerhouse Act 1869, after reciting the Acts above mentioned, it is enacted that no licence for the sale of beer, cider, or wine, or any of such articles, under any of such Acts, shall be granted except after the production of a certificate of justices, and no certificate for the sale of beer, cider, or wine, not to be drunk on the premises, "shall be refused" except upon one or more of four grounds, the fourth ground being that the applicant "is not duly qualified as by law required."
M., holding a strong beer dealer's licence, but not being

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resident upon the premises in respect of which he applied to be licensed, and not intending to reside there, applied for a licence to sell beer, wine, and spirits, not to be drunk on the premises. The justices refused the application, upon the ground that M. was disqualified by non-residence.

Held, that M. was not so disqualified, and a mandamus to the justices to hear and determine his application made absolute.

THIS was a rule for a mandamus to the justices for the county of Glamorganshire, commanding them to hold an adjourned sessions for the purpose of hearing and determining the application of William Morris for licences or certificates to hold additional Excise licences to sell beer, wine, and spirits by retail, not to be drunk on the premises.

From affidavits filed by the applicant and his solicitor, it appeared that the applicant was the holder of a wholesale spirit dealer's licence, and also of a strong beer dealer's licence from the Commissioners of Inland Revenue, that the notices required by the Licensing Act had been duly given, and that evidence of the applicant's good character and of the rateable value of the shop in which the liquor was intended to be sold was produced before the justices, and that the justices had expressed themselves satisfied with such evidence.

The notices were of the intention of the applicant to apply for licences, as follows :

A licence or certificate to hold an additional excise licence to sell by retail at a shop situate and being No. 63, Oxford-street, Mountain Ash, beer, to be consumed off the premises, in pursuance of the Act 26 & 27 Vict. c. 33, s. 1. . . . A licence or certificate to hold an additional excise licence to sell by retail, at the same shop, spirits, to be consumed off the premises, in pursuance of the Act 24 & 25 Vict. c. 21, s. 2. . . . A licence or certificate to hold an excise licence to sell by retail, at the same shop, wine, to be consumed off the premises, pursuant to the Act 23 Vict. c. 27, s. 3, and Acts amending the same, (a)

The affidavit of the applicant did not state that he was the holder of a wine dealer's wholesale licence.

The licensing justices, having taken time to consider, refused the application, and the chairman stated that they did so solely on the ground that it was not the intention of the applicant to reside upon the premises or personally conduct the business on the premises. They further intimated their opinion that the Wine and Beerhouse Act 1869 contemplated and intended that the person

(a) If the wholesale spirit licence, or wholesale wine licence, as the case may be, have been taken out by the applicant, and if the premises on which the spirits or wine, as the case may be, are intended to be sold, are occupied and used exclusively for the sale therein of intoxicating liquors, and have no communication with the premises of, nor are in any way occupied by a person who is carrying on any other trade or business, the consent of the justices is not required : (Licensing Act 1872, 35 & 36 Vict. c. 94, ss. 68, 73.) If the premises are occupied otherwise, the consent of the justices is required, but it may not be refused except on one or more of the grounds on which a certificate to sell beer, to be drunk off the premises, may be refused (*ib. s. 69*). The licence to sell spirits, to be drunk off the premises is grantable only to the holder of the wholesale spirit licence, or of the general public-house licence under the Licensing Act of 1828. The licence to sell wine, to be drunk off the premises, would seem to be tenable only by a person either holding the wine dealer's licence, or "keeping a shop for the sale of any goods or commodities other than foreign wine." (23 Vict. c. 23, s. 3.)

to whom a licence should be granted should reside upon the premises and personally conduct the sale of beer, wine, and spirits under the licence; that the grounds of objection enumerated in the 8th section of the Wine and Beerhouse Act 1869 were all of a personal nature, and that therefore a licence could only be granted to a person who intended personally to conduct the business. Upon that ground only the applications were refused.

The 8th section of the Wine and Beerhouse Act 1869 (32 & 33 Vict. c. 27), is as follows :

All the provisions of the said Act of the ninth year of the reign of King George the Fourth (a) as to the terms upon which and the manner in which, and the persons by whom grants of licences are to be made by the justices at the said general annual licensing meeting, and as to appeal from any act of any justice shall, so far as may be, have effect with regard to grants of certificates under this Act subject to this qualification, that no application for a certificate under this Act, in respect of a licence to sell by retail beer, cider, or wine, not to be consumed on the premises, shall be refused, except upon or more of the following grounds, viz. :—

- (1) That the applicant has failed to produce satisfactory evidence of good character ;
- (2) That the house or shop in respect of which a licence is sought, or any adjacent house or shop owned or occupied by the person applying for a licence, is of a disorderly character, or frequented by thieves, prostitutes, or persons of bad character ;
- (3) That the applicant, having previously held a licence for the sale of wine, spirits, beer, or cider, the same has been forfeited for his misconduct, or that he has, through misconduct, been at any time previously adjudged disqualified from receiving any such licence, or from selling any of the said articles ;
- (4) That the applicant, or the house in respect of which he applies, is not duly qualified as by law is required.

Where an application for any such last-mentioned certificates is refused, on the ground that the house in respect of which he applies is not duly qualified as by law is required, the justices shall specify in writing to the applicant the grounds of their decision.

B. T. Williams, Q.C., for the justices, now showed cause.—By 3 & 4 Vict. c. 61, after reciting 11 Geo. 2 and 1 Will. 4, c. 64, and 4 & 5 Will. 4, c. 85, it is enacted that no licence to sell beer or cider by retail, under the recited Acts or that Act, "shall be granted to any person who shall not be the real resident holder and occupier of the dwelling house in which he shall apply to be licensed." [BLACKBURN, J.—In a case where that Act applies, the justices would seem to be right, but the Wine and Beerhouse Act does not say "duly qualified," as by 3 & 4 Vict. c. 61, required, but "duly qualified as by law required."] It is submitted that residence has always been an essential qualification by law for the holding of a licence, otherwise a person may obtain a licence for as many houses as he pleases, and put a manager in each. [COCKBURN, C.J.—I entirely concur in the policy of a law which should require residence, and thus fix the licence holder with a personal responsibility, but the question is, whether the Legislature has steadily adhered to this policy. The qualification, if any, must be sought for in the Acts antecedent to the Wine and Beerhouse Act 1869.]

Poland, for the applicant, supported the rule.—It is admitted that for the sale of beer to be drunk on the premises residence is a necessary qualification, and that the Act 3 & 4 Vict. c. 61 applies to

(a) The Licensing Act 1828, which prescribes no residential qualification.

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such a case, but for the sale of beer to be drunk off the premises, no such qualification is necessary in cases where the applicant is fortified with a wholesale beer dealer's licence, under 26 & 27 Vict. c. 33, s. 1(a), as the present applicant was, nor is residence necessary in order to be able to sell spirits to be drunk off the premises. The only qualification is the possession of a spirit dealer's wholesale licence, and this licence also the applicant had already taken out.

PER CURIAM (Cockburn, C.J., and Blackburn and Field, JJ.).—This rule must be made absolute.
Rule absolute.

Solicitors for the applicant, *Bell, Brodrick, and Gray*, for *H. P. Linton*, *Aberdare*.

Solicitors for the justices, *Purkis and Perry*.

Monday, Jan. 17, 1876.

THE GASLIGHT AND COKE COMPANY (apps) v.
MEADE (resp.).

Gas rate, arrears of—Whether incoming tenant liable to pay—35 & 36 Vict. c. xviii.—Metropolis Gas Act 1860, and Gasworks Clauses Acts 1847, 1871.

By the Gaslight and Coke Company's Act 1872, in case a consumer of gas leave the premises without paying the rates due for gas supplied to him, the company shall not require payment of the arrears from the incoming tenant unless he shall have agreed with the defaulting consumer to pay the arrears, or unless the incoming tenant shall continue the trade of the outgoing one and pay him or the owner a consideration for so doing.

The respondent having taken over a public-house from M., who was in debt to the appellants for gas supplied, was summoned by the appellants for nonpayment of the arrears.

Held, upon a case stated under 20 & 21 Vict. c. 43, that the Act of 1872 gave no positive power to require payment of the arrears from the respondent, and that the appellants could not recover them from him.

THIS was a case stated under 20 & 21 Vict. c. 43, by the Stipendiary Magistrate for the District of Westminster.

The complaint of the appellants was, that the respondent did unlawfully neglect upon demand to pay to the appellants the sum of 16l. 3s. 9d. for gas supplied to one Henry Murray, a consumer, who had left the premises known as the Crown Public-house, where such gas was supplied to the said Henry Murray without having paid to the said appellants the said sum for the said rate and meter rent due from him, the respondent being the incoming tenant and continuing the trade of the outgoing tenant, and having paid the said Henry Murray a consideration for so doing.

All material facts were proved in favour of the appellants, but the magistrate dismissed the complaint, subject to the opinion of the Court of Queen's Bench upon a case, from which it appeared that the ground of the magistrate's decision was that the consideration money mentioned in the complaint was not in fact received by the said Henry Murray, but was with the consent of the said Henry Murray received by Messrs. Whitbread as mortgagees of the said public-house, and applied by them in discharge of a mortgage they held on the premises, and also of a debt due to them for

beer supplied and for rent, the balance being paid over to a firm of distillers who were second mortgagees of the lease.

Upon these facts the magistrate was of opinion that he was "exactly in the same position as a Superior Court with regard to an equitable jurisdiction, and although it was true a maxim of law applied, namely, that the deed executed between the respondent and Murray could not be disputed, still there had been no consideration as was necessary to carry out the 18th section of the Gaslight and Coke Company's Act 1872, relied on by the appellants, and that as the Judges of the County Courts or Superior Courts would have the power to exercise an equitable jurisdiction, he (the magistrate) considered himself as placed in the same position, and applying equitable principles to the case, gave judgment for the respondent."

The question for the opinion of this court was, whether the appellants were entitled to an order, as prayed for in their summons, i.e., that the respondent should pay to the appellants the said sum of 16l. 3s. 9d. If the appellants were entitled to such order, the determination of the magistrate was to be reversed, otherwise not.

The said 18th section is as follows:

In case any consumer leave the premises where gas was supplied to him without paying to the company the rate or meter rent due from him, the company shall not require from the next tenant of the premises payment of the arrears so left unpaid, unless the incoming tenant agreed with the defaulting consumer to pay the arrears, or unless the incoming tenant shall continue the trade or business of the outgoing tenant, and shall have paid to the owner, lessee, or mortgagee in possession, or to the outgoing tenant of such premises, a consideration for so doing; but the company shall, notwithstanding any such arrears in the absence of collusion between the outgoing and incoming tenant, supply gas to the incoming tenant, as required by this Act, on being required by him to do so. (a)

The principal Act of the company was the Gaslight and Coke Company's Act 1868 (31 & 32 Vict. cap. cvi.), which incorporated the Gasworks Clauses Act 1847, with which latter Act the Gasworks Clauses Act 1871 is to be read as one.

Willis and R. S. Wright, for the appellant, referred to

10 Vict. c. 15 (Gasworks Clauses Act 1847), s. 16;
23 & 24 Vict. c. 125 (Metropolis Gas Act 1860), s. 39;
34 & 34 Vict. c. 41 (Gasworks Clauses Act 1871), s. 39.

but none of these enactments contained a positive provision for the recovery of arrears of gas rate or rent of meter from an incoming tenant.

R. T. Reid, for the respondent, was not called upon to argue.

BLACKBURN, J.—The judgment of the court must be for the respondent, but not upon the ground upon which the magistrate proceeded, which I must say I fail to understand. However, we cannot send the case back, because the magistrate proceeded on a wrong ground. It was for the appellants to show affirmatively that the incoming tenant is liable for the arrears of the outgoing one, and they have not shown it.

LUSH, J., concurred.

Judgment for the respondent.

Solicitors for the appellants, *Curtis and Bedford*.

Solicitors for the respondent, *Nash, Field, and Matthews*.

(a) With the exception of the words printed in italics, this section is identical with the 39th section of the Metropolis Gas Act 1860, and with the 39th section of the Gasworks Clauses Act 1871.

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Monday, Jan. 17, 1876.

LORT (app.) v. HUTTON (resp.)

Articles of the peace, exhibition of—Evidence tendered by exhibitee, whether admissible.

Where articles of the peace are exhibited, the question for the justices is, whether or not they believe the exhibitor on his oath, and neither the evidence of the exhibitee himself nor witnesses tendered on his behalf may be heard to contradict the exhibitor.

THIS was a case stated, under 20 & 21 Vict. c. 43, by the justices of the peace for the borough of Shrewsbury, and the following are the material parts of such case:

At a petty sessions held at Shrewsbury, a complaint preferred by William Hutton, gentleman (hereinafter called the respondent), against William Lort, gentleman (hereinafter called the appellant), charging that the appellant had made use of divers threats towards the respondent, whereby he feared that the appellant would do him some bodily injury, and therefore praying that the appellant might be bound in a recognizance, with sureties, to keep the peace towards him, was heard and determined by four justices of the peace for the borough, in the presence of the said parties.

Upon such hearing the appellant was ordered to enter into his own recognizance, in the sum of 50*l.*, to keep the peace towards the respondent for six months.

The respondent on his oath said that the appellant had made use of threats towards him on the day named in the complaint, and swore that from such threats he was in bodily fear of the appellant, and that he did not ask for sureties of the peace against the appellant from malice or vexation.

No evidence was offered by the respondent to corroborate his statement as to the appellant having threatened him, but only as to the appellant having called him (the respondent) a blackguard, and that the respondent appeared more under the influence of fear than of other excitement.

Upon the conclusion of the respondent's case, the appellant, through his solicitor, denied ever having threatened the respondent, or used any signs of violence towards him on the day named in the complaint, and tendered himself as a witness to prove this; and further, to prove that the proceedings were taken by the respondent through malice and vexation, and also to explain portions of the evidence given by the respondent, and to show that the respondent had no just grounds to be in bodily fear of him.

The appellant further tendered one John Cook as a witness on his behalf, to prove that he was present on the day named in the complaint and heard no such threats as alleged by the respondent, and did not see the appellant exhibit any such conduct as to give the respondent grounds for being in bodily fear of him.

The justices being of opinion that the appellant was not a competent witness in the proceedings, inasmuch as the complaint made was not under any statute enabling him to be so, refused to allow the appellant to give evidence.

The justices were also of opinion (and in coming to such opinion they were influenced by former decisions of the Superior Courts), that a person demanding sureties of the peace swears only to his own apprehensions, of which no other

person can form an adequate judgment; and also, considering the deduction made by the judges in many cases, that as a general rule articles of the peace cannot be resisted on any ground except by showing direct evidence of express malice, and, moreover, that wherever particular facts of violence are stated by the complainant, it is not permitted for the defendant to controvert them, but that they must be taken to be true till negatived through the medium of an appropriate prosecution, thus came to the conclusion that they could not legally hear the evidence of the witness John Cooke, tendered by the appellant, and consequently rejected him. And bearing in mind the dictum of the authorities, that where a person has just cause to fear that another will do him some bodily harm, he may demand the surety of the peace against him, and that every justice of the peace is bound to grant it, upon the party making oath before him that he is under such fear, and that he has just cause to be so, and that he does not require it out of malice or vexation, they came to the conclusion that, inasmuch as the respondent had sworn to the facts as stated in the complaint, and as they had no reason to doubt his testimony, he was entitled to the surety of the peace against the appellant. The justices, therefore, ordered the appellant to enter into his own recognizances of 50*l.*, to keep the peace towards the respondent for six months, or, in default, to be imprisoned for such period.

The questions of law for the opinion of the court were: First, whether the justices rightly or wrongly refused to allow the appellant to be sworn, and to give evidence on his own behalf; and, secondly, whether the justices rightly or wrongly rejected the evidence of the man John Cooke, tendered by the appellant.

Rose, for the appellant, argued that the justices were wrong in refusing to hear the appellant, and wrong in refusing to hear the witness tendered on his behalf, and that the evidence tendered for the defence was legally admissible in order to show that the respondent had no just cause for going in fear of the appellant. It must be conceded that it was always a practice of the Court of Queen's Bench to exclude counter affidavits upon an exhibition of articles of the peace, but it is submitted that this is a rule of practice only, and is not binding on an inferior court. The justices may cross-examine, whereas the Superior Court is restricted to the affidavits. [BLACKBURN, J.—That is not so. An issue might be directed, or an oral examination before a master might be ordered.] It is stated in Oke's Magisterial Synopsis, 10th edit., vol. 2, p. 1295, to be the practice to conduct the hearing as on ordinary summary conviction, and for this the author cites

Reg. v. Tregarthen, 5 B. & Ad. 678;

Re Dunn, 10 L. J. 29, Mag. Cas.;

Reg. v. Stanhope, 12 A. & E. 624.

[BLACKBURN, J.—The authorities cited by Mr. Oke do not bear out the proposition.] It must be conceded that they do not, but the practice of examining the defendant would seem to be the more proper one; otherwise there is an infringement of the rule, that a man is entitled to be heard in his own defence. [BLACKBURN, J.—If it were a case of punishment I should be disposed to agree with you; but I do not see that compelling a man to give security is equivalent to a punishment.] There may be cases where it is a great indignity

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to be compelled to give security. He also referred to

16 & 17 Vict. c. 83, s. 2;
Lord Vane's Case, 2 S. 1202;
R. v. Doherty, 13 East, 171;
Stewart v. Gromett, 7 C. B., N. S., 191;
R. v. Parnell, 2 Burr. 806;
R. v. Bringle, 18 East, 174 n.

No counsel appeared for the respondent.

BLACKBURN, J.—The judgment of the court must be for the respondent. The appellant has not been punished, the process against him being only a process to prevent danger. The same rule which applies in the court above must bind the court below, and that rule is, that where it appears on oath that the applicant is in bodily fear, the justices have no alternative but to bind over the other party to keep the peace towards him.

LUSH, J.—I am entirely of the same opinion.

Judgment for respondent.

Solicitor for the appellant, *G. Frederick Cooke*, for *Chandler*, Shrewsbury.

COURT OF APPEAL.

SITTINGS AT LINCOLN'S-INN.

Reported by H. PRAT, E. STEWART ROCHES, and GILBERT G. KENNEDY, Esqrs., Barristers-at-Law.

Saturday, Dec. 11, 1875.

(Before JAMES and MELLISH, L.JJ., BAGGALLAY, J.A., and BLACKBURN, J.)

CORY AND OTHERS v. BRISTOW.

ERROR FROM THE COURT OF COMMON PLEAS.

Poor rate—Moorings in the Thames—Derrick, rateability of—Thames Conservancy Act (20 & 21 Vict. c. 147).

An exclusive occupation is the foundation of rating, and where the owner of the realty grants permission to erect a substantial erection on the land, though he retains power of terminating such permission at any time, the grantee thereby acquires an exclusive occupation in the soil.

The Conservators of the Thames being owners of the soil and bed of the river, and having statutory powers to give and revoke licences to lay down moorings, granted the plaintiffs permission to lay down moorings for two coal derricks, subject to the conditions (inter alia) that "if at any time it should be found by the conservators inexpedient to permit the mooring to remain," the conservators might under their statutory powers cause them to be removed.

The moorings consisted of four anchors and two stones. Two of the anchors were made with one fluke each, and were such as are generally used for permanent moorings. In laying them down, a hole was dredged out large enough to contain the whole of the anchor, at a depth of seven feet below the bed of the river, the stones were placed in similar holes, the derricks were attached by chain cables, to both anchors and stones, and the holes were then filled up to the level of the river bed with ballast. The moorings thus formed were as firm as moorings could be, and the derricks could only be moved by casting off the cables, and leaving the anchors and stones behind.

Under the statutory powers above-mentioned the conservators could, at any time, by giving one week's notice in writing, require such mooring chains to be removed.

Held (reversing the decision of the Common Pleas), that the derricks were liable to be rated in respect of such moorings.

THIS was an action brought (in pursuance of 9 Geo. 4, c. 43) against the defendant, as clerk to the churchwardens, overseers, and directors of the parish of Greenwich, to recover damages for the unlawful seizure and conversion by such churchwardens, &c. of a ship known by the name of the *Atlas*, and also for money had and received by them to the plaintiffs' use. The cause came on to be tried before Brett, J., at the sittings in Middlesex, after Hilary Term 1874, when a verdict was found for the plaintiffs for 145*l.*, subject to the opinion of the court, upon a special case, upon the question whether the plaintiffs were occupiers of land in the parish of Greenwich, and liable as such to be rated, or assessed to the relief of the poor.

The case came on to be argued before the Court of Common Pleas on the 26th April 1875, before Lord Coleridge, C.J., Brett, J., and Denman, J., when judgment was given for the plaintiffs, as reported *ante* Vol. 9, p. 500; 32 L. T. Rep. N. S. 797; L. Rep. 10 C. P. 504; 44 L. J. 288, C. P.

The facts of the case are fully set out in the report in the court below; the following were the paragraphs to which the court drew particular attention.

1, 2, 3, 4. The plaintiffs are coal merchants, and by the assessment duly made for the Parish of Greenwich were rated in the sum of 139*l.* as the occupiers of certain lands in the parish, which lands consisted of two moorings in the bed of the River Thames, to which were moored two coal derricks of the plaintiffs.

5. The said coal derricks are large floating hulks, fitted up so as to unload coal from colliers, and reload the same into vessels brought alongside.

9. The derrick *Atlas* (No. 1) is moored by two single fluke anchors on the side nearest the shore, by two stones on the channel side, and by two stream anchors, one at the head and the other at the stern.

10. Prior to *Atlas* (No. 1) taking up her position the resolution next following was passed by the conservators of the River Thames, in whom, by virtue of the Thames Conservancy Acts, the soil and bed of the River Thames is vested, and the terms and conditions therein contained were assented to and agreed to by the plaintiff:

Resolved, "That permission be given to Messrs. Cory and Son to lay down moorings (at which they may place derrick hulk) immediately opposite the sluice next eastwards of Angerstein's Wharf, East Greenwich, and 510ft. from the river wall at the said sluice as per plan, the work to be done to the satisfaction of the conservators of the River Thames, and under inspection of the harbour master, and to remain under the following conditions being agreed to and observed by Messrs. Cory, viz., that the accommodation be assessed and the rent paid thereon, that the hulk be not used for the purpose of storing coals, that it be for the general use of the coal trade, that the barges to or from the hulk be in all cases towed by a steam tug to or from the custom house, London; that all vessels leave the hulk immediately after being discharged, and that sailing colliers when discharged be towed away to such part of the river as the harbour master may direct, and in all other respects be worked to the satisfaction of the conservators under the inspection of the harbour master, and with the full understanding on the part of Messrs. Cory that if at any time hereafter it shall be found by the conservators inexpedient to permit the moorings of the derricks hulk to remain in that or any other part of the river, the conservators will, under the powers vested in them by the 91st section

of the Thames Conservancy Act cause the same to be removed."

11. Instead of themselves laying down the moorings contemplated by the said resolution, the plaintiffs caused and procured the necessary work to be done by the workmen of the said conservators, and paid the said conservators the whole of the costs and charges of the materials and labours expended in and about the same.

12. The moorings as actually laid down for *Atlas* (No. 1) consist of four anchors and two stones. Of the anchors, two are small and of little importance, and it is not contended on the part of the defendants that any liability to be rated in respect of the soil occupied by them attaches to the plaintiffs. But the other two anchors are made with only one fluke each, and are such as are never used as anchors on board ship, but are only used for permanent moorings. Anchors with one fluke could not be trusted to take the ground when dropped in the ordinary way. In laying down each of these anchors a hole was dredged out large enough to contain the whole of the anchor and to a depth between 7ft. and 8ft. below the bed of the river, with ballast which lies all round and over the anchor, through which the chain cable is led up to the derrick.

13. The two stones used are each of them about 7ft. long by 5ft. wide and 3ft. thick. In order to put each of these in their places, a hole was dredged large enough to contain the stone, and about 7ft. deep. The stone was then let down into the hole, then filled up to the level of the bed of the river with ballast. There is about 4ft. thickness of ballast on each stone, and about seventy tons of ballast are used; in each hole a chain cable is led up through the ballast to the derrick. The moorings formed by these two anchors and stones, are as firm moorings as it is possible to place in the river. It is quite impossible that the derrick using them can weigh them in the ordinary way in which ships weigh anchor; if the derrick had to be moved it could only be by casting off the cables and leaving these anchors and stones behind.

17. The rent paid by the plaintiffs is 600*l.* per annum for the moorings of *Atlas* (No. 1), and 650*l.* for those of the other derrick *Atlas* (No. 2).

The following sections of the Thames Conservancy Act 1857 (20 & 21 Vict. c. 147) was made part of the case; were referred to in the argument, and were material to the case. By sect. 58 the consideration for any license or permission which may be granted by the conservators . . . for the erection of any wharf or quay . . . or for laying down any mooring chains . . . shall be such as in the judgment of some competent person shall be deemed to be the value thereof to the person obtaining such licence. Sects. 80 and 82 gave the harbour master power to regulate the movements of vessels, and to remove any vessel; by sect. 90 the conservators might purchase private mooring chains; by sect. 91 "No mooring chains shall be put down or placed in any part of the river without the permission of the conservators previously obtained, and every such mooring chain which shall be put down or placed, shall be so continued only during the pleasure of the conservators; and, the conservators may, at any time by giving one week's notice in writing, require such mooring chains to be removed; and in case default shall be made in such removal, beyond the time to be mentioned in such notice, such mooring chain

shall be treated by the conservators as a nuisance and removed accordingly." By sect. 105 works are to be approved of by the Admiralty. The estate of the Crown in the soil and bed of the river, within the flux and reflux of the tide, was agreed to be conveyed to the conservators by articles of agreement, set forth in the preamble to the Act.

Barrow, for the defendants, the appellants.—First, as to the rateability of the things themselves. The whole current of decisions is to the effect, that the owners of such apparatus as gas pipes, telegraph posts, water pipes and such like, take possession of and occupy the soil and are rateable. Where a grantor erects works on the land, and grants the use of them, there may or may not be a rateable occupation in the grantee, but where there is a grant under which the grantee puts his materials into the soil, by this he takes possession and becomes rateable. In very early times the question has been whether there has been an easement. *R. v. Mayor, Alderman, and Citizens of Bath* (14 East. 609); *R. v. Brighton Gas and Coke Company* (5 B. & C. 466) per Bailey, J. Lord Coleridge in the court below says "the conservators could not, and do not by that resolution profess to grant to the plaintiffs the exclusive occupation of so much of the bed of the river as is occupied by these moorings; and the words of the resolution are abundantly satisfied by holding it to be a mere licence to place and use the moorings during the pleasure of the conservators"; but here the plaintiffs have made these substantial moorings, and if what they have done amounts to an occupation of the soil, no matter how they got it, it is a rateable occupation. In all these cases it is the rated company which puts the materials into the soil.

Reg. v. Chelsea Waterworks Company, 5 B. & Ad. 156;

Electric Telegraph Company v. Overseers of Salford, 11 Ex. 181; 24 L. J., Mag. Cas. 146;

Watkins v. Overseers of Milton near Gravesend, L. Rep. 3 Q. B. 350; 37 L. J. 73, Mag. Cas.; 18 L. T. Rep. N. S. 601, per Blackburn, J.;

Pimlico, Peckham, and Greenwich Street Tramways v. Greenwich Union Assessment Committee, L. Rep. 9 Q. B. 9; 43 L. J., Mag. Cas. 29; 29 L. T. Rep. N. S. 605.

[BLACKBURN, J. refers to *Smith v. Parish of St. Michael Cambridge* (3 E. & E. 383) and *Roads v. Overseers of Trumpington* (L. Rep. Q. B. 56; 40 L. J., Mag. Cas. 35; 23 L. T. Rep. N. S. 821). MELLISH, L.J.—It becomes a question whether the grantor has given an easement or possession.] The grantee gets a right to go and put materials there, which the man who gave the right could not go and take away, except under certain terms. [JAMES, L.J.—If the conservators had gone and removed these moorings without a week's notice, would an action of trespass lie?] Yes it would. The court below said, that by the terms of the Thames Conservancy Act, the conservators had no right to make a grant which would give up the occupation of the soil. [JAMES, L.J.—The object of the Act was to utilize the bed of the river.] Lastly, the power of the conservators to remove if they chose, would constitute a tenancy at will, and this is answered by the case of *Chelsea Waterworks Company v. Bowley* (17 Q. B. 358); *Dyson v. Collick* (5 B. & Ald. 600). In the cases of *Grant v. Oxford Local Board* (L. Rep. 4 Q. B. 9; 38 L. J., Mag. Cas. 39; 19 L. T. Rep. N. S. 378); *Allan v. Overseers of Liverpool* (L. Rep. 9 Q. B. 180; 43 L. J. 69, Mag. Cas.; 30

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CORY AND OTHERS v. BRISTOW.

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L. T. Rep. N. S. 93); *London and North-Western Railway Company v. Buckmaster* (L. Rep. 10 Q. B. 70; 44 L. J., Mag. Cas. 29; 31 L. T. Rep. N. S. 835), the persons appealing were held not to be rateable, as they only had an easement in the matter, but in none of those cases had they erected the building themselves.

Patchett, for the plaintiffs, the respondents.—The stones laid in the middle of the river are principally for anchorage, and the defendants are seeking to rate anchors. The soil is that of a navigable river which *prima facie* is in the Crown. [JAMES, L.J.—The phrase that the Crown is in possession as trustee for the public is entirely inaccurate.] The occupation has not passed out of the conservators. [MELLISH, L.J.—Is it not a general proposition that where the owner of the soil permits another to make a substantial erection on it, although the freeholder can at any time revoke his licence, yet until he does so, the occupation with regard to the erection is in the person who made it?] The construction of a similar licence was considered in *Cory v. Churchwardens of Greenwich* (L. Rep. 7 C. P. 499; 91 L. J. 39, Mag. Cas.; 27 L. T. Rep. N. S. 150). Sects. 80, 82 of the Act show the power of the harbour master to control the navigation and to remove vessels; sect. 91 the power of the conservators to remove these moorings at their pleasure. The cases of gas pipes, water pipes, and telegraph posts are cases where the materials have been laid down under the powers of an Act of Parliament. [BLACKBURN, J.—Not so in the case of *Reg. v. Clevelea Waterworks Company*.] It has been endeavoured to rate floating docks, *Reg. v. Morrison* (1 E. & B. 150). To render the plaintiffs rateable here there must be a parting by the conservators, with the exclusive possession of the soil to them, *Allan v. Overseers of Liverpool* (*ubi sup.*); *London and North-Western Railway Company v. Overseers of Liverpool* (*ubi sup.*). By sect. 105 of the Act the conservators are in the position of the Crown, and it is the intention of the statute that the possession should not pass out of the conservators; they had the power to go down and remove the ballast. There is no occupation in the plaintiffs because the owner of the soil did not intend to part with the possession. Upon this document the conservators did not intend nor did they part with the possession of the soil.

JAMES, L.J.—I am unable in this case to agree with the conclusion at which the Court of Common Pleas has arrived. There is no doubt as to the law in these questions, and the authorities show that where part of the soil is permanently occupied, as in the case of water pipes, gas pipes, sewers, and telegraph posts, there the persons owning the property have the occupation in the soil for those purposes and are rateable as such; if on the other hand the property is not occupied by them, but is occupied by some other person, who has only got the right to use the property, as in the case of a lodger or customer, there the property is not rateable in the hands of the occupier. The question, therefore, turns upon the facts stated in the case, and depends upon what the right is, which the conservators under and by virtue of the Thames Conservancy Act, have given to the plaintiffs. Under this Act the conservators are owners of the soil and bed of the River Thames, it is, indeed, the property of Her Majesty subject to the rights conferred on the conservators by this Act, and they

have the power of raising funds for the benefit of Her Majesty; they also have power to interfere with the position of vessels in order to regulate the navigation of the river. As owners of the soil, by reason of their estate, they have power to grant a number of things, such as wharfs and floating piers to be built on the river, and power to permit anyone to lay down mooring chains in the bed of the river. Having that power, they have granted to Messrs. Cory permission to lay down mooring chains, and make a permanent erection on the bed of the river, and, in order to do this, to dredge out a hole, in which a large stone is placed to which mooring chains are affixed, and then the remainder of the hole being filled up with ballast, an imposing structure is made composed of cable, stone, ballast, &c.—a licence to Messrs. Cory which would amount in substance to a licence to build a house. Having given such a licence, the plaintiffs have the erection completed at their own expense, and forthwith enter into such an occupation of the land as anyone would to whom the freeholder had given permission to erect some building, such as a wall, on the soil; a right, whether it was a licence to have permanent possession of the soil or not, that terminates the case. Such is the settled law with regard to the owners of gas pipes, water pipes, &c., but we are told to put a different construction on this occupation, because by one week's notice the conservators have power to terminate it, by requiring the mooring chains to be removed; and in case default should be made in such removal beyond the time to be mentioned in the notice, such mooring chain is to be treated by the conservators as a nuisance, and removed accordingly; but that, to my mind, strengthens the defendant's case, because it shows that for one week the plaintiffs have complete possession, and if during that week the conservators did anything wrong, such as moving the chains, they would be trespassers and could be treated as such. I am, therefore, of opinion that the defendants are rateable and that the decision of the Court of Common Pleas should be reversed.

MELLISH, L.J.—I am of the same opinion. The first question is whether these mooring places have become part of the realty. The ordinary anchor does not become part of the realty, because being thrown overboard and hauled up at pleasure it is part of the ship; although while overboard it moors the vessel, yet it is not put down in the way in which these stones are put down. The Court of Common Pleas have thought this was a temporary mooring for keeping the vessel in her position, such as an anchor would be; but having regard to the description of the mooring, the holes, the stones and the ballast, it is impossible to come to the same conclusion. This brings us to the second question—Whether the conservators or Messrs. Cory are in the occupation? It appears to me that the anchors, the stones, the ballast, and the chains remain the property of Messrs. Cory, and the conservators have the power to order their removal. There is a plain distinction between this and the cases referred to on behalf of the plaintiffs. Nice distinctions often arise as to whether the person obtaining possession does so, as lodger or tenant, in both cases both parties would have the occupation, and it is necessary to see what degree of control is exercised over the property by the landlord. The conservators do not

claim any property in these anchors, and the case becomes undistinguishable from the cases of occupation by means of gas pipes, water pipes, telegraph posts, &c., and other cases, where one person who is owner of the soil gives permission to another to make erections on the soil, giving him, in fact, an exclusive benefit in that part which is taken up by the erections, and there the person to whom permission is granted is occupier. In the case of telegraph posts, as long as the posts remain, the telegraph company have an exclusive occupation in them, and it would be the same in the case of tramroads; and therefore I am of opinion that Messrs. Cory were in occupation of the land and consequently liable to be rated.

BAGGALLAY, J.A.—I am of the same opinion. There is no question as to the principle in these cases, and the principle which has been decided by a long series of cases, of which one of the oldest is the case of *Reg. v. Mayor, Alderman, and Citizens of Bath*, referred to in the argument is, that an exclusive occupation is the foundation of rating. From the facts of this case, which I need not go through again, it appears to me that the exclusive occupation of these moorings was in Messrs. Cory. Of all the cases cited that of the telegraph posts seems the most in point, and though, sitting here as a court of appeal we are not bound by that decision and it is open to us to consider it, we do not think it necessary to do so.

BLACKBURN, J.—I am of the same opinion. Considering the manner in which these mooring places were fixed, I differ from the Court of Common Pleas in the conclusion at which they have arrived, as to who was the occupier of the land in them. The Common Pleas thought under the circumstances of this case that Messrs. Cory were not occupiers: upon that I differ. I will not go into the distinctions between what constitutes an occupation and what does not, more than by referring to the two cases of *Smith v. Overseers of St. Michael Cambridge* and *Roades v. Overseers of Trumpington* to which I referred in the argument, and those distinctions are sufficiently explained. In the first case, that of Smith's, which was the post office case, the appellant rented a house at Cambridge and let off five rooms to the post office; in the judgment of Sir Hugh Hill which he and I prepared together, it was held, that although the agreement to let these rooms amounted to a demise, yet that the real facts must be inquired into, and that although Smith let off these rooms at a rent, yet that from the facts it was apparent that he retained the possession of the rooms, and therefore was rateable as the occupier of the whole property. The other case, which was a coprolite case, was exactly the converse, for there, although in the agreement to dig for the coprolites no express words giving a right to the exclusive occupation of the land, were used, yet, in fact, the person obtaining the right to dig, had the right of the exclusive occupation of the land, and was, therefore, liable to be rated in respect of such occupation. Lord Coleridge in his judgment in the court below thought that the conservators could not be parting with the possession of this part of the soil of the river, because it would be in violation of their duty to do so. Brett, J. thought that the duty imposed by the Act of Parliament on the conservators, was to retain in their hands absolute power and control over every part of the river. I cannot find this in

the Act or in the case; the terms of the licence amount to a permission to Messrs. Cory to lay down moorings to the satisfaction of the conservators, and under the inspection of the harbour master, on which they are to pay rent, and with the full understanding on the part of Messrs. Cory, that if at any time thereafter it should be found by the conservators inexpedient to permit the moorings of the derrick hulks to remain in that or any other part of the river, the conservators would, under the powers vested in them by the 91st section of the Thames Conservancy Act, cause the same to be removed. By the terms of the 91st section of the Thames Conservancy Act "the conservators may, at any time, by giving one week's notice in writing require the mooring chains to be removed," but until this notice has been given and has expired the moorings remain in the possession of Messrs. Cory, and without a week's notice the conservators would, if they interfered with Messrs. Cory's possession, lay themselves upon to an action of trespass. The Court of Common Pleas have assumed what the Act does not bear out, viz., that the conservators had no authority to part with the exclusive occupation of the bed of the river. If the conservators, by virtue of the express powers given to them, have given permission to Messrs. Cory to put down moorings and occupy them subject to a week's notice, I can come to no other conclusion but that Messrs. Cory are in occupation of these moorings, and that for that privilege they are liable to be rated.

Barrow applied for costs.

PER CURIAM.—As the result of this decision is to enter the verdict for the defendant the costs will follow the event.

Solicitor for the plaintiffs, Mark Sheppard.

Solicitor for the defendants, W. Bristow.

Dec. 2 and 3, 1875.

(Before JAMES and MELLISH, L.JJ., BAGGALLAY, J.A., and BRAMWELL, B.)

ETHERINGTON v. WILSON.

Charity—Christ's Hospital—Election of scholar—Qualification—"Parishioner."

A scheme sanctioned by the Court of Chancery for a charity entitling the minister, churchwardens, and parishioners of a parish, to elect children for Christ's Hospital, provided that no child should be considered eligible to partake of the benefits of the charity unless he or she should have been born in, or unless his or her parents or one of them should be or should have been parishioners or a parishioner of the parish. Prior to an election to fill a vacancy under this charity, the father of a candidate, in order to qualify his son, took a house in the parish for three months, with an option of continuing his tenancy at a rent of 30s. per month, paid a month's rent, paid the rates payable in respect of the house (before they were demanded), and had his name inserted in the rate book, but he did not reside in the parish, nor did he put any furniture in the house, or sleep there till after his son had been elected:

Held (reversing the decision of Malins, V.C.), that the father was a "parishioner" within the meaning of the scheme, and that the fact of his acquiring the qualification of a parishioner with a view to the election did not invalidate his son's election.

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ETHERINGTON v. WILSON.

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THIS was an appeal from a decision of Malins, V.C. The hearing in the court below is reported *ante*, vol. ix., p. 521; 32 L. T. Rep. N. S. 789; L. Rep. 20 Eq. 606, where the facts of the case are fully reported.

The Vice-Chancellor held that the defendant, Henry Arthur Wilson, was not duly elected a scholar of Christ's Hospital, on the foundation of West's Charity, on the ground that his father was not a *bonâ fide* parishioner of the parish of Twickenham.

From this decision the vicar and churchwardens of Twickenham appealed.

J. Pearson, Q.C. and W. Phillimore, for the appellants.—The election was good, there being nothing in the scheme to render ineligible the child of a man who has acquired the qualification of a parishioner in order to make his child eligible. The legal meaning of the word "parishioner" is well settled. In the *Attorney-General v. Parker* (3 Alk. 576), it was thus defined: "The word 'parishioner' is a very large word, and takes in not only inhabitants of a parish, but persons who are occupiers of lands that pay the several rates and duties, though they are not resident." Residence, therefore, is not necessary to make one a parishioner. In *Jeffrey's case* (5 Rep. 66 b.) it was held that the occupier of lands, though living out of the parish, is, in the judgment of law, a parishioner, and may come to the assemblies of parishioners. By 58 Geo. 3, c. 69, and 59 Geo. 3, c. 85, it is provided that all inhabitants rated to the relief of the poor, whether resident inhabitants of the parish or not, are entitled to attend parish vestries and vote at them: (*Prideaux's Churchwardens' Guide*, p. 110.) There is no doubt that the defendant's father is a parishioner within the meaning of that word in the earlier clauses of the scheme. He would clearly be entitled to vote at an election to fill a vacancy in the charity, and there is no reason why a different interpretation should be given to the word "parishioner" in the qualification clause of the scheme. The defendant's father is clearly a "parishioner" in the legal meaning of the word, and his son was, we submit, eligible. The Vice-Chancellor ordered us to pay the costs of the suit. We are entitled to have that order discharged, for there is no ground on which it can be supported. It is the invariable practice in cases of this kind to order the costs to be paid out of the funds of the charity. They also referred to

Phillimore's Ecclesiastical Law, p. 1887.

Simmons, for the defendant, Henry Arthur Wilson.

Freeling, for the governors of Christ's Hospital.

Glasse, Q.C. and *Raulins*, for the plaintiff.—To be a parishioner one need not, it is true, be a resident in the parish, but a casual sojourner cannot be a parishioner (*Steer's Parish Law*, 3rd edit. p. 21). And it is evident this scheme was intended for the benefit of the *bonâ fide* residents in the parish, and not for any one who merely sought to qualify his son for election by taking a house at a trifling rent and becoming a non-resident occupier.

Without calling for a reply,

JAMES, L.J., said.—I am unable at all to concur in the judgment and decision of the Vice-Chancellor in this case. There is a certain charity regulated by a scheme of this court, and according to that scheme the parish of Twickenham, that is to say, the minister, churchwardens, and parish-

ioners for the parish in vestry assembled, have a right to present for admission to Christ's Hospital a child of a certain lineage, being the child of a father or mother who is or has been a parishioner of the parish of Twickenham, the qualification of course being intended for the benefit of the parish of Twickenham. There was a child, the defendant Wilson, who was of the prescribed lineage, and whose father was minded to complete the qualification for his child by making himself a parishioner of the parish of Twickenham, as he knew that the turn of that parish was very soon coming to present a child. He, being minded to acquire this qualification, proceeds to find out a vacant house in Twickenham, where there happened to be a vacant house. He goes to the landlord of that house, and bargains with him to take the house for three months, and thenceforward from month to month. It is not pretended that the landlord of the house had any object whatever but to find a tenant for the house and get rent for it. The father of the child enters into a valid binding contract to take the house and to pay the rent, and having done that, he, by way of further securing his qualification, causes his name to be entered on the rate book of the parish, and pays a portion of the rate which was then current. That being so, he was, as it appears to me, in point of law a parishioner, and in point of law he had acquired the qualification which was prescribed by the scheme. The child thereupon does obtain from the minister, churchwardens, and parishioners, in vestry assembled, the majority of the votes of the electors, and was thereupon by the vicar and churchwardens presented or nominated to the proper authorities of Christ's Hospital, upon which this bill was filed. Now, the Vice-Chancellor was of opinion that that election was to be set aside, and that the child was to be deprived of the benefit which he had received from the electors of the parish of Twickenham, and he declared that another boy who had not obtained the majority ought to have been declared duly elected, and was entitled to the benefit of the charity. The Vice-Chancellor does not appear to me to have denied that in point of law, and for every other purpose whatever, either at common law or under any Act of Parliament, the father of the child was a parishioner of the parish of Twickenham; but, admitting that he was a parishioner under an Act of Parliament or under the common law, he came to the conclusion that he was not a parishioner within the meaning of this scheme. Now I am not aware that there is any different interpretation of the word "parishioner" in this scheme from what it would have in any other legal document, but, unfortunately for the purpose, as it seems to me, the Vice-Chancellor imported into the consideration of the scheme his own knowledge of what were or would have been his intentions when he framed the scheme, if his attention had been called to what might have been done under it, which does not appear to me to be a legitimate subject, either for the Vice-Chancellor himself or for any other Vice-Chancellor of this court. He proceeded then upon the ground that the father of the child was not a *bonâ fide* householder and parishioner, but that his qualification as a parishioner was colourable. Now, I cannot help thinking that the fallacy of the Vice-Chancellor's judgment arose from the use of those words "colourable" and "*bonâ fide*." Of course, if the father of the child never did become

the occupier of the house, if he never did enter into a contract to take and never did take the house, but only got somebody to put his name over the door, or anything of that kind, then it would have been colourable, and it would have been a sham thing, and in that case he would never have been a parishioner; but if he was really a parishioner in point of law, then the thing is not colorable, is not fictitious, is not *malâ fide*. The meaning of the words "colourable" and *bonâ fide* in the Vice-Chancellor's judgment appears to me to be this: that a man is not entitled to be considered qualified under this scheme if he expressly, avowedly, and exclusively obtains the qualification for that purpose, and for that purpose only, without any other intention of establishing a permanent connection with the parish. I am of opinion that no court of law or equity has a right to attach any such condition or modification to the qualification of the scheme. If the law entitles a man to be qualified, he is qualified, and if it is intended to put any restriction upon that qualification, that restriction must be put by special enactment, or by a special provision in the scheme or other document. Of course it is familiar to us all that men constantly acquire qualifications for voting in counties. A man goes and buys a 40s. freehold for the sole purpose, the undisguised purpose, of giving himself a vote in a county with which he does not mean to have and has no other connection whatever. I might put a great number of other cases in which the law has prescribed qualifications. A man has a right to give himself a qualification if he can. If he does so, then he is qualified, and there is no equity to deprive a man of that qualification which the law entitles him to get. I am of opinion, therefore, that the Vice-Chancellor's declaration and decision were wrong in this case, and I must say I read with some surprise the order upon the vicar and churchwardens to pay the costs of the proceedings. The vicar and churchwardens were made parties merely in their representative character, as being the three parishioners who were best fitted to represent the whole body of parishioners who had an interest in this scheme; they seem to have done nothing whatever beyond presiding at this election, and have done their duty according to the best definition they could give to it, and accepted the child of a person who was a parishioner, and that they should under those circumstances be fixed with costs seems to me to be somewhat singular: I am bound, therefore, to say that if this had been an appeal merely for costs by these gentlemen, it is one of those cases in which the appeal would have been entertained. I am of opinion that the decree of the Vice-Chancellor must be discharged, and that in lieu thereof the bill of the plaintiff must be dismissed with costs as against the next friend.

MELLISH, L. J.—I am of the same opinion. The only question to be determined is whether Henry Wilson, the father of H. A. Wilson, the boy, was on the day of the election, which, I think, was the 31st Dec. 1874, a parishioner of the parish of Twickenham. Now I am of opinion that in interpreting this scheme, we must interpret just as we should interpret any other legal document, or Act of Parliament, or deed constituting a charity, and so interpreting it, I see no reason why we should not put the same construction on the word "parishioner" in this scheme as was given

by Lord Hardwicke in the case of the *Attorney-General v. Parker* (3 Atk. 576), where he says: "Parishioner is a very large word, and takes in not only inhabitants of the parish, but persons who are occupiers of lands, that pay the several rates and duties, although they are not resident, nor contribute to the ornaments of the church." Therefore, according to that definition, the question is, was Henry Wilson on the 31st Dec. last the occupier of property, and did he pay the several rates and duties in respect of that property? I agree with the argument of Mr. Pearson that, if there was any doubt as to what was the proper interpretation to be put on the word "parishioner" in the clause in question, it would be strong ground for giving it the interpretation he contends for that in the first and second clauses of the scheme the word "parishioner" is unquestionably used in that sense. Then the question is, was Mr. Wilson on the 31st Dec. the occupier of property in the parish of Twickenham, which was liable to be rated? The evidence is that he made an agreement with Stroud, the agent of the landlord, to take a house for a period of three months, and then afterwards from month to month, paying a certain rent. Is there any reason to say that that was not really done? I agree that even although a nominal agreement, or, perhaps, a formal deed had been made making such a lease, yet if it had been proved that there was a secret understanding between Stroud and Wilson that he should not occupy the premises, and that he should not pay any rent, or that if he went in he should go out whenever he was told to go out, and that the whole thing was a scheme adopted merely to make him appear to be an occupier when he was not an occupier, that he would not then have a qualification. There are authorities respecting the qualification of members of Parliament where the existence of a secret trust prevents the person seeking the qualification from being qualified, he not being the real owner; but I cannot see the slightest reason for supposing that Stroud was looking to anything except to get his rent, and Wilson was trying to get a house which apparently there might very likely have been great difficulty in getting, and Stroud wished to get rent for three or four months, if in any way he could get it. He knew very little about Wilson, and might have thought Wilson was not a very responsible person, but he was introduced to him by a person in whom he had confidence, and who told him the rent would be paid. He believed the rent would be paid, and if the rent was paid I do not suppose he cared whether Wilson paid it out of his own money or out of anyone else's. Therefore, he made a bargain, which seems to be a bargain fairly and candidly made. He gives up the key, and Wilson enters formally into possession, having the key. He put some furniture in, and came occasionally day by day. Now I am not aware of any authority for holding that a person who does that, does not become the occupier of the premises so as to be subject to be rated. There may be cases where the landlord, not being able to get a tenant, may be free from the rates because his house continues to be unoccupied, but if a person takes a lease of a house or the tenancy of a house, for the express purpose of becoming the occupier, and takes the key and goes in, I apprehend such person is the occupier, and is liable to be rated. The question whether he is actually rated or not, is immaterial,

but, so far, the fact of his being rated confirms the evidence that he was the occupier, and he had actually gone and requested to be rated, and had been put on the rate book. That is made evidence against him that he was the occupier. I am of opinion, therefore, that he did fulfil this qualification, and if he did fulfil the qualification, it appears to me that we really cannot enter into any further question about it, and all we have to do is to say that the qualification which entitled his son to be elected was fulfilled, and therefore, in my opinion, the election of the son was good.

BAGGALLAY, J.A.—I am of the same opinion.

BRAMWELL, B.—I am also of the same opinion. This was clearly to my mind not colourable. That is a word that is properly used when, if the true state of things were known colour would appear, and both parties had agreed that the true state of things should not be known, and that a different colour should be given to them. That is not the case here. I make no doubt but that this man was liable for the rent. There is no pretence for saying that Stroud meant that he should occupy the house without paying rent for it, or that the premises should continue empty until such time as the election took place. Stroud may have had to ask him, but although Wilson's object was to get a qualification for his son, it seems to me that Stroud's object was to get some rent for the premises. There is nothing colourable in it; it is the truth. Then he has a right to occupy the house, and he occupies so much as he thinks fit to occupy; he is subject to be rated, and is rated and pays rates. The result is that he has all the rights, and is subject to all the duties, of a parishioner, except in so far as there may be any statute applicable to this case which might deprive him of that right of voting or might not. But what then? That statute does not unmake him a parishioner, as it were, or make him not a parishioner, but it says, although you are a parishioner, you shall not have a particular right. The question is, whether he is a parishioner, and it appears to me that the statute would rather go to show that he was a parishioner, than that he was not. It is clear to my mind that this man was in some sense a parishioner, and I should say a parishioner in every sense he could be. Now a sort of, I can scarcely call it argument, has been used; but it is said of him that he is not a *bonâ fide* parishioner. I suppose anybody would have a difficulty in defining the difference between a parishioner and a *bonâ fide* parishioner. I do not know what difference there is between them. The matter may be tested in this way. Suppose with a view only to one of these elections a man had taken the premises ten years ago, and had occupied and paid rent and rates for them, I suppose he would have been a *bonâ fide* parishioner then beyond all doubt, and certainly if his occupation had been such as that of Mr. Wilson in this case, who, I believe, there is no doubt took these premises with a view to get a qualification for his son, the mere fact of his occupying them to get a qualification for his son, would not prevent his being a *bonâ fide* parishioner. Now suppose that instead of that being the case, Wilson had taken these premises without a view to the election, but that the windfall had happened a month after he had taken them, I suppose then there would be no doubt that he would be a *bonâ fide* parishioner. Therefore it seems to me

that he was a *bonâ fide* parishioner, although his occupation was short, and although his object in taking the premises was to qualify his son. Can the combination of those two things prevent his being a *bonâ fide* parishioner? Certainly not. It seems to me, therefore, that it is almost a matter of demonstration that this man is a parishioner, and as far as we can attribute any meaning to the expression, is not otherwise than a *bonâ fide* parishioner. It seems to me, therefore, that he had the requisite qualification, and that his son was duly elected.

Simmons.—On behalf of the boy Wilson, I have to ask the court to make an order that shall put him in the same position as he was in before the bill was filed. At that time he had been presented to Christ's Hospital; he had failed to pass one examination, and was prepared for another examination. Under the Rules of Court 1875, Order 58 rule 5, the Court of Appeal has power to make any order which ought to have been made by the Court of First Instance, and to make any other order it thinks fit which may do full justice. Will your Lordships now make an order declaring that Mr. Wilson's son is entitled to be presented?

JAMES, L.J.—I suppose we must declare that Wilson was duly elected, and dismiss the bill. What we have really decided is that Wilson was duly elected. The form of our order will be: The court being of opinion that the defendant, H. A. Wilson, was duly elected, dismiss the bill with costs.

Solicitors for the appellants, *Wright and Pilley*.

Solicitor for the plaintiff, *Montague Scott*.

Solicitor for the defendant Wilson, *R. Hewlett*.

Solicitors for Christ's Hospital, *Beachcroft and Thompson*.

Nov. 26 and Dec. 1 and 2, 1875.

(Before JAMES and MELLISH, L.JJ.; BAGGALLAY, J.A., and BRAMWELL, B.)

THE WIMBLETON AND PUTNEY COMMONS
CONSERVATORS v. DIXON.

Right of way—Limited user—Prescription—Excessive user—Right of way over common by undefined track.

The owner of a farm, adjoining a common, and to which access for horses and carriages had been obtained from time immemorial by ancient tracks over the common from one point to another, but by no clearly defined road, sought to erect houses on a portion of his farm, and to use a road which had recently been made in substitution for the ancient tracks over the common, for the purpose of drawing building materials, intending afterwards to use it as a means of access to the houses when built. On the farm there were a farm-house and a cottage, and there was evidence that, in addition to using the ancient tracks for access to the farm for ordinary agricultural purposes, the owner or his predecessors in title had also drawn over the tracks building materials for adding a wing to the farm-house, and for converting a mud hovel into a brick cottage.

On a bill by the conservators of the common to restrain the owner of the farm from drawing over the road made in substitution for the ancient

tracks any building materials for the erection of the proposed houses, and from any other excessive user of the road:

Held (affirming the decision of the Master of the Rolls), that the owner of the farm had no right to increase the burden of the servient tenement by changing the character of his property, and that the plaintiffs were entitled to the injunction sought for,

Held, also (differing from the Master of the Rolls) that there may be a good right of way in respect of the ancient tracks over a common from one fixed point to another, although there is no clearly defined road.

Observations on dicta of Lord Abinger, C.B., and Parke, B., in Cowling v. Higginson (4 M. & W. 256.)

Williams v. James (16 L. T. Rep. N. S. 664; L. Rep. 2 C. P. 577), approved.

THIS was an appeal from a decision of the Master of the Rolls.

The facts of the case were as follows:

By the Wimbledon and Putney Commons Act 1871, the plaintiffs were incorporated, and the commons, with the buildings and enclosures within the ambit thereof, and including the new road, which was the road in question in this suit, were vested in the plaintiffs for all the estate and interest therein, which immediately before the passing of the Act was vested in or belonged to Earl Spencer, in whom the fee simple and inheritance of the commons were then vested. And it was by the Act provided that the plaintiffs should at all times keep the commons open, uninclosed and unbuild upon, except as regarded such parts thereof as were at the passing of the Act enclosed or built upon, and should by all lawful means prevent, resist, and abate all encroachments on the commons, and protect the commons and preserve them as open spaces, and resist all proceedings tending to the enclosure or appropriation for any purpose of any part thereof.

At the time of the passing of the Act there were and still are three messuages, with pleasure grounds and appurtenances, called respectively "The Rounds," "Cæsar's Camp," and "The Holmwood," standing on the south side of and adjoining Wimbledon Common, and on the east side of an ancient earthwork of great historical interest, commonly known as Cæsar's Camp, and consisting of a fosse and double bank or vallum nearly circular in form, and enclosing to the edge of the outer bank an area of about fifteen acres. Access to these messuages is obtained by a road on the north side running from a public road called Workhouse Lane across part of the southern side of Wimbledon Common, and connected by two short roads running nearly at right angles therefrom southwards to the entrance gates of the messuages.

The new road was made under the following circumstances: Before the year 1867 the sites of the three messuages, together with Cæsar's Camp and the farm and lands on the west and south sides thereof, respectively called Warren Farm, Shadwell Wood, and Warren Cottage, were the property of Mr. Drax, and access for horses and carriages to the lands which now form the sites of the said messuages, and to Cæsar's Camp, Warren Farm, Shadwell Wood, and Warren Cottage, was obtained by an old private road running from Workhouse Lane at or near the point at

which the new road now runs therefrom, to a cottage called Camp Cottage, lying to the north-east of the grounds of The Holmwood, and from a point in the said old private road near Camp Cottage by several ancient tracks across Wimbledon Common, running a little to the south of the new road to the eastern entrance to Cæsar's Camp, and thence across and through the Camp and round the south-east and south sides thereof. Except by means of the old private road and tracks, and the tracks which are presumed to have been replaced by the old private road, so far as it extended, the bill alleged that there was not and never had been, down to the year 1867, any road for horses or carriages across Wimbledon Common to Cæsar's Camp, which is separated from those parts of the common abutting thereon by a post and rail fence, and a ditch; that the old private road and the tracks were never used for horses or carriages except by the occupiers of Camp Cottage, Warren Farm, and Warren Cottage respectively, save that they may occasionally have been so used by persons who visited Cæsar's Camp from curiosity, and that the road and tracks were never used by such occupiers except for their personal access to, and for the agricultural purposes only of the said farm and premises. The area within Cæsar's Camp is, and has always within living memory been, uncultivated.

In or shortly before the year 1867 the defendant became the lessee, from Mr. Drax, of the sites of the messuages called the Rounds, Cæsar's Camp, and Holmwood, which messuages he thereupon erected, and he shortly after entered into negotiations with Earl Spencer, as the then owner of the soil of Wimbledon Common, for the grant of a right of foot, horse, and carriage way from the Workhouse Lane to the sites of the messuages and grounds called the Rounds. No grant of such right of way was ever executed, but the new road, so far as the cross road nearest to Cæsar's Camp, and the said two cross-roads were made by Earl Spencer at his own cost, and were kept in repair by him until the passing of the Wimbledon and Putney Commons Act 1871, and the defendant paid to the Earl until that time the yearly sum of 10l. for the use of the said roads, and the defendant and his tenants have since used the said roads for access to the said messuages. The new road has also been used by the occupiers of Warren Farm and Warren Cottage "for their personal access to and for the agricultural purposes only of the said farm and lands," as the bill alleged, "and the user thereof for the several purposes aforesaid, has, so far as the said road extends, been only in substitution for the said ancient tracks across the common, and has been limited to the ancient user of the said tracks."

After the making of the new road the defendant became the lessee from Mr. Drax of Cæsar's Camp and the land lying to the south of it, and in 1872 he erected fences within the area of the Camp, apparently with a view to building thereon, and thereupon the plaintiffs through their clerk wrote to the defendant, giving him notice that they recognised "no right of access to the Camp over Wimbledon Common, except along the existing road or track to the gate of the Camp for the purposes of agricultural occupation only."

The defendant replied that he did intend to build in the Camp, and also to use the road for the purpose of taking building materials on to the

ground, and afterwards as the means of access to all houses to be there erected. But he took no further proceedings till 1874, and did not begin to build till April 1875.

Thereupon the plaintiffs filed their bill praying that the defendant, his servants, and agents might be restrained from drawing, or causing to be drawn along the new road leading from Workhouse-lane to the entrance to Cæsar's Camp, or along any part of the new road, any bricks, stone, or other building materials to be used in the erection of houses or other buildings upon Cæsar's Camp or any part thereof, or upon any of the lands now or lately forming part of Warren Farm, and of which the defendant claims to be lessee from Mr. Drax, and from otherwise using the new road as a means of access to the Camp and lands in excess of the user to which the same is liable as a road made in substitution for the ancient tracks across Wimbledon Common.

The defendant's case was that he had a right to use the road for all purposes, and in support of his case he adduced evidence that the ancient tracks over the common had been used for the purpose of drawing building materials on one occasion to add a wing to the farm-house, and on another to turn a mud hovel into a brick cottage; for the purpose of taking away gravel which had been found and dug on the farm, and by persons going to the farm for the purpose of shooting, and by visitors to Cæsar's Camp. It is not necessary to refer at greater length to the evidence which is sufficiently stated in the judgments of the Court of Appeal.

The Master of the Rolls granted an injunction in the terms of the first part of prayer of the bill, with this addition, "except for the ordinary farming purposes of the said Camp and lands respectively."

In delivering his judgment the Master of the Rolls (Jessel), after stating the facts, said: On the first point of whether there was a road there is really no substantial conflict of evidence. Up to 1867 the state of matters was this: There was a place called the Rounds, now generally called or known as Cæsar's Camp, forming a part of Warren Farm. It was a place of great interest to the public, and there was a gate leading to it, which gate had a lock upon it, the key of which was kept by the owner of Warren Farm; and as strangers and others from motives of curiosity were in the habit of visiting the Camp, they used to go down to the farm-house and get the key and go into the Camp. Those strangers of course came in all sorts of vehicles, and they used to turn off from the high road somewhere near the National Schools, and go on to the common. They used to drive their gigs and other vehicles to this gate, and so get into Cæsar's Camp. In addition to this the farmer occupying Warren Farm, if he wanted to go that way, and cart materials or manure or anything, used to drive his carts across the common and through this gate to the Rounds or Cæsar's Camp on to the farm, but beyond that there is no evidence of user at all, and it appears that not only was this a driving over the common, but there was no road at all, but only a series of tracks, which tracks are nothing but cart tracks more visible in winter when every cart, as one of the witnesses told us, made a separate rut and, therefore, a separate track, almost always invisible in summer on account of the ground-being

hard or more consolidated. Just close to the gate there was more of a road. For about fifteen yards out of the 200 yards, which the gate was distant from the high road, it was more like a road on account of the carts and carriages being driven along a narrower portion, but upon the rest the grass grew between the cart-ruts, and the cart-ruts diverged at some places as much as fifty yards, and at others thirty yards, there being no defined line of road. Therefore it was not a road going from point to point. There is no evidence of any repairs except to this extent, as some of the witnesses said, that they had seen gravel occasionally thrown into the ruts. There was nothing like regular repair, nor anything like a regular road, but simply that sort of track across a common which is not as a rule interfered with either by the owner of the soil in the common, who probably has a right to interfere with it, or by the commoners, who probably have no right to interfere with it, because it does not interfere with their right of common. No one cared about it, and people used to go over it. I am told that that is a proof in law that this amounts to a definite road. I am of opinion that it is no such proof in law, and that the defendant's case must fail on that ground. [His Lordship then examined the evidence as to the user of the road for carrying materials to add a wing to the farm-house, and to turn the mud cottage into a brick cottage, and continued:] That being the state of the evidence, it appears to me that the rule of law that the use of a road to a farm for farming purposes for any number of years, does not give a right to use the road when you have turned the farm into a small town or series of houses, must apply, and, therefore assuming that I have come to the conclusion, which I have not, that the defendants have proved a road up to the gate of the Rounds or Cæsar's Camp, to exist at all, I should still be of opinion that he had not proved his right to use it for the purpose for which he desires to use it. It follows from what I have said that there will be a perpetual injunction.

From this decision the defendant appealed.

Miller, Q.C. and Bush, for the appellant.—We adduce evidence of user of the way, for a variety of purposes, and the inference is that we are entitled to use it for all purposes. [Lord Justice JAMES.—Surely it is settled law that the owner of a dominant tenement cannot change the character of his tenement in such a way as to increase the burden of the servient tenement.—Lord Justice MELLISH referred to *Godson v. Richardson*, 30 L. T. Rep. N. S. 142; L. Rep. 9 Ch. 221.] In *Cowling v. Higginson* (4 M. & W. 256) Lord Abinger, C.B. says: "If a way has been used for several purposes, there may be a ground for inferring that there is a right of way for all purposes." And in the same case Parke, B. says: "If the way is confined to a particular purpose, the jury ought not to extend it, but if it is proved to have been used for a variety of purposes, then they might be warranted in finding a way for all." And in the course of the argument in the same case, observations were made by the judges which are still more strongly in our favour. Lord Abinger C.B. there said (4 M. & W. at page 252): "The extent of the right must depend upon the circumstances. If a road leads through a park, the jury might naturally infer the right to be limited: but if it went over a common, they might infer

that it was a way for all purposes." And Parke, B., said during the argument: "If it had been shown that from time immemorial it had been used for all purposes that were required, would not that be evidence of a general right of way?" And further on he answered the question thus: "If they show that they have used it time out of mind for all the purposes that they wanted, it would seem to me to give them a general right." The acts of user proved by us show that we are entitled to use the road for the purposes of the proposed houses. They also referred to

The United Land Company v. The Great Eastern Railway Company, L. Rep. 17 Eq. 158; and on appeal, 33 L. T. Rep. N. S. 292; L. Rep. 10 Ch. 586;

Gale on Easements, 4th edit. 330.

Chitty Q.C. and W. R. Fisher, for the respondents.—The evidence does not prove user of the right of way for any other purposes than those to which the land was originally put. And the law is quite settled that a right of way cannot be increased so as to cast a greater burden on the servient tenement. This is clearly settled by many cases, and especially by a recent case of *Williams v. James* (16 L. T. Rep. N. S. 664; L. Rep. 2 C. P. 577) where Bovill, C.J. says: "When a right of way to a piece of land is proved, then that is, unless something appears to the contrary, a right of way for all purposes according to the ordinary and reasonable use to which the land might be applied at the time of the supposed grant. Such a right cannot be increased so as to affect the servient tenement by imposing upon it any additional burthen." And in the same case Willes, J., says: "I quite agree with the argument that the right of way can only be used for the field in its ordinary use as a field. The right could not be used for a manufactory built upon the field. The use must be the reasonable use for the purposes of the land in the condition in which it was while the user took place." Against such clear language as that, the appellant can set nothing but the dicta of Lord Abinger and Parke, B. in *Cowling v. Higginson* (*ubi sup.*) Too much weight must not be attached to mere dicta. As Lord Selborne said in *Re The Metropolitan Public Carriage and Repository Company, Brown's Case* (29 L. T. Rep. N. S. 562; L. Rep. 9 Ch. 106): "It seems to me to be only just to the learned judge, from whom those dicta proceeded, to remember that judges have tacitly in their minds the circumstances and facts of the particular case before them, when they speak of the influence of any material fact in the evidence which they have to consider. They are not to be supposed to forget that there are other facts, but they speak of the value of the particular fact, bearing in mind the general character of the entire case." [Lord Justice JAMES referred to *Henning v. Burnet*, 8 Ex. 187.] In the old case of *Jackson v. Stacey* (Holt. 455) it was held that the user of a way for agricultural purposes only was not sufficient to support a general right. *Allan v. Gomme* (11 A. & E. 760) turned upon the construction of a reservation of a right of way, and does not apply, but so far as it goes it is in our favour. They also referred to:

Skull v. Glenister, 9 L. T. Rep. N. S. 763; 16 C. B. N. S. 81;

The South Metropolitan Cemetery Company v. Eden, 16 C. B. 42;

Gale on Easements, 3rd edit. 451, 2;

Basendale v. McMurray, L. Rep. 2 Ch. 790.

Miller, Q.C. in reply.

JAMES, L.J.—I am of opinion that, subject perhaps to an alteration that may be made in the words of the injunction, the order of the Master of the Rolls ought to be affirmed. The question between the parties is as to whether Mr. Dixon is entitled to convert a piece of land that has been uncultivated up to the present time, forming part of an estate or farm called Warren's Farm, into sites for several houses, the right which he claims being an unlimited right for himself and for Mr. Drax, in whose right he is claiming, to turn the whole of the farm into a town or towns if they should be so minded, and should be able to do so. As far as we have any evidence before us, the farm and lands in respect of which this right is claimed have been substantially in their present state from time immemorial, during which it is to be assumed that the right of way has been exercised; that is to say, there was a farm-house, farm lands, and a piece of woodland. The only alterations in the state of the property, of which we have any evidence, have been an enlargement of the farm-house to a small extent, the change of a mud cottage into a brick cottage, and probably the erection of another cottage, but whether an erection or a change I am not quite sure. But those are the only changes which have taken place in the property. Now that those changes may be material, and may be to some extent evidence of the general right, it is probably difficult to deny. But whether they amount to evidence sufficient to justify any inference of fact is another question. I am of opinion that the mere fact that over a common some building materials were taken to build another house is not sufficient to justify the inference of fact that the right, whatever it was, that belonged to the house and property was a right for all purposes whatsoever to which the land might be applied. The other rights alleged are for agricultural purposes, for sporting, which seems to me the same thing as an agricultural purpose, and for taking gravel from a gravel pit in one of the fields. That is insufficient, as it seems to me, to raise any inference of fact from which to draw the right claimed. Then the property has been used practically for all purposes for which a farm may be used, for residential purposes, and for farming purposes. We have then to consider whether the character of the property can be so changed in substance as substantially to increase or alter the burden upon the servient tenement. I said when this case was first opened that I was strongly of opinion that it was the settled law of this country that no such change in the character of a dominant tenement could be made as would increase the burden on the servient tenement. The dicta and observations, which are entitled to very great weight, of Lord Abinger and Mr. Baron Parke, in the cases which have been referred to, induced me at first to think that the opinion I had formed was wrong. But when we consider those dicta and observations in connection with the very clear language of the Court of Queen's Bench in *Allan v. Gomme* (11 A. & E. 759), and of the Lord Chief Justice Bovill and Mr. Justice Willes in the case of *Williams v. James* (16 L. T. Rep. N. S. 664; L. Rep. 2 C. P. 577), I am quite satisfied that the true principle is the principle laid down in these later cases—namely, that you cannot from evidence of user of property in its original state infer a right to use it in whatever

form or for whatever purpose that property may be changed; that is to say, if there be a right of way, however general, for whatever purpose, to a field, the person who is the owner of the field cannot from that say, I have a right to turn that field into a manufactory, or into a town or ten yard, and then use the right of way for the purposes of the manufactory or town so built. I therefore think that the Master of the Rolls was right in the result at which he arrived in drawing an inference from the facts as well as in the law which he applied to those facts. But I think it right to say, as the judgment of the Master of the Rolls has been read to us, that I am unable to agree with the view which he apparently formed that there could be no right of way at all in respect of what are called the tracks over the common. I am not at all prepared to assent to that as a true statement of the law of this country. If from one point, say from a gate to a road 200 yards off, persons have found their way from time immemorial across a common, although sometimes going by one track, and sometimes by another, with such deviations as occur between the gate and the road, I am not prepared to say that a way across the common through those tracks may not be validly claimed, and may not be as good as any right over any formed road. But when the Master of the Rolls says that the way ought to be used only for the purposes for which it was used when the land was in a state in which it was formerly, and when we see the evidence of user, I think he is right, and concur in what he has said. The substance of the injunction is to restrain Mr. Dixon from erecting the new buildings, or using the road for the purpose of any new buildings, except agricultural buildings there. Then it goes on to say, "and from using the same except for agricultural purposes." Probably it should run in this way, if their Lordships agree with me: "except for the purposes to which the land has been heretofore applied."

MELLISH, L.J.—I am of the same opinion. The question is whether Mr. Drax and his tenants are entitled to use this right of way for the purpose of turning the land into building land and erecting new buildings upon it, and then using the way, after the buildings are erected, for the purposes of those buildings. It was admitted in the bill, and proved in point of fact, that the right of way did exist for some purposes; and I do not agree, as the Lord Justice has said, with what was thrown out by the Master of the Rolls as to the consequence of the track not being a perfectly definite track over the common, but being a track going in different directions previously to the time when the new road was made. No doubt it is perfectly correct that if a person has land bordering on a common, and it is proved that he went on the common at any place where his land might happen to approach, sometimes in one place and sometimes in another, and then went across the common sometimes to one place and sometimes to another, it would be difficult from that to infer any right of way. But if you can find the terminus *ab quo* and the terminus *ad quem*, the mere fact that the owner of the land does not go precisely along the same line for the purpose of going from one place to the other would not enable the owner of the servient tenement to dispute the right of way. Assume the owner of this common had a grant

which stated that Mr. Dixon had the right to go from the gate leading out of Caesar's Camp, to the highway by the National School with carriages and horses, at his free will and pleasure, I cannot suppose that the grant would fail in point of law, because it did not point out the precise definite track between the one terminus and the other in which he was to go, in using the right of way. If the owner of the servient tenement did not point out the line of the right of way, then the owner of the dominant tenement must take the nearest way he can. If the owner of the servient tenement wishes to confine him to a definite track, then he must point it out, and in that case the owner of the dominant tenement would not be entitled to go out of the way, strictly speaking, merely because the way is rough and there are ruts in it, and so forth. In my opinion the bill has properly admitted that he has a right of way for some purposes. Then comes the question to what extent does that right of way go? That depends partly on a question of law, and partly on a question of fact, but mainly on a question of law. When the question of law is settled, there is no great difficulty in arriving at a proper conclusion as to the question of fact. The question of law is this: assuming that it is made out that Mr. Drax and his tenants have used this way not exclusively for agricultural purposes, but for all purposes for which they wanted it in the state in which the land was at the time of the supposed grant—at the time when the right of way first begun—and assuming that there has been no material alteration in the premises since the user of the way for all the purposes for which they have required it in the state in which the premises were at the time when the road was supposed to have its origin and during all the time it has been used, does that entitle Mr. Drax to alter substantially, and increase the burden on, the servient tenement by building any number of houses he pleases on this property, and arguing that the persons who inhabit those houses will have a right to use the way for all purposes connected with the houses? I certainly was under the impression, when this case was opened, that the owner of the dominant tenement could not increase or alter the burden on the servient tenement in any such way as that. Mr. Miller called our attention very pointedly to the language of Parke, B., in *Cowling v. Higginson* (4 M. & W. 245) and that certainly did raise some doubt in my mind as to what the true rule of law is. But now that the other cases have been cited, I doubt whether Parke, B., had the question now before us present to his mind; and I am of opinion that the true rule is that laid down by Lord Chief Justice Bovill and Mr. Justice Willes in the case of *Williams v. James* (16 L. T. Rep. N. S. 664; L. Rep. 2 C. P. 577), and I think by Parke, B. himself, in the other case of *Henning v. Burnett* (8 Ex. 187). That was with reference to a grant. I am now speaking merely with reference to user. In *Cowling v. Higginson* (4 M. & W. at p. 256) Lord Abinger is cautious in the way in which he lays down the rule. He says: "If a way has been used for several purposes, there may be a ground for inferring that there is a right of way for all purposes; but if the evidence shows a user for one purpose, or for particular purposes only, an inference of general right would hardly be presumed." If the owner of the dominant tenement has used the way

only for purposes connected with the occupation of the land in its existing state, that may be considered to be a user for particular purposes, and I have a doubt whether Parke, B., really intended the contrary, although he says that the user of a way for several purposes implies its user for all purposes; because if the facts in *Cowling v. Higginson* are examined, it will be found that the mines were opened seventy years before, it is true, but it was, therefore, a property with existing mines in it. That way, it is true, had not been used for those mines, but it being a property with mines in it, it may be inferred that if the owner is entitled to use the way for all the purposes for which he wanted it, that might include the user of it for the purposes of the mines, that being a reasonable occupation of the land in the condition in which it was. However that may be, in my opinion the true rule is that laid down by Lord Chief Justice Bovill in *Williams v. James* (*ubi sup.*), that where a right of way to a piece of land is proved, that is, unless something appears to the contrary, a right of way for all purposes according to the ordinary and reasonable use to which that land might be applied at the time of the supposed grant. Mr. Justice Willes evidently agrees with that view. That being the rule, what are the purposes for which, according to the ordinary and reasonable use to which this land would be assumed to have been applied at the time of the grant, or supposed grant, this road may be used? We do not know when the grant was made. It is from time immemorial; Cæsar's Camp has existed from time immemorial; so have Wimbledon Common and the village of Wimbledon. When Warren Farm was first inclosed we do not know. But one cannot suppose that there was any notion of using it for general building purposes at that time, though no doubt the owner of that farm must always have required, first of all, the way to the cottages in one direction, and then a way to Wimbledon, which lies in another direction. Is there any such evidence of user for purposes beyond what was necessary, and beyond what was reasonably required for the occupation of the land in its existing state, as entitles us to hold that the right extends beyond that? I agree that if we found that several houses had been built, and that the owner of Warren Farm had exercised the right of building new houses, and had a road to those new houses, we might infer that it was not to be confined to those particular houses, because that was not the original grant. But for that it must be inferred that building generally was contemplated at the time of the original grant, and that that was included in it. I will not say that there is no evidence of it, but there is not sufficient evidence for us to act upon and say that there is a right of way beyond what is necessary and reasonable for the occupation of the premises as they existed at the time of the supposed grant. The enlargement of Warren Farm-house does not go beyond the right for farming purposes. It would be a very narrow construction to hold that because a small farm-house with some small buildings was erected 200 or 300 years ago, the farmer could not enlarge his farm buildings for the purposes now required in agriculture. Then with regard to the cottage, the changing of a mud cottage into a brick cottage is really the strongest piece of evidence in the case. That is very weak evidence, if it is evidence at all, because if a mud cottage became un-

fit for human habitation, in the alteration of it, although there is the carrying of bricks for the time, the burden is not permanently increased. On the assumption that the owner and occupiers had a right of way to the mud cottage, the going to the brick cottage after it is once built, is no greater burden than the going to the mud cottage. The other acts of user that occurred in taking away gravel, and in going to the farm for the purposes of shooting, are acts of user reasonably connected with the occupation of the premises as they have been during the whole time that the right of way has existed, as far as we know. I am, therefore, of opinion that it is not made out that there is any right to use this road for the purpose of erecting entirely new buildings, and then after those buildings are erected, using the road for the purposes of those buildings. I agree, therefore, that the appeal must be dismissed.

BAGGALLAY, J.A.—I am of the same opinion. It appears to me that there are two questions for decision in this case. The first is, what is the extent of the right of way which is proved by the evidence in the case; and the second is, if that right of way is established as limited to particular purposes, can it be extended consistently with the rule of law applicable to questions of the like kind? I think the judgment of Parke, B., in the case of *Cowling v. Higginson* (4 M. & W. 245) has been interpreted to an extent beyond what the learned Baron intended. It is true that in one part of his judgment he uses this expression: "If it is shown that the defendant and those under whom he claimed have used the way whenever they have required it, it is strong evidence to show that they had a general right to use it for all purposes, and from which a jury might infer a general right." These words taken by themselves point in the direction of Mr. Miller's argument. But I think those wide words are qualified by this statement: "If the way is confined to a particular purpose, the jury ought not to extend it; but if it is proved that it has been used for a variety of purposes, then they might be warranted in finding a right for all." Now let us assume we have the case of an agricultural district where there has been a right of way to a certain piece of land exercised for agricultural purposes for a length of time, and then it appears that there is valuable gravel on the estate, and it is raised and sold from time to time and carried over the way previously used for agricultural purposes alone; then assume that afterwards mineral produce was found on the estate and raised, and the way was used for carrying it away, and one might imagine a variety of acts of user that would from time to time arise in the course of the occupation of the land—in such a case, with all this variety of acts of user established, I can understand that the jury might be directed to find from that that the original grant must be treated as a grant for all purposes. No such case arises here. If it is not proved by evidence, as I think it is, it is admitted that the right of way was used for agricultural purposes from time immemorial. Then we find in addition to that two or three kinds of user suggested as going beyond agricultural purposes which do not appear to do so, such as building a new barn, or adding a wing to the house, or even the shooting. But we have got two purposes for which this way has been used, the one for carrying materials for replacing a mud cottage upon a

C.P. Div.]

ASHWORTH (app.) v. HOPPER (resp.).

[C.P. Div.]

small portion of the property by a more substantial building, and the other for taking gravel and carting it away. If it came before me as a jurymen to say, whether I could infer a right to use the way for all purposes, I should answer, "No." It is not like a general user for all purposes, such as Parke, B., contemplated. Therefore to the first question it must be answered, that the right of way has been enjoyed merely for the purposes to which the land was applied at the date of the grant and no further. Then the second question is whether the right to use this way, being limited to these particular purposes as to which there has been actual proof, can it be extended to the purposes for which the defendant desires to use it? I think it cannot be so extended consistently with the rule of law from time to time enunciated, and particularly in the case of *Williams v. James* (*ubi sup.*) that the burden of the servient tenement must not be increased, nor can the nature of the user be substantially changed. Answering the questions that arise in this case in the way I have suggested, it appears to me that the judgment of the Master of the Rolls is correct, and that, subject to the modification which has been mentioned by Lord Justice James, the injunction must stand.

BRAMWELL, B.—I agree, and have nothing to add.

Appeal accordingly dismissed with costs.

Solicitors for the appellant, *Dixon, Ward, Letchworth, and Weld.*

Solicitors for the respondents, *Horne and Hunter.*

HIGH COURT OF JUSTICE.

COMMON PLEAS DIVISION.

Reported by P. B. HUTCHINS and CYRIL DODD, Esqrs.,
Barristers-at-Law.

Tuesday, Nov. 16, 1875.

REGISTRATION CASE.

ASHWORTH (app.) v. HOPPER (resp.)

County vote—Freehold determinable at will of grantor—Parliamentary franchise.

Where an equitable freehold rent-charge was granted by deed for valuable consideration to certain persons called in the deed "beneficiaries," by certain other persons called therein "trustees," the trustees having by the deed an absolute power of sale of the whole of the property comprised in the deed, it was

Held by the court (Lord Coleridge, C.J., Grove and Archibald, JJ.), that such power of sale could only be exercised subject to the process being held in trust for the "beneficiaries," and that the beneficiaries had a sufficient interest, until the exercise of such power of sale, to entitle them to the franchise.

THIS was an appeal from the decision of the revising barrister for the North-East Division of the county of Lancaster, who struck off the register of voters for that division of the county of Lancaster, the name of the appellant, and the names of thirty other persons whose claim arose under circumstances similar to those of the appellant.

The material parts of the case stated by the revising barrister for the opinion of the court were as follows:

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The appellant claimed to be entitled to vote in respect of 1-54th share of a freehold rent-charge of 120*l.* under a deed of which the following is a copy:

This indenture, made the 28th day of Jan. 1875, between [certain persons therein called the trustees], of the one part, and the several persons whose names are subscribed and seals affixed to these presents, and whose descriptions are set forth in the schedule hereto (hereinafter called the said beneficiaries), of the other part; whereas, by an indenture dated the 5th day Jan. 1875, and made between Richard Siddall, of the one part, and the said trustees of the other part, in consideration of the sum of 2820*l.* therein expressed to have been paid to the said Richard Siddall by the said trustees, all those four plots of land situate at Waterford, in Rosendale aforesaid, formerly part of an estate there, called the Miller Barn Estate, and also all those messuages, &c., erected upon the said plots of land, and the appurtenances were granted and conveyed to uses limiting thereout unto the said trustees, their heirs, and assigns, the clear yearly rent of 120*l.*, payable by equal half yearly payments on, &c., together with certain powers and remedies for securing and enforcing payment of the same yearly rent, and subject to the said rent, powers, and remedies, to the use of the said Richard Siddall, his heirs, and assigns for ever; and whereas the said trustees have agreed with each of the said beneficiaries for the sale to him of the beneficial interest of and in one undivided equal fifty-fourth part or share of and in the said yearly rent, and the securities therefore, at the price of 52*l.* 5*s.*, and upon the terms hereinafter appearing. Now this indenture witnesseth that in pursuance of the said agreement, and in consideration of the sum of 52*l.* 5*s.* to the said trustees, paid by each of the said beneficiaries on or before the execution of these presents, one such sum being so paid by each of them, the said beneficiaries (the receipt whereof the said trustees do hereby acknowledge), they the said trustees do hereby declare and agree to and with the said beneficiaries respectively, that they the said trustees, their heirs and assigns, do and shall henceforth stand seized and possessed of one undivided fifty-fourth part or share of and in the said yearly rent of 120*l.*, and the said powers and remedies for securing and enforcing payment thereof, and the benefit of the covenants by the said Richard Siddall, in the hereinbefore recited indenture contained (all hereinafter referred to as the said rent and premises), in trust for each of the said beneficiaries, his heirs and assigns, absolutely. And it is hereby further agreed and declared by and between the said trustees that they, the said trustees, their heirs and assigns, do and shall stand seized and possessed of the remaining parts or shares of and in the said rent and premises, in trust for the said trustees, their heirs and assigns, as tenants in common, in equal shares; and each of them, the said beneficiaries, doth hereby, for himself, his heirs, executors, administrators, and assigns, covenant with the said trustees, their heirs and assigns, that if at any time he, the said covenanting party, his heirs or assigns, shall be desirous of selling his or their part, share, or interest of and in the said rent and premises, such part or share shall be first offered to the said trustees, or the survivors or survivor of them, or other the trustees or trustee for the time being of these presents, at a price to be ascertained, in case of dispute, by two arbitrators, or their umpire, to be appointed and to act in accordance with the provisions of the Common Law Procedure Act 1854, or any then subsisting statutory modification thereof. And each of them, the said trustee, doth hereby, for himself, his heirs, &c., covenant with the others of them, their heirs and assigns, that if at any time he, the said covenanting party, his heirs or assigns, shall be desirous of selling his or their beneficial part, share, or interest of and in the said rent and premises (including the benefit of the covenant hereinbefore lastly contained), such part, share, or interest shall be first offered to the others of the said trustees, or the survivor of them, or other the trustees or trustee for the time being of these presents (other than the trustee so desirous to sell), at a price to be ascertained in case of dispute in manner aforesaid. And it is hereby expressly agreed and declared that the said trustees, or that the survivors or survivor of them, or that the heirs of such survivor, or that other the trustees or trustee for the time being of these presents shall re-

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spectively have an absolute power of sale over the said rent and premises exercisable at their or his discretion, without any further consent on the part of any person. And that the power of appointing a new trustee or new trustees of these presents shall be exercisable by the surviving or continuing trustees or trustee for the time being, or the acting executors or executor, administrators or administrator of the last surviving and continuing trustee, or by the last retiring trustees or trustee, and on every or any such appointment the number of trustees may be either augmented or reduced. And each of them the said trustees, so far as relates to the acts of himself and his own heirs, executors and administrators, alone, and so far as to bind himself, his heirs, executors, and administrators respectively only while in the actual custody of the deeds and writings hereby covenanted to be produced, and so far as practicable to bind such deeds and writings, into whosesoever hands the same may come, and not so as to bind himself, his heirs, executors or administrators, or to incur any liability in relation thereto, farther or otherwise, doth hereby, for himself, his heirs, executors and administrators, covenant with each of the said beneficiaries, his heirs, and assigns, that they, the said covenanting parties respectively, and their respective heirs and assigns, will at all times, unless prevented by fire or other inevitable accident, upon the request, in writing, of the covenantee, his heirs or assigns, or any person lawfully or equitably claiming through him or them, any estate or interest in the said rent and premises, at the expense of the person or persons, &c., the hereinbefore recited indenture of the 5th day of Jan. 1875, and this present indenture, or either of them, for the support or manifestation of the estate or title of the said covenantee, his heirs and assigns, and every or any other person claiming as aforesaid, and upon such request, and at such expense as aforesaid, make and deliver to the person or persons requiring the same, or to such person or persons as he or they shall appoint such true copies, attested or unattested, of the same deeds and writings as he or they may require, and in the meantime keep the said deeds and writings safe, uncancelled and undefaced.

The deed was duly executed and signed by the parties thereto, and proof of such execution given, and also of the fact that previous to the 31st. Jan. 1875, the claimant had received payment of 1l. 2s. 2d., being the first half yearly instalment of the one fifty-fourth share of the rent-charge. The claimant's full share of the said rent-charge being 2l. 4s. 4d. per annum.

It was contended on behalf of the objector that the covenant by the parties in the said deed, who are therein called the "beneficiaries," that if at any time they should be desirous of selling their respective shares, such shares should first be offered to the persons in the said deed styled the trustees at a price to be ascertained in case of dispute by arbitration, and the absolute power of sale vested in the trustees by the said deed exercisable at their or his discretion, without any further consent on the part of any person, were inconsistent with the claimant having such freehold interest in the said 1-54th share of the said rent-charge as would entitle him to have his name inserted on the said list of voters. I was of opinion that inasmuch as the estate of the beneficiaries might be determined at the will of the trustees, the former had not such an interest in the rent-charge as entitled them to vote. I therefore expunged the name from the list. The question for the court was whether this decision of the revising barrister was correct or not.

Gorst, Q.C., for the appellant.—The estate granted to the beneficiaries was an equitable freehold which would, indeed there is no question raised as to that, give a right to vote if there were no conditions or covenants in the deed relating to the determination of the estate conveyed. The effect of the conditions for determining the estate

is not to alter the nature of the estate during its actual continuance. It remains an equitable freehold until it is put an end to by the exercise by the trustees of their absolute power of sale, or by a sale by the beneficiaries themselves. [Lord COLERIDGE, C.J.—There is nothing against you in the right of pre-emption that is given to the trustees, but assuming that the absolute power of sale that is given to them can be exercised by them, without any regard to the interest of the beneficiaries, and the money resulting from the sale appropriated by them, would the estate still be an equitable freehold?] The trustees cannot appropriate the money resulting from a sale under this power. Equity would impose a trust upon them, they would be trustees of the money resulting from the sale, just as before the sale they were trustees of the estate. That a trust is to be implied is evident from the whole frame of the deed. In the witnessing clause the trustees agree with the beneficiaries to stand seised in trust for the beneficiaries absolutely. The deed, too, shows that the agreement was for a sale to the beneficiaries, and shows that the beneficiaries paid for an interest and not for a mere tenancy or holding at the absolute will of the trustees. The 4th section of the Act 23 & 24 Vict. c. 145, enacts that the money received upon sales by trustees having a power to sell, shall be laid out in the manner indicated in the instrument creating the trust, but if no indication is therein contained, then in the purchase of other hereditaments; and it may well be that this section being in the mind of the draftsman, he avoided the unnecessary labour of indicating what should, in case of a sale by the trustees, be done with the resulting funds. But even if the trustees could determine the estate at their absolute will, and appropriate the proceeds of the sale of it, it would still, until they did so, be an equitable freehold and confer the right to vote. *Davis v. Waddington* (7 M. & G. 37, note (a), p. 45) shows what interests the court have held not to be freehold interests, but mere holdings at the will of the grantors, and it is evident that the case itself of *Davis v. Waddington* is regarded by the learned reporters as an extreme case, or indeed as being actually wrongly decided by the court. In 2 Coke's Instit. 201a, the nature of freehold estates on condition is explained. The authorities are to be found collected in *Wynne v. Wynne* (2 M. & G. 19), a case mentioned in the note to *Davis v. Waddington*. The statute gives to the persons in possession of equitable freehold rent-charges of certain value the right to vote, and does not, either expressly or by implication, deprive them of it because, under certain circumstances, the estate may be divested. He also cited Sugden on Powers, 8th edit. p. 452.

J. Edwards, Q.C., for the respondent.—The intention of this deed is obviously to manufacture a number of votes, and to keep the voters in a state of perpetual dependence on the trustees, as they are called. It is true that it is not found by the case that this deed is a fraud, or within the statute 10 Anne c. 23, but it is submitted that the interest which the beneficiaries have is dependent upon the absolute will of the trustees, who are the grantors. A person may, when there is no impending contest, desire to withdraw, and the trustees will then allow him to do so, and pay him an arbitration price; but when an election is impending, and he is not to be depended upon as a sure

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voter for the party espoused by the trustees, they will sell over his head, unless indeed seeing his danger he reconciles himself to the trustees and their party. The Act (23 & 24 Vict. c. 145) only deals with cases where there is a trust; it does not impose a trust where none has been created by the instrument. [ARCHIBALD, J.—You must not overlook the fact that the beneficiaries have paid a valuable consideration.] It is a matter to be decided upon the construction of the whole instrument, whether there is, in truth, any trust. But, even assuming that when the question arises between the parties to the instrument, the beneficiaries will be held to have equitable freeholds, it may well be that for election purposes public policy requires a different construction to be put upon the matter. It has never been decided that a freehold determinable at the will of the grantor gives a vote; and here, as I have submitted, the trustees are the grantors. Cases bearing on this point are to be found collected in Rogers on Elections, 10th edit., p. 12, and in a judgment of Mr. Manning's, sitting as revising barrister for South Hants, reported in 2 Jur. 459. In *Beeson v. Burton* (12 C. B. 647; 20 L. T. Rep. 3 O. S.; 2 Lut. 225, 232), Maule, J., says: "It is the arbitrary power of removal which prevents the estate being a freehold." Here there is an arbitrary power of removal, and there is not any resulting trust of the purchase money in favour of the grantees. The estate, therefore, at any rate for election purposes, is not a freehold. He also referred to Lewin on Trusts, p. 176; *Burgess v. Wheate* (1 Eden. 177); *Steele v. Bosworth* (11 L. T. Rep. N. S. 507; 34 L. J. 57, C. P.; 10 Jur. N. S. 1239).

Gorst, Q. C., replied.

Lord COLERIDGE, C.J.—This case comes to us on appeal from the decision of the revising barrister, who struck the name of the appellant off the list of voters, under these circumstances: There was a deed which, according to one construction, gave to the appellant, and the other persons styled in the deed "beneficiaries," an estate of freehold, but which according to another construction, gave them nothing, or nothing except what the so-called trustees chose to allow them to have. The question is, which of these is the true construction? This deed between "trustees" and "beneficiaries" recites an earlier indenture whereby in consideration of a considerable sum of money certain lands were conveyed to uses limiting thereout unto the "trustees," their heirs and assigns, the yearly rent of 120*l.* to the use of the grantor, his heirs and assigns. We must take it, as the case stands, that this deed did give to the "trustees" the rent. Then the "trustees" sell in small shares the greater part, but not the whole of this rent to the "beneficiaries." The portion unsold still remained in the "trustees." The deed which we have to construe states that there was an agreement for a sale between the "trustees" and the "beneficiaries," and in the operative part of the deed it is "declared and agreed that the trustees shall stand seised of the remaining parts or shares of and in the said rent and premises in trust for the trustees, their heirs and assigns." The trustees are, therefore, beneficial owners of the remaining parts or shares. Then each beneficial owner covenants to give an offer to the trustees first, of his part or share, when he may wish to sell. This is followed by a provision for determining the price to be paid in such case,

if the trustees wish to buy. So far there is a freehold interest. Then comes this important clause. "It is hereby expressly agreed and declared that the said trustees, or that the survivors or survivor of them, or that other the trustees or trustee for the time being of these presents shall respectively have an absolute power of sale over the said rent and premises, exercisable at their or his discretion without any further consent on the part of any person." I think myself, though I know not whether as to this I shall have the assent of my brothers, that it is a power extending as well to each separate and individual share or part as to the whole corpus; but at any rate, even if they cannot sell each part or share separately, they can sell the whole corpus without any consent on the part of the beneficiaries to the sale. Now, if that were a power which the trustees might exercise for their own benefit, pocketing the proceeds, as at present advised I should say that *Davis v. Waddington* (7 M. & G. 37) and *Beeson v. Burton* (20 L. T. Rep. O. S. 111; 12 C. B. 647; 2 Lut. 225, 232) applied, and that the deed would not operate to give an equitable freehold interest. I think, however, that this is not the true construction of this deed. A consideration was paid for the interest conveyed, as appears by the deed, in the latter portion of which is found this power of sale, so that the law would, in my opinion, imply that the proceeds were not to go into the pockets of the trustees. Although the power of sale is absolute, and no trust is expressed, yet a trust can be collected from the deed. Even if the Act of Parliament cited (23 & 24 Vict. c. 145) does not apply, the trustees cannot in defiance of the interests of the *cestui que trusts* forfeit the fifty guineas consideration money, so that until the arising of the event defeating the estate, until the exercise of the absolute power of sale, there is a freehold interest. It may be that a fraud upon the election law was intended, but the revising barrister has not so found. To create votes is not unlawful, but to create them so as to be in the absolute power of the creator is an object which, if unlawful, is not attained by this deed, for these trustees, whether they wish it or not, have created a franchise which they cannot extinguish without accounting to the voters created for the proceeds of the property, and so repaying them the amount invested. The decision of the revising barrister, therefore, is incorrect.

GROVE, J.—I am of the same opinion. Whether, if the interest were subject to revocation at the mere will of the trustees, it would be a freehold or not, we need not decide. I am far from saying that it would not be a freehold. Still, so long as it existed *Co. Lit.*, 42, and the cases cited in *Comyn's Digest*, Tit. Estate (A 6), and the notes to *Davis v. Waddington* (7 M. & G., note a), make it arguable that it would be a freehold, though defeasible at will; but that, as I say, is a question which it is unnecessary to decide. So, also, is it unnecessary to decide whether the power of sale is as to the whole property or as to each separate share. We can only look to the deed, not to any extraneous facts. Can we derive it therefrom as the intention of the parties that the money was given to persons who may at once forfeit the interests for which the money was paid and pocket the money? To construe the deed so would be contrary to the use and plain meaning of the word

"trustees." The trustees are so named in the deed, and the other contracting parties are called "beneficiaries," and give a consideration. A court of equity would impose a trust, and say they sold for the benefit of the beneficiaries. I think the statutes would supply this if it were needed, though, in my opinion, it is not necessary to rely upon the statute. As I read the Act (23 & 24 Vict. c. 145) it saves the insertion of certain provisions, and where they are not inserted adds to the deed what a court of equity would say was required for the just construction, and refers to the case of deeds in which persons called trustees have a power of sale. I think, therefore, that these persons did take an equitable freehold interest, and that as the sale was not to be for the trustees' own benefit it is clear that the appellant has such an interest as, the value being admittedly sufficient, will entitle him to the franchise.

ARCHIBALD, J.—I am of the same opinion. The question is, whether the appellant has a freehold interest. I think we must look at the deed and construe it without reference to the motives of the grantor, and when so looked at, the deed in its earlier part amply conveys a freehold interest. We need not decide whether the case of *Davis v. Waddington* (*supra*) governs the present case or not. I refrain from saying whether this case is similar to that case or to the case of *Beeson v. Burton* (*sup.*), but from the whole contents of the deed I am clear that the power of sale cannot be construed as Mr. Edwards has suggested. The first part of the deed gives an interest to the *cestuis que trust*, and then it provides that they may sell that interest. The trustees are to hold for the *cestuis que trust* their heirs and assigns.

Solicitors for the appellant, *Ridsdale, Craddock, and Ridsdale*.

Solicitors for the respondent, *Robinson and Preston*.

EXCHEQUER DIVISION.

Reported by H. LEIGH and PAWSON, Esqrs., Barristers-at-Law.

Nov. 13 and 15, 1875.

HALL v. NOTTINGHAM AND OTHERS.

Custom—Recreation in alieno solo—Right of parishioners to at any time in the year—Reasonableness and certainty of custom—"Any lawful and innocent recreation"—"Any time in the year"—Meaning of word "custom."

A custom was claimed for the inhabitants of a parish to erect a Maypole in a certain piece of inclosed ground of a private owner in the parish, and to dance round and about the same, and otherwise enjoy any lawful and innocent recreation at any time in the year on the said ground:

Held by the court (Kelly, C.B., and Cleasby and Amphlett, BB.) to be a good valid and reasonable custom, and sufficiently certain, on the authority of Abbott v. Weekly (1 Lev. 176) and Fitch v. Rawling and another (2 H. Black. 393) which were approved and followed in preference to Millechamp v. Johnson and others (Willes 205 (note b), which was also distinguished.

Per Cleasby, B. the meaning of the word "custom" in a case like this, is something having the effect of a local law, arising from the consent of all the inhabitants of a district from before the time of

legal memory. But the general law of the land requires that this kind of local law shall be both reasonable and certain.

THIS was an appeal from the decision of the Judge of the County Court of Shropshire, holden at Ludlow, in an action of trespass which was brought by the plaintiff against the defendants, parishioners of the parish of Ashford Carbonell in the county of Salop, for trespass on a field or piece of pasture land called "The Maypole Piece" situate in the said parish. The defendants pleaded a right under a custom which they claimed for the parishioners of Ashford Carbonell to go upon the said piece of land at all times, for the purpose of using the same as a recreation ground, and they disputed the plaintiff's right to the freehold of the land.

The learned judge, after hearing the evidence and arguments on both sides, found that the freehold was in the plaintiff and that the land in respect of which the rights were claimed, was a piece of glebe land situate in an enclosed field of the plaintiff, and which glebe was exchanged in the year 1780 by the incumbent of Ashford Carbonell (with the consent of the bishop) with a predecessor of the plaintiff for an equal portion of another field in the said parish, of equal value; that the said land over which the said rights were claimed had been regularly rated to the poor, and tithe had been paid and commuted for the same; and that the custom had been claimed for a number of years by the parish and also disputed by the owner for the time being for the same period. He found also that the said piece of land was subject to a lawful custom for the inhabitants of the said parish to erect a Maypole on the said ground, and dance round and about the same, and otherwise enjoy any lawful and innocent recreation at any time in the year on the said ground. Judgment having accordingly been given in favour of the defendants, the plaintiff brought the present appeal. The question for the opinion of the Court of Exchequer was whether the custom alleged was good in law.

Masterman, for the plaintiff (appellant), submitted that the custom was bad, inasmuch as it was too wide, general and uncertain. The particular games or sports were not specified, nor were the times at or during which they were to be indulged in limited: The defendants claimed a right by custom to dance and enjoy other recreations at any and all times of the year on the plaintiff's land, and that such a custom could not be upheld was clear from the case of *Millechamp v. Johnson and others* (Willes 205, note b) in which the custom claimed was for all the inhabitants of the Town of C. for the time being to have and enjoy the liberty and privilege of playing at all rural sports or games in the said close every year at all times of the year at their will and pleasure, and the court held that the custom as laid, extending to "any rural sports," was too general and uncertain. No doubt a somewhat similar custom was upheld in *Abbott v. Weekly* (1 Lev. 176) where a prescription for all the inhabitants of the vill, to dance at all times of the year at their free will for their recreation on the plaintiff's close was held a good custom. So also in *Fitch v. Rawling and others* (2 H. Blacks. p. 393) a custom for all the inhabitants of a parish to play at all kinds of lawful games and sports and pastimes in the close of A., at all seasonable times of the year, at their free will and pleasure, was held to be reasonable and good. But these cases are clearly distinguishable.

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In *Abbott v. Weekly* the recreation was specified and limited to dancing; whereas here it extended not only to dancing on May Day, but to all and any other times and to any other games and recreations, so that it might deprive the plaintiff of the entire use of his land for any agricultural or profitable purpose; and in *Fitch v. Rawling* the claim was limited to all seasonable times of the year, whereas in the present case there was no such limitation. [AMPHLETT, B. referred to *Race v. Ward and others* (4 E. & B. 702; 24 L. J. 153, Q. B.).] The court will be slow to hold the custom good as it is one "beyond reasonable control," and falls within the judgment of Lord St. Leonards, L. C. in the Scotch appeal case of *Dyce v. Hay*, in the House of Lords (1 Macq. H. L. Cases) where the right was claimed for the pursuer, as an inhabitant of Aberdeen, to go at all times for purposes of recreation upon the enclosed land of the appellant, and in his judgment there at p. 309 his Lordship said, "Now that I conceive is a claim so large as to be entirely inconsistent with the rights of property, for no man can be considered to have a right of property worth holding in a soil over which the whole world has the privilege to walk and disport themselves at pleasure." [KELLY, C.B.—That case was a case of prescription.]

Nov. 15.—*Bosanquet*, for the defendants (respondents), *contra*, contended that the custom claimed was a perfectly good and valid one. The proposition contended for by the plaintiff is that there cannot be so wide a custom *in alieno solo*, and, inasmuch as a parish cannot as an individual person have a freehold, it amounts to saying that a piece of ground cannot be dedicated to the use of a parish so that the parishioners may have a right to play games therein, which would be a practical denial of the right to a village green. *Abbott v. Weekly* (*ubi sup.*) is it is submitted a conclusive authority for the defendants. The custom under which the trespass in that case was justified was alleged to be for all the inhabitants of the vill to dance on the *locus in quo* at all times of the year. The objection was taken after verdict that a prescription to dance in the freehold of another and spoil his grass was void, especially as it was said, "at all times of the year" and not at all seasonable times. But the court said, "This is a good custom and it is necessary for the inhabitants to have their recreation." So in *Fitch v. Rawling* (*ubi sup.*) a custom, for "all the inhabitants of a parish to play at all kinds of lawful games, sports, and pastimes, in the close of A. at all seasonable times of the year at their free will and pleasure" was held to be good; the court there resting their judgment on *Weekly v. Abbott* (*ubi sup.*) and Buller, J. in his judgment there says, "In the case in *Levinz* (*Abbott v. Weekly*) the court say that it is necessary for the inhabitants to have their recreation. If so, it is a matter of law, and though there may be precedents which state such custom to be for either the health or recreation of the inhabitants, yet where the court lay it down that recreation is necessary, it is not necessary to be averred in pleading." [KELLY, C.B.—The right claimed in the present case is the use of the whole surface of the soil of the plaintiff's land at all times.] That is so, but, though no doubt such a custom might and probably would practically deprive the owner of the use and profit of the surface, the current of authority is in its favour. And as to *Millechamp v. Johnson*

(*ubi sup.*) relied on by the plaintiff, the only case that is at all opposed to the contention of the defendants, the decision there that the custom as laid, extending to "any rural sports," was too general and uncertain, is not good law; whilst as to "all times of the year," the court there expressly held that these "must be taken to mean all legal and seasonable times of the year," and that this did not take away the profits of the land. Sir W. Blackstone (2 Black. Comm. p. 263 of the 16th edition by Coleridge and p. 293 of the 20th edition by Stewart) in pointing out the distinction between custom and prescription, the former being "properly a local usage and not annexed to any person," says, "If there be a usage in the parish of Dale that all the inhabitants of that parish may dance on a certain close at all times for their recreation (which is held to be a lawful usage) this is strictly a custom, for it is applied to the place in general and not to any particular person," and he cites *Abbott v. Weekly* as upholding such a custom. The question arose again in this court in *Mounsey v. Ismay* (7 L. T. Rep. N. S. 767; 1 H. & C. 729; 12 L. J., N. S., 94, Ex.) and both Pollock, C.B. and Martin, B. in their judgments refer to *Abbott v. Weekly* as distinctly holding such a custom as the present though not limited to "seasonable times" to be good. The case of *Dyce v. Hay* (*ubi sup.*) though cited by my friend in support of the plaintiff's case, in truth is an authority in favour of the plaintiff, for the Lord Chancellor (Lord St. Leonards, in his judgment says "There is one thing as to which I must particularly guard myself, and I must anxiously beg that the House may not be taken as expressing any adverse opinion; I mean that right to which the right in question in this case has been improperly assimilated; the right of village greens and playgrounds the enjoyment of which has been dedicated to the public . . . It is now admitted to be clear that the law of Scotland in that respect agrees with the law of England. If there be a piece of ground uninclosed (not that I mean to say inclosure would make any difference, unless there was an exercise of an adverse right), but I say, if there be a piece of ground uninclosed, and dedicated from time immemorial to the public from which a custom may be laid for sports generally or for village recreation, nobody I trust will suppose that such rights can at all be affected or disturbed by any decision at which your Lordships may arrive upon the present appeal. Those rights will remain untouched, and are unassailable, be the fate of this case what it may." [KELLY, C.B.—As far as it may operate, that opinion of Lord St. Leonards, although the decision in the particular case is the other way, is no doubt in your favour.] There is nothing unreasonable in one piece of ground in a parish being dedicated to the recreative use of the inhabitants of the parish, and all the cases recognise the validity of such a custom. [AMPHLETT, B.—In his judgment in *Race v. Ward* (4 E. & B. at p. 713) Lord Campbell, C.J. refers to the case of *Abbott v. Weekly* in *Levinz* (*ubi sup.*) and says "It is a good custom for all the inhabitants of a parish to dance in a particular spot or the like."]

Masterman in reply.—The assumption that this ground is a village green, and that its destruction will be wrought by the court giving judgment for the plaintiff, has no foundation in fact. The close in question is an inclosed piece of land about an acre in extent, and it is found by the case to be the

plaintiff's freehold; it was formerly glebe land. It is rated to the poor and tithes have been commuted and paid in respect of it. Certainly since 1780 it has not in any way been waste of the manor. Taking its name "The Maypole Piece," the utmost there could be gotten from that would be that, as in *Mounsey v. Ismay*, the parishioners might have a right to dance there on May Day. All the cases that have been cited are cases of limited rights; and *Millechamp v. Johnson* shows that a custom for all kinds of games at all times is uncertain and too large.

KELLY, C.B.—I have had very considerable doubt in the course of the argument of this case, arising principally from the fact that, to hold the custom claimed by the defendants here to be good, would be practically to deprive the owner of the freehold of the whole beneficial enjoyment and use of the entire surface of the piece of ground in question. It is a case, therefore, which requires very clear authority to be shown in favour of the defendants' contention that the custom as claimed by them is a good custom. Now the authorities which have been cited to us on the one side and the other in argument are the case of *Millechamp v. Johnson* on the part of the plaintiff, and the cases of *Abbott v. Weekly* and *Fitch v. Rawling* on the part of the defendants; and these authorities are entirely opposed to each other, and, it being impossible to reconcile them, the court have to decide between them. In *Millechamp v. Johnson* a custom for "all the inhabitants of a town to play at any rural sports or games in the close of the plaintiff at all times of the year at their will and pleasure" was held to be a bad custom; though not on the ground that the claim extended to "all times of the year," for as to that objection which was taken in the case, the court were of opinion that "there was no weight in it," for that "all times of the year" must be taken to mean all legal and reasonable times of the year," but on the ground that "the custom as laid extending to any rural sports was too general and uncertain." On the other hand we find in *Abbott v. Weekly* and *Fitch v. Rawling* (*ubi sup.* respectively) decisions, which, if they are to be followed, are decisive of the present case in favour of the defendants. In both those cases, as in the present case, the right claimed was unlimited both as to the games, sports, pastimes, and recreations to be indulged in on the ground, and which when indulged in would necessarily occupy the whole surface of the land, but also as to the times when the right might be exercised, for that extended to "all times of the year;" so that there was no moment of time when the owner of the soil could enjoy or make any profitable use of it, as there are some games and sports which in being played or pursued necessarily occupy every inch of the surface of the ground so played upon. The whole question then is, which of these conflicting authorities we are to follow and give effect to. We are dealing, it must be remembered, with a matter affecting an individual owner of a small piece of land on the one hand, and the rights and privileges of all the inhabitants of an entire parish on the other; and it is so much for the physical and moral benefit and advantage of those inhabitants that they should have rational and healthful recreation, and that they should have a piece of ground on which they may be able to indulge in the exercise of all lawful sports, games, and pastimes, that I think the benefit and advantage accruing to them from the right claimed out-

weigh the injury and disadvantage arising therefrom to the owner of the land. Having then the authority of the cases of *Abbott v. Weekly* and *Fitch v. Rawling* in favour clearly of the defendants in this question, to say nothing of the additional weight given to that authority by the observations of Pollock, C.B. and Martin, B. in *Mounsey v. Ismay* (*ubi sup.*) which have been referred to in the course of the argument, and finding only the solitary and not very decisive authority of *Millechamp v. Johnson* (*ubi sup.*) the other way, I think we ought to adhere to and to follow the first mentioned authorities, and to hold in favour of the inhabitants of this parish that the custom claimed by them in this case is lawful, reasonable and good.

CLEASBY, B.—I am quite of the same opinion. The one question put to us and which we have to consider and answer, is whether the custom claimed in this case is a good and valid custom and the judgment of the County Court Judge correct? The custom as claimed, and found by the judge, is for the inhabitants of the parish in question "to erect a Maypole on the ground, and dance round and about the same, and otherwise enjoy any lawful and innocent recreation at any times in the year on the said ground." Now I am of opinion that that is a good and valid custom. I believe that the proper meaning of the word "custom" as used and applied in a case like the present, is something having the effect of a local law arising from the consent of all the inhabitants of a particular district from before the time of legal memory. But the general law of the land requires that this kind of local law shall be both reasonable and certain. Now, with regard to the reasonableness of this custom, it seems to me that all the authorities to which our attention has been directed in the course of the argument, are conclusive in favour of the custom on that point. There are, in the first place, the cases of *Abbott v. Weekly* and *Fitch v. Rawling* (*ubi sup.*) with which, so far as the reasoning goes, the case of *Millechamp v. Johnson*, in Willes agrees; we have further the judgment of Lord Campbell, C.J. in *Race v. Ward* (*ubi sup.*) and the opinion of Lord St. Leonards in *Dyce v. Hay* (*ubi sup.*) in the House of Lords. The other question, as to the custom being sufficiently certain, is a more difficult one. In *Millechamp v. Johnson* (*ubi sup.*) the right was claimed to play at "any rural sports or games," and that was held to be too general and uncertain; but, in the present case, the custom claimed is "to erect a Maypole and dance around it and otherwise enjoy any lawful and innocent recreation." Now I do not think that this addition to the specified sport of "erecting a Maypole and dancing round it," of "otherwise enjoying any lawful recreation" makes the custom bad on the ground of uncertainty. It would not, I think, be reasonable to expect that any more specific description of the nature of the particular sports or recreation to be indulged in should be given. They specify the erection of a Maypole and dancing, and then add generally the enjoying "any lawful and innocent recreation." I do not think, therefore, that we should be justified, having regard to the authorities, in saying that there is such uncertainty in the present case as to invalidate the custom; though, no doubt as appears from the note to the case in Willes' Reports, the merely saying "any rural sports," without any thing more, was held to be too uncertain. On the

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other hand, in *Fitch v. Rawling* (*ubi sup.*) a custom to play at "all kinds of lawful games, sports, and pastimes at all seasonable times of the year" was held to be a good and valid custom, and the only distinction between that case and the present case is that, in the present case, the time is not limited, it being "at any times in the year;" but then *Millechamp v. Johnson* and other subsequent cases, have decided that that must be taken to mean "all seasonable times of the year." I am of opinion, therefore, on the authority of *Abbott v. Weekly* and *Fitch v. Rawling* that the custom in the present case is a good, reasonable, and valid custom and sufficiently certain.

AMPHLETT, B.—I am of the same opinion. Certainly a custom to be valid must be both reasonable and certain. A test of unreasonableness no doubt is the fact that the owner of the land may, by the exercise of the custom, be deprived of all beneficial use of the surface. There may be many circumstances, however, which may counterbalance that one circumstance, and so the custom may, nevertheless, well be held to be reasonable. Take the present case, for instance, of a piece of land in a parish being appropriated to the recreation of the inhabitants of the parish. Would it have been unreasonable at the time of the inclosure of this land that a small piece of land should, for the benefit of the parishioners, be appropriated or dedicated to the purpose of their recreation? And even if it might be that its use for such recreative purposes might deprive the owner of the beneficial enjoyment of the surface, it might not have been unreasonable in those days that a piece of land would be so appropriated; and the Legislature seems to have been and to be of that opinion, for it is a common thing to make it a condition in inclosure Acts, that a portion of the land shall be set apart for the purposes of recreation; thus showing that what is reasonable now was or may have been reasonable 500 years ago. But another objection to the custom in this case was that it was uncertain, inasmuch as it did not specify what sports and games in particular were to be played and indulged in on the ground. It does not indeed specify any particular mode of recreation beyond erecting a Maypole and dancing round it, and "otherwise enjoying any lawful recreation at any times in the year." I think that that is reasonably certain; and surely it is but reasonable that the parishioners should have some place in which to recreate themselves and enjoy the benefit of fresh air and out of door pastimes. Apart from authority such a custom, I think, ought to be held good, and all the cases except only that cited from Willes Reports (*ubi sup.*) are strongly in favour of it. With regard to the question of the time of enjoyment I cannot distinguish the present case from the decision in Willes, where the court said that "all times of the year" must be taken to mean "all legal and seasonable times of the year." We have also the high sanction of the opinion of Lord St. Leonards on the subject, who in his judgment in that case in the House of Lords (*ubi sup.*) seems to have been quite astonished that, at this time of day, any doubt should be thrown upon the right of the inhabitants of towns and villages to these village greens and playgrounds, the enjoyment of which has been dedicated to the public.

Judgment for the defendants.

Solicitors for the plaintiff (appellant), *Abbott, Jenkins, and Abbott*, agents for *Bowles*, Ludlow.

Solicitors for the defendants (respondents), *Pownall, Son, Cross, and Knott*, agents for *Wayman*, Ludlow.

Monday, Nov. 22, 1875.

BEESTON v. BEESTON.

"Gaming and wagering"—Contract by way of—Cheque given for share of winnings—Illegality—Betting agent—Liability of to account—8 & 9 Vict. c. 109, s. 18.

An agreement between A. and B. that B. should employ certain money of A., paid by A. to B. for the purpose, together with other money of B.'s own, in making and laying bets and wagers upon the result of certain horse races, and should pay to A. a certain proportion of such sums as B. should win by such betting and wagering, is not "a contract or agreement by way of gaming or wagering" within sect. 18 of the 8 & 9 Vict. c. 109; nor is A. prevented by that statute from suing B. on a cheque given by him to A. for the latter's proportion of the winnings which were received by B. to the joint use of A. and himself, and for which he was bound to account to A.

So held, by Cleasby, Pollock, and Amphlett, BB, on the authority of and following *Johnson v. Lansley* (12 C. B. 468).

To a declaration containing a count on a cheque or order, drawn by the defendant in favour of and made payable to the plaintiff for 50l., and the common money counts, the defendant pleaded (amongst other pleas) for a third plea as to the first count, and so much of the plaintiff's claim under the money counts as related to money alleged to be due upon accounts stated, that the said accounts stated [were stated of and concerning the said cheque or order in the first count mentioned and the consideration for the same and not otherwise; and that the defendant made and delivered the said cheque or order to, and the same was received by, the plaintiff for and in respect of moneys alleged to be due from the defendant to the plaintiff, upon a contract made between them by way of wagering, that is to say, a contract whereby it was agreed between the plaintiff and the defendant that the plaintiff should pay certain moneys to the defendant, and that the defendant should employ and use the said moneys and certain moneys of the defendant in making and laying bets and wagers upon the result of certain horse races, and that the defendant should, subject to certain terms and conditions agreed upon between the plaintiff and the defendant, pay to the plaintiff a certain proportion of such sums as he should win by betting and wagering on the said horse races with the said moneys; and the money so alleged to be due on the said contract, and in respect of which the said cheque or order was given and the said accounts were stated, was money alleged to have been won upon the said bets and wagers, and except as aforesaid there never was any value or consideration for the making or payment of the said cheque, or order, or stating the said accounts by the defendant.

Demurrer, on the ground that the illegality of bets and wagers between the defendant and persons other than the plaintiff is no defence to the

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plaintiff's claim to a certain proportion of such sum as the defendant should win by such betting and wagering.

Joinder in demurrer.

R. Purvis for the plaintiff in support of the demurrer to the plea.—The defendant will no doubt rely on sect. 18 of the 8 & 9 Vict. c. 109 (the Act to amend the law concerning Games and Wagers), which enacts "That all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made." That section however it is submitted does not apply to the present case. No doubt a betting or wagering contract is thereby rendered void, but is not made illegal, and that this is so is clear from the case of *Fitch v. Jones* (5 E. & B. 238; 24 L. J. 293, Q.B.). That was an action on a promissory note by an indorsee against the maker, and the plea was that the defendant made and delivered the note to the indorser in payment of a bet on the amount of hop duty, and that the plaintiff took it without value, and it was held by the Court of Queen's Bench that, although proof that a negotiable instrument was affected with fraud or illegality in the hands of a previous holder would call on the plaintiff to prove value, yet that the presumption did not arise where the previous holder merely held without consideration; and that a bet, though void, and therefore no consideration, was not illegal so as to raise the presumption of indorsement without value. Lord Campbell, C.J., in his judgment there said, "The question comes to be whether this note was given for a consideration merely equivalent to no consideration, or whether it was given in an illegal transaction. I am of opinion that the note did not take its inception in illegality within the meaning of the rule. The note was given to secure payment of a wagering contract which, even before stat. 8 & 9 Vict. c. 109, the law would not enforce, but it was not illegal; there is no penalty attached to such a wager, it is not in violation of any statute, nor of the common law, but is simply void, so that the consideration was not an illegal consideration, but equivalent to no consideration at all." And Erle, J., in the same case said, "The question is whether this note was brought within the category of notes tainted with illegality within the meaning of the rule. I am of opinion that it was not. I think that the defendant might, without violating any law, make a wager. If he lost, he might, without violating any law, pay what he had lost, or give a note for the amount." So, again, in *Knight v. Cambers* (15 C. B. 562; 24 L. J. 121, C.P.), it was held to be no answer to an action for money paid by the plaintiff for the defendant's use at his request, that the money was paid in respect of losses on wagering contracts made void by the 8 & 9 Vict. c. 109, s. 18. [AMPHLETT, B. refers to *Sharp v. Taylor* (2 Phillip's Chanc. Rep. 801), a case before Lord Cottenham, L.C., which illustrates the distinction between enforcing illegal contracts and asserting title to money which has arisen from them, and where it was held that one of two parties, who had possessed himself of the property of the firm, cannot be allowed

to retain it merely by showing that, in realizing it, some provision of some Act of Parliament had been violated or neglected.] That case is strongly in favour of the plaintiff here. To the same effect as *Knight v. Cambers*, already cited, is that of *Jessopp v. Lutwyche* (10 Ex. 614; 24 L. J. 65, Ex.) This is not the case of a winner of a bet on a horse race suing the loser for the amount, to which the statute no doubt would apply, and the money would be irrecoverable; but it is in the nature of an action for money had and received. That the plaintiff was privy to the original transaction is immaterial. Where A. has received money from B. to the use of C. on an illegal contract or consideration it may nevertheless be recovered by C. in an action for money had and received, and A. would not be allowed to set up the illegality of the contract or consideration as a defence to the action:

Tenant v. Elliott, 1 Bos. & Pul. 3;

Farmer v. Russell and another, 1b. 236.

A more recent case of *Johnson v. Laneley* (12 C.B. 468) is precisely in point. There A. and B. jointly made bets with third persons on horse races. B. received the money, and gave A. a bill accepted by C. for his share, and it was held that A. was not prohibited by sect. 18 of the 8 & 9 Vict. c. 109 from suing C. on the bill. As was said by Maule J., in that case, "A duty arises on the part of the defendant to pay over his share to his co-partner." The defendant was bound to account for this money to the plaintiff. The losers having paid the defendant could not get the money back, and it would be unjust that the latter should retain it. He cited also, *Nicholson v. Gooch* (5 Q. B. 999; 25 L. J. 137, Q.B.), and particularly the observations of Crompton J. in that case.

Hill v. Fox, in error from this court, 4 H. & N. 352;

Flight v. Reed, 8 L. T. Rep. N. S. 638; 1 H. & C. 703; 32 L. J. 265, Eq.;

Bubb v. Yelverton, (before the M. R.) 22 L. T. Rep. N. S. 258; L. Rep. 9 Eq. Cas. 471; 59 L. J. 428, Ch.

W. Graham, for the defendant, *contra*, supported the plea, and contended that it was good. It was not necessary to dispute much of the argument, or the cases cited on the other side. The ground taken by the defendant here is that if no consideration was given for this cheque the plaintiff cannot recover upon it. The present is an attempt to recover on an illegal contract, and the case differs entirely from the cases of money had and received. The consideration in this case was illegal, and the transaction wholly void under the statute of 5 & 6 Will. 4, c. 41, sect. 1. It is a different thing altogether from a bet on which ready money is paid at the moment. Here the contract was that A. should go and bet on horse racing, and pay the proceeds of his winnings or the part of them to B. That was a void contract under sect. 18 of the 8 & 9 Vict. c. 109, and if so there was no consideration for the defendant's cheque. It is not a contract to pay a specific sum, but a contract to advance money for purposes of gambling. The fact that the defendant has been paid the various bets, does not make him an agent. The case is within the very mischief against which the Act was directed, and the contract being void as a contract "by way of gaming or wagering" within sect. 18, it is submitted, is void, and the demurrer to it should be overruled.

Purvis was not called on to reply.

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CLEASBY, B.—I am of opinion that sect. 18 of the 8 & 9 Vict. c. 109 does not apply to the present case. [His Lordship read the section]. Now, it is necessary that we should see what the cause of action here is. It is the receipt by the defendant of money for which he ought and is bound to account to the plaintiff. Why is he bound to account for it? Because it has been paid to him, and he agreed to do so. The obligation to account for this money to the plaintiff is on the defendant, and the only reason given by him in answer to the plaintiff's claim is, that he is not bound to account by reason of its being a wagering contract which the statute 8 & 9 Vict. c. 109, s. 18 has prohibited and rendered illegal and void, and which therefore cannot be enforced in an action by the plaintiff. I am of opinion that that is not so. I do not think that this was an illegal transaction. It was not, in my opinion, a contract "by way of gaming or wagering," which is what sect. 18 says "shall be null and void." The mere act of betting on a horse race is not illegal in the sense that any and every transaction connected with or arising out of such betting is tainted with illegality. The case of *Johnson v. Llewellyn* (*ubi sup.*) which was cited in argument, is in point, and cannot, I think, be distinguished from the present case. A. and B. there jointly made bets on a horse race, and B. received the money and gave A. a bill for his proportion of the winnings. In that case, as in the present, there was an attempt to raise the defence that A. was precluded by sect. 18 of the 8 & 9 Vict. c. 109, from suing or recovering on the bill; but the court held that he was not prohibited by that statute from recovering the amount of the bill. The observations of Jervis, C.J., and Maule, J., in that case, are in point here, and show the ground on which the decision there proceeded. Jervis, C.J., says, "Before the passing of the 8 & 9 Vict. c. 109, there were various statutes relating to betting on horse races, all of which were repealed by the 15th section of that Act." Then, after reading sect. 18, the Chief Justice proceeds as follows, "There is nothing there (sect. 18) to show this transaction illegal. Hunt was bound upon every principle of justice to pay this money to Johnson, and the circumstance of Lansley being substituted for Hunt, cannot make that illegal which, as between Johnson and Hunt would not have been so." And Maule, J. says, "The money which was the consideration for this bill was money which Hunt was bound to account for to the plaintiff. The losers could not get it back from Hunt, and it would be a very unjust thing that he should keep the whole. Before the statute 8 & 9 Vict. c. 109, he clearly would have been bound to pay over the money, and I find nothing in that statute to excuse him from doing so." The ground on which the court held that A. the plaintiff, was entitled to recover in that case, was that the defendant, or B., for whom the defendant was substituted, was A.'s agent, and had, as such, received money in respect of bets made by them jointly, of which he was bound to account to A. for his share. That is precisely the present case, with this difference only between the two cases, that there it was known that A. and B. were jointly interested in the bets, whereas here it was not known that the plaintiff had any interest at all in the matter. On the authority of that case, therefore, I am clearly of opinion that the plaintiff may recover from the defendant the

money which has been paid to the defendant under this contract. This is not "a contract by way of gaming or wagering," and is, therefore, not void under sect. 18 of the statute in question, nor is this an action to recover money due on such a contract. The demurrer to the plea must therefore be allowed, and our judgment be for the plaintiff.

POLLOCK, B.—I also think that it is clear that this is a bad plea. In the first place the cheque on which this action has been brought was given for money which had been paid to and was then actually in the defendant's hands, and which was in fact the money of the plaintiff. There was, therefore, beyond all question, good consideration for the cheque. But it is said that the defendant is not bound to account for this money, or to pay the amount of the cheque to the plaintiff, because sect. 18 of the 8 & 9 Vict. c. 109 prohibits the bringing or maintaining any suit for the recovery of any money alleged to have been won upon any wager, &c. [His Lordship read the section.] Now I do not think that this section avails the defendant here. It is clear that this action is not brought "for the recovery of money won upon a wager," within the meaning of that section; that section does not apply to a case like the present, but to a case where the action is brought by one party to the wager against the other party to it, or by the winner of the bet against the stakeholder between the two. But it is said that this betting between the defendant and third persons is illegal, and therefore the agreement between the plaintiff and the defendant is tainted with illegality. But betting is not in itself illegal at common law, nor by the statute of 9 Anne, c. 74, or the 5 & 6 Will. 4, c. 41, sect. 1; which latter Act relates only to securities given in respect of money lost at play, and enacts that such securities shall not, as theretofore, be absolutely void, but shall be deemed to have been made and given for an illegal consideration. And the 8 & 9 Vict. c. 109, sect. 18, makes such wagering contracts void, but does not make them illegal. I agree with the observation of Sir J. Byles on this matter, in Byles on Bills, where, at p. 137 of the 10th edition, referring to the statute of 8 & 9 Vict. c. 109, s. 18, the learned writer says, "It further makes all gaming contracts, written or oral, null and void," and then he adds the following note: "But not illegal in the sense of criminal, or in such a sense as to impose on the subsequent holder of a negotiable instrument the obligation of proving the consideration he himself gave for it," and he then cites the case of *Fitch v. Jones* (*ubi sup.*). For these reasons I am of opinion that our judgment on this demurrer should be in favour of the plaintiff.

AMPHLETT, B.—I am entirely of the same opinion. When we look at the contract between the plaintiff and defendant in this case, it appears to me that there is nothing illegal in it. [His Lordship read the agreement as set forth in the plea]. That is an agreement between them that the defendant should employ the plaintiff's money, together with money of his own, in betting upon horse races, and that the winnings should be shared between them; and to such a case the Act of 8 & 9 Vict. c. 109, s. 18 has no application. What that Act means and what it says is, that no money lost on a bet of this kind shall be recoverable from the loser, but it says not a word about making betting,

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or such a contract as the present one, illegal. That being so, what illegality is there in A. saying to B.: "Go and make bets on our joint account, and whatever the winnings on such bets may be shall be shared between us." That is exactly what took place in the present case. The defendant, using the plaintiff's money and his own, made certain bets which he won, and which were paid to him; when he received money in payment of such bets, he received it to the joint use of the plaintiff and himself, and he then gave the cheque in question to the plaintiff for his agreed proportion of such winnings. Now I see nothing illegal in that transaction. The case of *Sharp v. Taylor* (in 2 Phillips) to which I referred during the argument, is in point very strongly in favour of the plaintiff here. There A. and B., subjects of this country, purchased an American built ship on a joint speculation with a view of employing her in the trade between the two countries until they could sell her at a profit, and for that purpose they had her registered in America in the name of C., a citizen of that country, upon a false declaration that she was *bonâ fide* the sole property of C. After some voyages, B., who had had the management of her, attempted to exclude A. from his share in the speculation, and in spite of A. sent her on another voyage to America. In a suit by A. against B. for an account and payment of his share of the realised profits, the contention on the part of B., the defendant, was that A.'s (the plaintiff's) case, involved the confession of a falsehood, and a deliberate violation of the navigation laws of both countries, and that a title to relief in a court of justice could not be founded on it; that if the plaintiff's case was correct, the ship had been engaged in an illegal traffic, and the plaintiff could not assert in a court of justice any title to the profits of it. But it was held by Lord Cottenham, L.C., that, even supposing the declaration and registration to have been a fraud upon the American law, and the employment of the ship as registered to have been a fraud upon the English navigation laws, such fraud would not prevent A. from maintaining his suit for an account and payment of his share of the realised profits of the speculation. In his judgment in that case, Lord Cottenham said (at p. 818 of 2 Phill.): "As between these two, can their supposed evasion of the law be set up as a defence by one against the otherwise clear title of the other? In this partnership, can the one tenant in common dispute the title common to both? Can one of two partners possess himself of the property of the firm, and be permitted to retain it, if he can show that, in realizing it, some provision in some Act of Parliament has been violated or neglected? Can one of these two partners, in any trade, defeat the other by showing that there was some irregularity in passing the goods through the custom house? The answer to this, as to the former case, will be that the transaction is completed and closed, and will not be in any manner affected by what the court is asked to do as between the parties." Therefore, in the present case, I say that, if it be made out that there was something illegal in this kind of wagering, yet, if the loser has not raised the question of illegality, but has paid the money over, it is not recoverable back by the other party. But it is not necessary to go so far here, because there is nothing illegal in horseracing. As to the other point

that was raised by Mr. Graham, viz., that this cheque was a void security under sect. 1 of the 5 & 6 Will. 4, c. 41, I agree with my learned brothers that that objection is not maintainable. The securities made void by that Act are securities given in payment of a gambling debt. This cheque was not given for the security of such debt, but in payment of half the amount of money which had been received by the defendant, and which he actually had in his possession at the time, and was bound to account for to the plaintiff.

Judgment for the defendant.

Solicitor for the plaintiff, J. T. Luscombe.

Solicitors for the defendant, Monckton, Long, and Co.

Monday, Dec. 6, 1875.

(Before KELLY, C.B., and CLEASBY and POLLOCK, BB.)

BROWN (*qui tam*, &c.) v. EVANS.

Municipal Corporations Act (5 & 6 Will. 4, c. 76), s. 102—*Municipal Corporations Act Amendment Act* (24 & 25 Vict. c. 75) s. 5—Clerk of the peace for the county—Clerk to the justices of the borough—Appointment of same person to both offices—Legality of appointment—Appointing or continuing—Liability of justices to penalty under sect. 5—Action by informer—Construction and operation of statute.

The Municipal Corporations Act Amendment Act of 1861 (24 & 25 Vict. c. 75), s. 5, repeals certain provisions of sect. 102 of the principal Act (5 & 6 Will. 4, c. 76), disqualifying certain persons for holding the office of clerk to the justices of a borough, and in lieu thereof enacts that "it shall not be lawful for the justices of any borough to appoint or continue as their clerk any . . . clerk of the peace of such borough, or of the county in which such borough is situate, or the partner of such clerk of the peace . . . and any person who shall in anywise offend in the premises shall, for every such offence, forfeit and pay the sum of 100l., one moiety, &c. Provided that nothing herein contained shall prevent the justices of any borough from re-appointing as their clerk any clerk of the peace, or partner of such clerk of the peace, of their borough, or of the county in which such borough is situate, who, at the time of the passing of this Act shall be, or who shall not, at the time of such re-appointment, have ceased to be, the clerk of such justices."

In June 1845, F., who, from before 1840, had been, and still was, a partner in the firm of P. and F., attorneys and solicitors, in the borough of N., in the county of M., being a borough having a separate commission of the peace, under the *Municipal Corporations Act* (5 & 6 Will. 4, c. 76), was appointed, and acted as clerk to the justices of the said borough. In March 1848, P., being still a member of the said firm, was appointed and acted as clerk of the peace for the county of M., and continued as such until his death, in June 1874. Soon after his appointment P. appointed F. his deputy clerk of the peace, and since 1870 F. discharged all the duties of the office down to P.'s death. Upon the passing of the *Municipal Corporations Act Amendment Act* (24 & 25 Vict. c. 75) in 1861, the justices of the said borough re-appointed F. as their clerk, and he continued to act as such clerk. On P.'s death F. was, on 24th

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June 1874, appointed and accepted the office of clerk of the peace for the said county, and has continued to act as such since that time.

On the 9th Nov. 1874, at a properly convened meeting, the justices of the said borough passed the following resolution:—"If and so far as it may be necessary, in accordance with the provisions of sect. 5 of the statute 24 & 25 Vict. c. 75, Mr. F. be re-appointed clerk to the justices of the said borough." F. has continued to fill the offices and to act as clerk of the peace of the said county, and of clerk to the justices of the said borough thence hitherto. The defendant took part in the meeting of the 9th Nov. 1874, and voted with other justices for the above resolution, and has since continued to act as a justice of the peace for the said borough, and so acted on the 13th Nov. 1874.

The plaintiff brought a *qui tam* action against the defendant to recover 100l. penalty, and by the first count of his declaration charged that the defendant, after the passing of the 24 & 25 Vict. c. 75, then being and acting as a justice of the peace for the said borough, did appoint F. to be clerk to the justices of the said borough, he, F., being at the time of the said appointment clerk of the peace for the county of M., contrary to the form, &c. And by the second count he charged that the defendant being and acting as such magistrate as aforesaid, wilfully and unlawfully continued the said F. as clerk to the said justices, between the 3rd June and the 13th Nov. 1874, after the passing of the said last-mentioned Act, and contrary to the form, &c.

The notice of action delivered by the plaintiff related only to the appointing and continuing F. as clerk to the justices on the 13th Nov. 1874, he being at the time clerk of the peace for the county.

On a special case stated by order of the judge at *Nisi Prius*, it was

Held, by the court (Kelly, C.B., and Cleasby and Pollock, BB.), giving judgment for the defendant, that although the holding of the two offices together by one individual is illegal within the general purview of the two Acts of Parliament (5 & 6 Will. 4, c. 76, and 24 & 25 Vict. c. 75), yet by the express terms of the proviso in sect. 5 of the latter Act, which was inserted to save vested interests existing at the passing of the Act, the appointment or re-appointment of F. as justices' clerk in Nov. 1874, was rendered lawful by reason that he was at the time of the passing of the Act, in 1861, clerk to the justices of the said borough.

Per Cleasby, B.—The operation of the proviso in sect. 5 is not confined to one act of appointment or re-appointment, and the justices may re-appoint from time to time a person who fulfils the conditions therein mentioned.

Quære, per Kelly, C.B., whether the merely continuing, without formal re-appointment, a clerk to the justices who has accepted the office of clerk of the peace, would be within the penal provisions of the section, and render the justices liable to a penalty?

SPECIAL CASE.

THIS is one of twenty-six distinct actions brought by the same plaintiff, an informer, against the defendant and other gentlemen, Justices of the Peace for the borough of Newport, Monmouthshire, to recover penalties, under the Municipal Corporations Act Amendment Act of 1861 (24 & 25 Vict. c. 75), sect. 5, and which action came on

to be tried before Archibald, J., at the Spring Assizes 1875, at Monmouth, when a verdict was found for the plaintiff by consent for 100l. (one penalty) subject to the opinion and determination of the Court of Exchequer upon the following

CASE.

1. The borough of Newport, in the county of Monmouth, has a separate commission of the peace, under 5 & 6 Will. 4, cap. 76, sect. 98, but has no recorder or separate quarter sessions for the trial of prisoners, and prisoners committed for trial by the borough justices are tried at the assizes held at Monmouth, or at the general quarter sessions of the peace for the county held at Usk.

3. The defendant became in or about 1850, and still is, a justice of the peace for the borough of Newport.

4. Prior to 1840, Mr. Charles Barton Fox became a partner in the firm of Prothero and Fox, attorneys-at-law and solicitors, practising at Newport, in the county of Monmouth, and in June 1845, Mr. Fox was appointed and acted as clerk to the justices of the borough of Newport.

5. In March 1848, the said Mr. Prothero being still a member of the said firm of Prothero and Fox, was appointed and acted as clerk of the peace for the county of Monmouth, and continued as such clerk of the peace until his death on the 16th June 1874.

6. Mr. Prothero soon after his appointment nominated Mr. Fox deputy clerk of the peace for the said county, and since the year 1870 the said Mr. Fox discharged all the duties of the office down to the said Mr. Prothero's death.

7. Upon the passing of the said Act, 24 & 25 Vict. c. 75, in 1861, the justices of the borough of Newport re-appointed Mr. Fox clerk to the justices of the said borough, and he continued to act as such clerk.

8. On the 24th June 1874, Mr. Fox was appointed to and accepted the office of clerk of the peace for the county of Monmouth, and has continued to act as such clerk of the peace since that time.

9. On the 9th Nov. 1874, at a properly convened meeting, the justices of the borough of Newport passed the following resolution:—"If and so far as it may be necessary, in accordance with the provisions of sect. 5 of the statute 24 & 25 Vict. c. 75, Mr. C. B. Fox be re-appointed clerk to the justices of the said borough."

10. Mr. Fox has continued to fill the office of and act as clerk of the peace for the county of Monmouth, and also to fill the office of and act as clerk to the justices of the said borough of Newport, in the county of Monmouth thence hitherto.

11. The defendant took part in the said meeting held on the 9th Nov. 1874, and voted, with eleven other justices, for the said resolution, and has since continued to act as a justice of the peace for the said borough, and so acted on 13th Nov. 1874.

The notice of action and pleadings herein are set out in the appendix, and are to be referred to and taken as part of this case.

The question for the opinion of the court is, first, whether the notice of action is sufficient, and, secondly, whether, upon the facts above stated, the plaintiff is entitled to recover.

APPENDIX.

Notice, signed by Clennell and Fraser, the attorneys for the plaintiff, and addressed to the

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defendant, and dated 30th Nov. 1874, that at or soon after the expiration of one calendar month from the time of the said defendants being served with this notice, a writ of summons would be sued out of Her Majesty's Court of Exchequer against him the said defendant at the suit of the said plaintiff, for that he the said defendant, being one of the justices of the said borough of Newport, in the county of Monmouth, on the 13th Nov. 1874, contrary to the statute 24 & 25 Vict. c. 75, appointed or continued as clerk to the justices one C. B. Fox, who was at the time of such appointment or continuance, clerk of the peace of the county in which the said borough is situate, whereby he the said defendant became liable to forfeit and forfeited the sum of 100*l.* to the said plaintiff.

The declaration dated 19th Jan. 1875, in which the plaintiff sued, as well for himself as for the treasurer of the said borough of Newport, charged that the defendant, being one of the justices of and for the said borough, to which borough a separate commission of the peace had been theretofore granted under the provisions of the Municipal Corporations Act (5 & 6 Will. 4, c. 76), heretofore, to wit on the 13th Nov. 1874, after the passing of the Municipal Corporations Act Amendment Act (1861) (24 & 25 Vict. c. 75), then being and acting as one of the justices of the peace for the said borough, did appoint one C. B. Fox to be clerk to the justices of the said borough, he, the said C. B. Fox, being at the time of the said appointment the clerk of the peace of and for the said county of Monmouth aforesaid, contrary to the form of the said statute, whereby, and by force of the said statute, the defendant became liable to forfeit, and forfeited, the sum of 100*l.*, one moiety thereof being payable to the said treasurer, and the other moiety thereof to the plaintiff; and thereby and by force of the statute an action hath accrued to the plaintiff, who sues as aforesaid, to demand and have the said sum of 100*l.* of and from the defendant. The second count of the declaration charged that the defendant, being and acting as such magistrate as aforesaid, wilfully and unlawfully continued the said C. B. Fox as clerk to the said justices, between the 30th June 1874 and the 13th Nov. 1874, after the passing of the said last-recited statute, and contrary to the form thereof, whereby and by force of the said statute, the defendant became liable to forfeit, and forfeited, 100*l.*, and an action has accrued to the plaintiff as aforesaid. Claim 200*l.*

Plea, not guilty (by Statutes 24 & 25 Vict. c. 75 (public Act), ss. 5, 8; 5 & 6 Will. 4, c. 76 (public Act), ss. 102, 133; 11 & 12 Vict. c. 44 (public Act), ss. 8, 9, 11, 12 (added by amendment)).

The plaintiff's points: First, that the appointment of the said C. B. Fox as clerk of the peace for the said county, vacated the office of clerk to the justices of the borough of Newport. Secondly, that the said C. B. Fox was, from the 24th June 1874, incapacitated from filling the office of clerk to the justices. Thirdly, that the re-appointment of the said C. B. Fox to the said office was an offence on the part of all persons taking part therein, within the meaning of the statutes in such case made and provided. Fourthly, that acting as a justice of the peace for the borough of Newport, with the said C. B. Fox as clerk, was, after the said 24th June 1874, an offence within the meaning of the statutes in such case made and pro-

vided. Fifthly, that the same, after the 9th Nov. 1874, was an offence. Sixthly, that the plaintiff is entitled to the judgment of the court upon the facts stated in the case. Seventhly, that the notice of action is sufficient.

The defendant's points.—First, that the appointment of the said C. B. Fox as clerk of the peace for the county of Monmouth did not vacate the office of clerk to the justices of the borough of Newport; secondly, that the said C. B. Fox was not, from the 24th June 1874, incapacitated from filling, or disqualified for being reappointed to the office of clerk to the justices; thirdly, that it was competent to the said justices, under the circumstances stated in the case, to reappoint the said C. B. Fox as their clerk, under the proviso contained in the 24 & 25 Vict. c. 75, s. 5; fourthly, that the declaration discloses no cause of action against the defendant; fifthly, that no offence against the said statute appears upon the facts stated in the case to have been committed; sixthly, that no sufficient notice of action was given to the defendant, pursuant to 24 & 25 Vict. c. 75, s. 5; and 5 & 6 Will. 4, c. 76, s. 133; and 11 & 12 Vict. c. 44, s. 9; seventhly, that an informer has no right to bring twenty-six actions for thirty-five penalties for one and the same alleged offence; eighthly, that the defendant is entitled to the judgment of the court.

The following is the section of the Municipal Corporations Act Amendment Act 1861 (24 & 25 Vict. c. 75), on the construction of which the question in the case turned:

Sect. 5. Whereas, by the 102nd section of the principal Act (5 & 6 Will. 4, c. 76), it is enacted "that it shall not be lawful for the justices of any borough to appoint or continue as such clerk to the justices, any alderman or councillors of such borough, or clerk of the peace for such borough, or partner of such clerk of the peace, or any clerk or person in the employ of such clerk of the peace; and that it shall not be lawful for the said clerk to the justices, by himself or his partner, to be directly or indirectly interested or employed in the prosecution of any offenders committed for trial by the justices, of whom he shall be such clerk as aforesaid, or any of them, at any court of gaol delivery, or general or quarter session; and that any person being an alderman, or councillor, or clerk of the peace of any borough, or the partner, or clerk, or in the employ of such clerk of the peace who shall act as clerk to the justices of such borough, or shall otherwise offend in the premises, shall, for every such offence, forfeit and pay the sum of 100*l.*, as therein mentioned." And whereas the said provisions have been found to be insufficient for preventing the mischief intended to be prevented, it is hereby enacted that the said provisions of the 102nd section of the principal Act shall be repealed, and from and after the passing of this Act it shall not be lawful for the justices of any borough to appoint or continue as their clerk, any alderman or councillor of such borough, or the clerk of the peace of such borough, or of the county in which such borough is situate, or the partner of any such clerk of the peace, and it shall not be lawful for the clerk to the justices of any borough, by himself or his partner, or otherwise, to be directly or indirectly employed or interested in the prosecution of any offender committed for trial by the justices of such borough or any of them at any court of gaol delivery or general or quarter sessions. And any person who shall in any wise offend in the premises shall, for every such offence, forfeit and pay the sum of 100*l.*, one moiety thereof to the treasurer of such borough, to be paid over to credit and account of the borough fund, and the other moiety thereof, with costs of suit, to any person who may sue for the same in any of His Majesty's Courts of Record at Westminster. Provided, that nothing herein contained shall prevent the justices of any borough reappointing as their clerk any clerk of the peace or partner of such clerk of the peace of their borough, or of the county in which such

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borough is situate, who at the time of the passing of this Act shall be, or who shall not at the time of such reappointment, have ceased to be, the clerk of such justices.

A. T. Lawrence (with him was Patchett) for the plaintiff.—The question arises under sect. 5 of the Municipal Corporations Act Amendment Act 1861 (24 & 25 Vict. c. 75). Sect. 5, the general effect of which section is to prevent justices appointing as their clerk one who is also a clerk of the peace for the county. The appointment of Mr. Fox as clerk of the peace for the county, in June 1874, *ipso facto* vacated his previous appointment of clerk to the justices, so that after that date he continued to be their clerk no longer. Moreover, I contend that, on the passing of the Act of 1861, he ceased to be justices' clerk, because, by the operation of the Act, being at that time the partner of the then clerk of the peace, he was disqualified for the office of clerk to the justices. Upon the passing of that Act, therefore, he was reappointed justices clerk under the proviso in sect. 5, and so continued until his partner's death in 1874, when he was appointed clerk of the peace, and by accepting that office he vacated the office of clerk to the justices. That, I contend, is the effect of these Acts of Parliament. [POLLOCK, B.—If that be so, the effect would be that a person in that position would not only be liable to a penalty, but all his acts as clerk to the justices would be *ipso facto* void, and he would cease to be clerk; whereas the statute seems to contemplate a person holding the office and by doing so becoming liable to a penalty.] He vacates the office to this extent, that he must be reappointed, and if reappointed he is liable to a penalty, as also are the persons appointing him. The Act expressly says it shall not be lawful for the justices to "appoint or continue" as their clerk, &c. [KELLY, C.B.—Where is it found that they continued him as clerk after June 1874? The case seems to be silent as to the interval between June and Nov. 1874, when he was, as it is termed, reappointed.] It is clear, I submit, and found by paragraphs 8, 9, and 10 of the case, that he continued to act as justices' clerk from 24th June to his reappointment in November. That reappointment was a nullity and unlawful. The proviso, which was inserted to save vested interests existing at the passing of the Act, was exhausted, and to all purposes satisfied and fulfilled once, and for all, by his reappointment as justices' clerk in 1861. By sect. 102 of the 5 & 6 Vict. c. 76 (the Municipal Corporations Act), the justices are required to appoint a clerk; but by a proviso in that section certain persons are disqualified for the appointment, but not clerks of the peace for the county. Then sect. 5 of the Act of 1861, enlarged the area of disqualification, and included clerks of the peace for the county therein, with the proviso, however, saving vested interests then existing. By sect. 66 of the original Act, compensation was given to persons whose office should be abolished, or who should be removed from office by the provisions of the Act, or who should not be reappointed, and there was, therefore, no necessity for a proviso to sect. 102 in that Act similar to that in sect. 5 of the Act of 1861. But, if the defendants' contention is right, the effect will be that a proviso intended simply to save existing vested interests will operate to repeal, not only the provisions of the Act itself, but also the Municipal Corporations Act, because, according to the defendant's view, it will

be competent by the use of that proviso, to appoint, at any time, and from time to time, a person to fill these two offices together, by first appointing him clerk to the justices, and then clerk of the peace, and then reappointing him as clerk to the justices. [POLLOCK, B.—Oh, no. What is meant is that he shall not, at the time of such appointment, have ceased to be the clerk of such justices. The whole proviso was clearly meant to provide for the case of a person who at the date of the Act was a justices' clerk. If it be, as you contend, that he ceased to be so on appointment as clerk of the peace, you would be entitled to succeed; but if it be a continuous holding of the appointment, and he did not cease to be clerk to the justices, then he comes within the proviso, and the reappointment must be taken together with his holding of the office at the date of the Act.] The penalty is recoverable, and the action is for continuing him in his office. If the proviso is to be read disjunctively and literally, according as the words are, the effect will be to repeal the Act; but ample force is given to it by reading it as securing Mr. Fox's vested interests from 1861 to 1874. [CLEASBY, B.—Sect. 102 deals with clerks of the peace for boroughs, and sect. 5 extends to that office in counties. By its express terms the section supposes that a borough clerk of the peace can act as justices' clerk, for he is to forfeit 100*l.* if he does so. He can act, therefore, as such clerk, and the office, therefore is not *de facto* vacated.] Whatever the status of the person taking the office may be, and whether his acts be lawful or not, the justice who continues him in the office is liable to the penalty. [CLEASBY, B.—The notice of action is for one act of appointing or continuing on the 13th Nov. and you cannot go back to the interval from June, and say they continued him. POLLOCK, B.—You are confined to the dates in the paragraph when the defendant took part in the meeting of the 9th Nov.] Unless justified by the proviso they are liable; but the proviso applies to re-appointing only. If the office was not vacated in June 1874, it was only because they continued him; then they re-appoint him, and say it is within the proviso, because he never ceased to be their clerk, thus setting up their own illegal act. The day before re-appointment he either was or was not their clerk. If he was, no re-appointment was necessary, and if he was not, it could only be because the accepting and acting in the office of clerk of the peace vacated the other office. He referred to the cases of

Cos (qui tam., &c.) v. Lawrence, 22 L. J. 14, Q. B.; 1 E. & B. 516; 17 Jur. 1115;

Reg. v. Fox, 1 L. T. Rep. N. S. 216; 1 E. & E. 729; 28 L. J. 157, M. C., affirmed in error, 2 L. T. Rep. N. S. 281; 1 E. & E. 746; 5 Jur. N. S. 124.

H. Matthews, Q.C. (with him Jelf), for the defendant, *contra*.—The justices, who re-appointed or concurred in re-appointing Mr. Fox on the 9th Nov., acted within the proviso in sect. 5, and the defendant is not liable to this penal action, even assuming him to be within the penal portion of the section. Now in 1861, Mr. Fox was clerk to the borough justices, and therefore, on the face of the proviso, the act in which the defendant concurred is within its terms. But says the plaintiff, the word "or" in the proviso must be read "and," and the whole proviso be read as "who at the time of the passing of this Act shall be, and who shall not at the time of such reappointment have ceased to be, the clerk of such justices." Now such a change

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in the language of a penal statute might at once be demurred to; but it will not help the plaintiff, because Mr. Fox had not *de facto* ceased to be justices' clerk. My friend says that the legal operation of his appointment as clerk of the peace was to affect his other office, and that, *eo instanti*, he ceased to be justices' clerk. But if so, the proviso would be inopportune and incapable of operation in every case. There could be no case immediately after the passing of the Act in which it could have operated, because, according to the plaintiff's contention, immediately upon the passing of the Act the holding the office of clerk of the peace, or being partner of one who held it, would vacate the office of justices' clerk, and so, *eo instanti*, there would be a break in the continuity of the holding of the latter office, and Mr. Fox's reappointment in 1861 would be, therefore, bad, and not justified by the proviso. But a reasonable time must always elapse before the justices can meet and resolve whether they will act upon the proviso and reappoint their old clerk or appoint some other person. The plaintiff's construction is neither a reasonable nor a right one, and it would be monstrous to say (as it must be said if that construction is to prevail) that because a justices' clerk was appointed clerk of the peace on one day, and a justice was suddenly called on the next day to do some necessary magisterial act, and, there being no other person to act as his clerk except the clerk so appointed clerk of the peace, therefore the justice is to be held to have "continued" the man as clerk, and to be liable to 100*l.* penalty for so doing. No doubt the main intention of the proviso was to save vested interests, but it gave the justices the power to reappoint their existing clerks with whom they were satisfied, if they or their partners should afterwards become clerks of the peace. It does not require, as the plaintiff contends, that at the date of the Act the person to be reappointed should have held both offices together. But it says in effect, "If you were justices' clerk at that time, inasmuch as a new enactment is introduced which may deprive you of that office, we will leave it in the justices' power who have employed you continuously to reappoint you." And it then goes on to say, "You must not have ceased to be clerk to the justices." (He was here stopped by the court.)

Lawrence, for the plaintiff, did not reply.

KELLY, C.B.—I think that in an action for penalties like the present one, we must really look to the substance of the provisions of the Act, and unless something is there found which compels us, applying the ordinary rules of construction to the language of the Legislature, to hold that this gentleman has become liable to the penalty which is here sought to be enforced against him, that we should hold him not liable and say that he is entitled to the judgment of the court. Now the general effect of these Acts is this, that these two offices of clerk of the peace and clerk to the borough justices cannot be held together; that is to say, that the office of clerk to the borough justices shall not be held by anyone who is either clerk of the peace for the borough, or clerk of the peace for the county in which such borough is situate, or a partner of the one or the other of such officers. The question is, whether anything has been done here in violation of the evident general intention of the Legislature to prevent

these two offices being held together by the same individual. And if within the Act of Parliament we find any provision which, as I have said, applying the ordinary rules applicable to the construction of the language of the Legislature, compels us to come to such a conclusion, we must conform to the law. We have then to consider whether this case comes within the words of the Act of 1861. Now, no doubt when we look at the 5th section of that Act of Parliament, we find a direct enactment that it shall not be lawful for the justices of a borough to appoint or continue as their clerk (among other persons described) "any clerk of the peace for the county in which such borough is situate." Now, here there can be no doubt that the borough justices have not only continued but they have actually appointed a person who at the time he was so appointed, and at the time he was re-appointed, as it has been called, to the office of clerk to the borough justices, held the office of clerk of the peace for the county in which the borough is situate, and therefore it would clearly be within that provision. It is unnecessary to consider whether the mere continuing the clerk to the justices without more, without any formal appointment or re-appointment, would be within the Act, because this is not an action for penalties incurred between June 1874 and Nov. 1874, the times respectively when he was appointed clerk of the peace for the county, and re-appointed clerk to the justices of the borough; therefore I offer no opinion upon that. It must not be supposed, however, that I think any penalties could have been recovered, although I do not say that they could not have been, in respect of acts done during that interval of time. But he has been reappointed. He was appointed clerk of the peace for the county in June 1874; he was appointed, or reappointed, I care not which, clerk to the borough justices in Nov. 1874; and the question is whether that latter appointment or reappointment is within and authorised by the proviso which we find at the end of the fifth section of the Act of Parliament. Now, the words of that proviso are these: "Provided that nothing herein contained shall prevent the justices of any borough re-appointing as their clerk any clerk of the peace or partner of such clerk of the peace of their borough, or of the county in which such borough is situate, who," and here come the important words upon which the question whether the appointment or re-appointment is valid or void really depends, "who at the time of the passing of this Act shall be, or who shall not at the time of such re-appointment have ceased to be, the clerk of such justices." Now, I do not enter into the question whether this gentleman had ceased to be the clerk to the justices. Nothing can be more clear than that he was at the time of the passing of this Act clerk to the justices. Whether he has continued such during the whole interval or not is not the question, unless the learned counsel for the plaintiff is right in saying that the word "or," in the proviso should be read "and." I take the words as I find them, and nothing can be clearer than this—if the validity of this appointment or reappointment depends upon the very words of this section, it clearly appears within these very words, that Mr. Fox was, at the time of the passing of this Act in 1861, clerk to the borough justices. Then it is said that we are to read the word "or" as "and,"

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and that both requisites must concur, namely not only that he should have been clerk to the borough justices at the passing of the Act in 1861, but also that he should not at the time of such re-appointment have ceased to be such clerk. I do not think that in an action for penalties, where really there has been no violation of anything obviously within the intention of the Legislature, we should be justified in substituting the one word for the other in order to make a gentleman liable to penalties for an act which is within the words of the whole of the Act or Acts of Parliament taken together, and which is in itself entirely blameless and, for aught that we know, expedient and necessary, in the state of the county in which the appointment has been made. Upon this ground, therefore, that we must read the Act as we find it, although the holding of these two offices together by one individual is illegal within the general purview of the two Acts of Parliament read together, yet finding that by the express words of the proviso in the 5th section of the Act of 1861, the act of appointment is rendered lawful by reason that the gentleman in question was, at the time of the passing of that Act, clerk to the borough justices. I am clearly of opinion that his re-appointment in Nov. 1874 was lawful, and that from that time forth he acted as clerk to the borough justices, and, consequently, that the act of re-appointment itself by the magistrate in question is not a subject of an action for penalties.

CLEASBY, B.—I am quite of the same opinion. The case depends entirely upon the proviso in the 5th section of the 24th & 25th Vict. c. 75. A person who is clerk of the peace for a county or borough is in general disqualified for being clerk to the justices, and the appointment of such a person would be altogether illegal. It might be void possibly, but would be altogether illegal. But previous to this Act there is no disqualification, and therefore a person might have had the status of clerk to the justices with the right to appointment as clerk of the peace for the county. That was the position of this gentleman. It seems to me pretty obvious that it was thought not to be right to deprive such a person of that which was, to a certain extent, annexed to that status, as they would be depriving him of it without compensation; and therefore the proviso is framed to meet that particular case. Now, what would properly take place, I apprehend, upon the appointment as clerk of the peace of a person who was clerk to the justices, would be that, as he held that latter office during the pleasure of the justices, the justices would at their first meeting displace him and appoint another person. That would be the ordinary course of things, and what ought to happen, and what would ordinarily happen. But the proviso gives them another alternative, and this particular proviso, which is a proviso in the penalty clause, is, no doubt, according to the ordinary rules of construction, to be read either strictly or literally as far as it is to the interest of the person who is sued to read it so. This proviso is in the terms which have been referred to, and it is contended on the part of the defendant that, being within the first part of the proviso, is of itself sufficient. But, says the learned counsel for the plaintiff, you ought not, where you have an alternative introduced by the word "or," to read it in any other way than as a complete alternative, or to make it

a separate case. There is something to be said in favour of that, no doubt. But if you were to read the first part as separate you must read the second part as separate too. I must say that the learned counsel for the plaintiff has produced a conclusive argument to show that you cannot read the second part of that alternative separately, as enabling the appointment of any person who, at the time of the re-appointment, happened to be clerk to the justices. It seems to me to be quite a satisfactory argument, and it would really be in a roundabout way defeating the intention of the Act of Parliament altogether to enable them to have a fresh person—it might be clerk to the justices who was appointed from time to time clerk of the peace. I have, therefore, very great difficulty in acceding to that part of the argument of the learned counsel for the defendant. It is sufficient, however, to refer to the first alternative. We must look at the whole proviso, and it appears to me that the real and the only question in this case is, whether the operation of this proviso had been exhausted by the reappointment of Mr. Fox after the passing of the Act of 1861. I think there is a good deal to be said in favour of that, and much also against it. If you look at the words, they would seem rather to point to one appointment. All it says is that nothing therein contained shall prevent the justices from doing this act, that is from reappointing as their clerk any clerk of the peace. As soon as they have reappointed the act is done. Then it is said, on the other side, that that would be giving a limited meaning to the section. But we must, of course, have some regard to the nature of the proviso; and the conclusion at which I have arrived is that it is not confined to one act of appointment or re-appointment, and that they may reappoint from time to time a person who fulfilled the conditions therein mentioned. A man might have two or three partners. He might be clerk of the peace and he might be clerk to the justices at the time the Act was passed, and one of his partners might be appointed clerk of the peace of the county. Soon afterwards he might die and another of his partners might be appointed clerk of the peace of the county. It strikes me that the rational construction would be to say that we will still give him the privilege which he would have had but for this Act being extended to clerks of the peace of the county, as long as he fulfils the conditions of being clerk to the justices at the time of the passing of the Act, or clerk to the justices at the time when the office of clerk of the peace was accepted; and that this re-appointment might still be made. I do not feel any difficulty whatever as regards Mr. Fox's appointment between June and November 1874, because some time must reasonably and necessarily be allowed to elapse between the acceptance of the one office and the appointment to the other.

POLLOCK, B.—I also think that the plaintiff here has failed to make out any case against the defendant, under this Act of Parliament. Looking at the facts which are here stated, it seems to me to be unnecessary to consider what is the precise status of a clerk to the justices, who is also appointed a clerk of the peace anterior to his re-appointment as clerk to the justices, because the only case which could be made out against the present defendant upon the present facts, is the charge that he appointed

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one C. B. Fox to be clerk to the justices of the said borough. That, of course, is pointed to his reappointment, which is alleged in the case to have taken place upon the 9th Nov. 1874. Now, was that reappointment one that could be legally made or not? To answer that question, I think we must consider what was the intention of the 5th section of the Act of 1861. There seems to me to be, by the express words of that section, two clear intentions of the Legislature, and if that be so, we must follow those intentions to see how far they govern, so far as intentions can govern, the different parts of the section. Now the first intention is that a person who is a clerk to the justices ought not to hold certain other offices besides that office, one of which other offices is the office of clerk of the peace of the county. But the other intention, which is equally clear, is to protect, as is common in cases of this kind in this country, what are called vested interests. The vested interests of whom? Not the vested interests of the clerk of the peace, for this Act has nothing to do with that, but it is the vested interests of the clerk to the justices, and that, therefore, would require that the person, who accepts the office of clerk to the justices previous to the passing of this Act in 1861, should never have taken from him the opportunity of holding jointly with that office the other office which he might, previously to and but for this Act, have held. Otherwise it might be argued, and the ordinary argument might fairly be used, that he was induced to accept an office, and, having accepted it, and having given up other things for it, was cut down by the Legislature without compensation. That being so, I do not myself see that there is any very great difficulty in saying, that being the object and intention of the clause, that the words, "who at the time of the passing of this Act shall be," &c. of course mean that he must hold the office at the time of the passing of the Act. That this gentleman did; "or who shall not, at the time of such reappointment, have ceased to be the clerk of such justices." As I said before, I consider it unnecessary here to consider what his status was after his accepting the appointment of clerk of the peace, and before his reappointment as clerk to the justices. Although I should not, I confess, have much difficulty in dealing with that question if the facts were clear. It appears to me that the words "or who shall not at the time of such reappointment have ceased to be," &c., mean that he shall be a person who held the office at the time of the passing of the Act, and who has, either by resignation or otherwise, ceased to hold it, and then has been reappointed. If he had ceased to hold it voluntarily, and was unduly reappointed, any status or right which he might enjoy by way of vested interest would have ceased to exist, and the proviso in this section of the Act would not apply. In this case it appears to me that he has not, by anything which has occurred, ceased to be a clerk to the justices within the meaning of this section or the proviso, and that, therefore, the case against the defendant fails.

Judgment for the defendant, with costs.(a)

Solicitors for the plaintiff, *Clennell and Fraser*.
Solicitors for the defendant, *Hunt and Son*.

(a) The plaintiff has appealed from this decision, and the case now stands for hearing in the Court of Appeal.

QUEEN'S BENCH DIVISION.

Reported by M. W. McKELLAR and J. M. LELT, Esqrs.
Barristers-at-Law.

Thursday, Jan. 19, 1876.

REDGATE (app.) v. HAYNES (resp.)

Licensing Act 1872, s. 16, sub-s. 1—"Suffering" gaming by connivance of servant—Evidence of connivance.

In order to convict a licensed person of suffering gaming within the meaning of the 16th section of the Licensing Act 1872, it is not necessary to show actual knowledge. It is enough to show connivance, and the connivance of the servant is the connivance of the master.

R. kept an hotel at Epsom, in which a gentleman from Newmarket took three rooms, and invited a trainer and a jockey to stay with him. R. went to bed at 11 p.m., leaving a hall porter in charge of the house.

The porter retired to the extreme end of the house for the night. While the porter was so stationed the guests above-mentioned played cards for money, with much noise, but no interruption on the part of R. The justices drew the inference that the porter had retired at the instigation of R., and in order that he might not hear what passed.

Held, that it could not be said that there was no evidence from which the justices might draw such inference, and a conviction of R. for suffering gaming affirmed.

This was a case stated under 20 & 21 Vict. c. 43, by two justices for the county of Surrey, and the following are the material parts of such case:

The respondent was a sergeant of the Metropolitan Police Force, stationed at Epsom, and the appellant the landlady of the King's Head Hotel, High-street, Epsom.

The information was laid under sect. 17, sub-sect. 1, of the Licensing Act 1872, which enacts as follows:

If any licensed person suffers any gaming to be carried on on his premises, he shall be liable to a penalty not exceeding for the first offence 10l.

It was proved on the part of the respondent, by three witnesses, that, whilst standing in the public street, at the window of the room where the play took place, they could hear the conversation, owing to the loud tone of voice in which it was conducted. That three persons, one a horse trainer, called James Nightingall, and another, a jockey, called Henry Constable (both being inhabitants of Epsom), were, together with Charles Groucock, gentleman, of Newmarket (temporarily staying at the King's Head Hotel), playing at cards for money in a room in the house of the appellant, between 1.30 and 2.30 a.m. on the 7th Jan. 1875. It was subsequently admitted by the said Charles Groucock, who was called as a witness for the defence, that he and the said James Nightingall and Henry Constable were at such time and place playing at cards for money.

No direct evidence was given that the appellant knew of the gaming, and it was contended on her behalf that she was in ignorance that play for money was going on in her house at the time stated, and, therefore, that she did not suffer gaming within the words of the Act.

The appellant gave evidence in her own defence, and also called the witnesses whose names and depositions are hereinafter stated.

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REDGATE (app.) v. HAYNES (resp.)

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1. Elizabeth Redgate, the appellant, deposed :

That she was defendant in the case. She had a gentleman of the name of Groucock, who had, on the 30th Dec. last, taken a sitting room and two bedrooms, and, on the evening of the 6th Jan., had taken another bedroom. He had been a visitor in the house before; he was, on the evening of the 6th, an occupier of rooms in the house. The house was closed at eleven o'clock on the 6th; she went into the room on the right hand side of the hall, a little before eleven o'clock, to ask if any refreshments were required before closing. Mr. Nightingall and Mr. Groucock were then in conversation, and they did not require anything. She afterwards closed the house, and did not go into the room again; she saw no cards, and did not supply any; she had no cards in the house, and had never seen any, and did not know of any card playing. As she came away she told the hall porter she was going to bed; she then locked up the bar and went to bed. Mr. Groucock had engaged two bedrooms, and then a third for that night, and all three gentlemen stayed in the house that night. Mr. Groucock had the exclusive use of the room for the seven days mentioned, and he was still there. One night Mr. Nightingall was there. The said bedrooms were occupied by Mr. Groucock and Mr. Constable, and the third by Mr. Nightingall.

2. John Matthews deposed :

That he was hall porter at the King's Head. It was his duty to close the house, and attend on customers. betting and gaming were strictly prohibited in the house and notices similar to that produced, which was in the following words, "Subscribers and visitors are respectfully informed that betting cannot be permitted," were hung around the billiard room. On the night of the 6th Jan. Mr. Groucock had the occupation of the room on the right hand side, with Mr. Constable; he had the exclusive use of it. A little before eleven o'clock, on the evening of the 6th, he saw Miss Redgate go to this room, and when she came away she said she was going to bed. She then closed the bar and went to bed. He (John Matthews) closed the house and retired to his own chair, in a parlour beyond the bar, at the extreme end of the house. He attended the door, and saw the police come in.—He knew nothing whatever of any gambling, and did not go into the room after eleven o'clock till Mr. Groucock went to bed, when he returned the light on.

3. Charles Groucock deposed :

That he resided at Foley House, Newmarket, and was of independent means. On the 6th Jan. he was residing at the King's Head; he came there on the 31st Dec. 1874, and took a sitting room and two bedrooms, and Mr. Constable was with him the whole time. He (Mr. Groucock) had one, and Mr. Constable the other bedroom. On the evening of the 6th Mr. Nightingall was with him (Mr. Groucock). Just before eleven o'clock Miss Redgate came into his room, to know if he wanted anything more. He asked his guests, and they said no. They were then in conversation. She said she was going to bed. After that they began to play at cards, but Miss Redgate knew nothing whatever of it, and they played till the police came in. There was no concealing the cards; they played for money.

On the above evidence, the justices were of opinion that the appellant knew that gaming was intended to be carried on in her house, and that she instructed the hall porter, who waited up, to go to the parlour beyond the bar, at the extreme end of the house, where it was impossible that he could hear the loud talking that took place, instead of being in his usual position in the hall, where he could have heard everything; that, in fact, the appellant purposely took pains not to know what her guests, two of whom were residents in Epsom, were doing, and therefore it was by her own wilful neglect of proper precautionary measures and provisions on her premises, and through her own default, that the gaming took place. They were also of opinion that, as the word "knowingly" was inserted in the form of licence given in the schedule, and directed to be used by the Act 9 Geo. 4, c. 61, which Act was in force up

to the year 1872, the Legislature, by leaving out the word "knowingly" in the Act of 1872, intended to cast upon the licensed persons the onus of taking active measures to prevent gaming on their premises, and that it was not necessary to have stronger and more direct evidence than they had in support of the information, and they thought this view was supported by the fact that in the section immediately preceding the one in question, viz., the 16th section, a penalty is imposed for "knowingly" harbouring a constable.

The decision, therefore, was that the defendant be convicted of the offence with which she was charged, and that she pay a penalty of 5*l.* and costs.

The question of law for the opinion of the court was, whether proof of actual and direct knowledge on the part of the appellant or her servants that play for money was going on on her premises at the time hereinbefore stated, was necessary to support the conviction under sub-sect. 17 of the Licensing Act 1872.

If the court should be of opinion that the said conviction was legally and properly made, the said conviction to stand: but if the court should be of opinion otherwise, the information to be dismissed.

The case came on to be argued before the Court of Queen's Bench on the 12th June 1875, when it was ordered to be restated "specially with reference to any evidence of the hall porter having been sent to an unusual place." The following additional statement was accordingly submitted:—"There was not any direct evidence that the hall porter was sent to an unusual place. His own evidence was that he retired to his own chair, in a parlour beyond the bar, 'at the extreme end of the house.' As the usual place for the hall porter is in the hall, and he stated before us that part of his duty was to wait upon the guests in the sitting room, we drew the inference that the removal of the chair to the greatest possible distance from the room was in order that he might not hear what passed there, and that such removal was directed by the appellant."

Willis, for the appellant, argued that, to bring the appellant within the terms of sect 17, sub-sect. 1, of the Licensing Act 1872, it was necessary to show that the gaming was with the permission of the appellant, and that the case did not disclose any evidence of such permission. He cited *Bosley app. v. Davies, resp.* (33 L. T. Rep. N. S. 528). In that case a party of gentlemen were playing cards for money in a room of the appellant's licensed premises, and were disturbed by a police constable, who heard them from outside. The appellant's manager knew nothing about it, and it did not appear that any waiter came into the room whilst they were playing. It was held by the court (Cockburn, C.J. and Mellor and Quain, JJ.) that it must appear that there was gross negligence or wilful ignorance on the part of the licensed person or his servant, in order to support a conviction for "suffering gaming." There was no such gross negligence in the present case, and no evidence to warrant the inference which the justices have drawn.

The *Attorney-General* (Sir J. Holker, Q.C.), for the respondent, argued that there was evidence of constructive knowledge on the part of the appellant, and that she was liable for the acts and omissions of her hall porter, whom she had left in charge of the house.

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BLACKBURN, J.—I am of opinion that our judgment ought to be for the respondent. I think that there was evidence on which the justices might draw the conclusion that the appellant had suffered gaming within the meaning of sect. 17, sub-sect. 1, of the Licensing Act 1872. The conviction was for suffering gaming, and that there was gaming in fact is perfectly clear. But the mere fact of the gaming having taken place is not enough; it must be also shown that it took place by the fault or with the connivance of the party convicted, and whether it so took place is a question of fact. But if the landlord goes away, or goes to bed, and leaves another person in charge, he is answerable for the whole conduct of the person so left in charge, and is liable for the connivance of such person. Now what were the facts here? It appears that a gentleman of independent means connected with Newmarket, takes three rooms in the hotel of the appellant, and invites two other persons, the one a jockey the other a trainer, to stay with him in those rooms. Now I do not say that there is any inference in law that three such persons would engage in gaming. But what I do say is, that it is not improbable they would do so. The landlady, knowing the character of these persons, goes to bed leaving the hall porter in charge of the house. Here comes the important part of the case. It was the duty of the hall porter to sit up and look after the wants of all the guests at the hotel. Now upon the first statement of the case, the justices find that the hall porter went away to the furthest part of the house, so that he did not hear the noise made of the gamblers which was heard in the street, and would have been heard by him if he had not changed his place. The justices drew the inference that he went away on purpose, and holding that his connivance was the connivance of his mistress, convicted her. In the amended statement I find they say that there was no direct evidence that the porter went away to an unusual place; but that the evidence was that he retired to the extreme end of the house, and that, "as the usual place for the hall porter's chair is in the hall," and his duty was to wait on the guests in the sitting-room, the justices drew the inference that he retired for the express purpose of not hearing what passed. Now I do not think that the necessary inference was that he went away on purpose. Nor was there any duty upon him to enter the room where the gaming was going on, or to listen at the door. But as his duty was to stay within call and he did not stay within call, might not the justices draw the inference that he went away for the express purpose of not being able to know of the gaming if it should take place? Whether I should draw such an inference myself I am not sure. But I think that Epsom justices might draw such an inference.

LUSH, J.—I am of the same opinion. It was not necessary to prove actual knowledge. The offence of "suffering" may be committed by connivance, and the connivance of the servant is the connivance of the master. Now there was some evidence of the connivance of the servant in this case. The justices might, and indeed were bound, to use their general knowledge, and we may assume that they had a general knowledge of the proper place for the hall porter's chair. Whether I should draw the inference which the justices have drawn I do not know. It is enough for us to say that

there was some evidence on which they might have drawn it.

Judgment for respondent.

Solicitor for the appellant, *Ambrose Haynes.*

Solicitor for the respondent, *The Solicitor for the Treasury.*

Saturday, Jan. 22, 1876.

WEST HAM LOCAL BOARD v. MADDAMS.

Limitation—Debt upon a statute—Concurrent remedy with summary proceedings (11 & 12 Vict. c. 63, s. 69; 24 & 25 Vict. c. 61, s. 24).

By sect. 69 of the Public Health Act 1848, a local board can recover expenses, to be paid by owners in default, in a summary manner; the limitation for such recovery being, by 11 & 12 Vict. c. 43, s. 11, six months.

By sect. 24 of a similar Act of 1861, proceedings for the recovery of demands below 20l. may, at the option of the local board, be taken in a County Court as upon a debt.

Held, upon appeal from a County Court, that proceedings under the last-mentioned section are barred by a six months' limitation, in the same way as if they were taken in a summary manner.

APPEAL from the Middlesex County Court holden at Bow.

This was an action brought to recover the sum of 13l. 18s. upon the following particulars:

This action is brought to recover a sum of 13l. 18s. payable by the defendant as the owner of certain premises in a certain street, called Victoria Dock-road, as the amount of a certain contribution towards the expenses incurred by the plaintiffs in sewerage, levelling, paving, flagging, and channelling the said street, after notice in writing duly given pursuant to the Public Health Acts and the other Acts incorporated therewith, to the owners and occupiers of the premises adjoining, fronting, and abutting upon such part of the said street as required to be sewerage, levelled, paved, flagged, and channelled pursuant to such Acts, such contribution being the proportion settled by the plaintiff's surveyor according to the frontage of the defendant's said premises as the amount to be paid by the owner of the said premises. And the plaintiffs claim the above amount by virtue of the various Public Health Acts, the Local Government Acts, and the West Ham Local Board of Health Act 1867 and the Acts incorporated therewith.

The cause was tried on the 2nd July 1875.

No witnesses were called, but the case was decided on admissions, and the following are the facts of the case:

The defendant was on the 9th Sept. 1862 and still is the owner of certain premises situated in a certain street called Victoria Dock Road, and the plaintiffs are the local board of the district in which the said house and street are situate.

Previously to the 9th Sept. 1862 the said street was not sewerage, levelled, paved, flagged, and channelled to the satisfaction of the plaintiffs.

On the 9th Sept. 1862 the plaintiffs duly passed a resolution, conformably with their statutable powers, that the said street should be made up and properly sewerage, levelled, paved, flagged, and channelled.

The defendant's house and premises fronted

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adjoined, and abutted upon the part of the street requiring the above work.

Due notice in writing was given by the plaintiffs to the defendant upon the 20th Sept. 1862, according to the statute, requiring the defendant to sewer, level, pave, flag, and channel, the parts of the said street on which his lands and premises abutted within the time specified in the notice.

The defendant did not execute the said work.

The plaintiffs, under the powers given to them by statute, thereupon proceeded to execute the said work, and their surveyor, upon the 6th Sept. 1865, settled the proportion of the expenses incurred by the plaintiffs in executing the above works to be paid by the defendant, according to the frontage of his premises, at the sum of 13*l.* 18*s.*, and no dispute ever arose between the plaintiffs and the defendant as to the amount.

On the 5th Jan. 1872, the plaintiffs demanded the said sum from the defendant.

No proceedings were taken by the plaintiffs against the defendant until this action was brought on the 26th May 1875.

The defendant gave notice of a special defence, that the cause of action did not arise within six years.

Upon the hearing, it was contended before the said County Court judge, on the part of the plaintiffs, that the action was founded on a statute, and that the period of limitation was twenty years. On the part of the defendant, that it was the same as upon a summary application before justices, and that the option given by 24 & 25 Vict. c. 61, s. 24, must be exercised within six months, and that the plaintiffs were accordingly barred.

In order to enable the case to be put in train for discussion, the judge decided all the points in favour of the defendant, but gave the plaintiffs leave to appeal, it being agreed that the court should have power to make such order as he ought to have made.

The question for the opinion of the court was whether, upon the facts above stated, the right of the plaintiffs to recover the amount was barred by lapse of time. Judgment was to be made as the court should direct.

Day, Q.C. (with him *W. G. Harrison*) argued for the plaintiffs, the appellants.—The sole question is what period of limitation governs an action of this kind. The plaintiffs are right if the ordinary period in respect of a debt upon a statute—viz., twenty years, is the only limitation (3 & 4 Will. 4, c. 42, s. 3; see *Shepherd v. Hills*, 25 L. J., Ex. 6.) The Public Health Act 1848 (11 & 12 Vict., c. 63), s. 69, enacts that in case any present or future street, or any part thereof (not being a highway) be not sewered, levelled, paved, flagged, and channelled to the satisfaction of the Local Board of Health, such board may, by notice in writing to the respective owners or occupiers of the premises fronting, adjoining, or abutting upon such parts thereof as may require to be sewered, levelled, paved, flagged, or channelled, require them to sewer, level, pave, flag, or channel the same within a time to be specified in such notice. And if such notice be not complied with, the said local board may, if they shall think fit, execute the works mentioned or referred to therein; and the expenses incurred by them in so doing shall be paid by the owners in default, according to the frontage of their respective premises, and in such

proportion as shall be settled by the surveyor, or, in case of dispute, as shall be settled by arbitration (having regard to all the circumstances of the case) in the manner provided by this Act, and such expenses may be recovered from the last mentioned owners in a summary manner, or the same may be declared by order of the said local board to be private improvement expenses, and be recoverable as such in the manner hereinafter provided." By 11 & 12 Vict., c. 43, s. 11, it is enacted, "That in all cases where no time is already or shall hereafter be specially limited for making any such complaint or laying any such information in the Act or Acts of Parliament relating to each particular case, such complaint shall be made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose." Under these two statutes this debt was created, and a special remedy supplied, subject to a six months' limitation. [BLACKBURN, J.—And no action for the debt could lie.] Perhaps so. Then by 24 & 25 Vict. c. 61, s. 24, "Proceedings for the recovery of demands below twenty pounds, which local boards are now empowered by law to recover in a summary manner, may, at the option of the local board, be taken in the County Court as if such demands were debts within the cognisance of such courts." The demand in this case must be treated as any other debt of like kind, that is, a debt upon a statute. The limitation of six months was a mere incident of the summary remedy, and no part of the cause of action. When another remedy was given, there was no application of the limitation to the new remedy. It could not be contended that if the summary remedy had been abolished simply that the debt could not be recovered at all; and in that case the previous limitation would go with the remedy.

Grantham, appeared for defendant.

BLACKBURN, J.—We need not call upon the other side. It is clear to us that the County Court Judge was right in deciding for the defendant. 11 & 12 Vict. c. 63, s. 69 enacted that these expenses might be recovered in a summary manner, and gave no other remedy. The Legislature thereby limited the period of such recovery to that which was incident to a summary remedy. Mr. Day argues that if the summary remedy given by this Act had been repealed without any further enactment concerning the debt, an action would lie for twenty years; and, therefore, when a power to recover by action is added to the summary remedy, the result is the same. Whatever might have been the effect of a simple repeal of the summary remedy we need not consider. The later Act, 24 & 25 Vict. c. 61 s. 24, gives local boards an option to recover demands below £20 either in a County Court or in a summary manner as before. It says proceedings may be taken in the County Court as if such demands were debts within the cognisance of such courts. It does not say that a local board may have its choice of the limitation to its demand; such a power to choose would be unreasonable; and there would follow this unreasonable and absurd effect, that if the demand were over £20 the limitation would be six months, if under £20 it would be twenty years. I think the statutes themselves sufficiently show by the words used that the six months' limitation applies to recovery in a County Court as well as in a summary manner, and this

BLACKBURN, J.—I am of opinion that our judgment ought to be for the respondent. I think that there was evidence on which the justices might draw the conclusion that the appellant had suffered gaming within the meaning of sect. 17, sub-sect. 1, of the Licensing Act 1872. The conviction was for suffering gaming, and that there was gaming in fact is perfectly clear. But the mere fact of the gaming having taken place is not enough; it must be also shown that it took place by the fault or with the connivance of the party convicted, and whether it so took place is a question of fact. But if the landlord goes away, or goes to bed, and leaves another person in charge, he is answerable for the whole conduct of the person so left in charge, and is liable for the connivance of such person. Now what were the facts here? It appears that a gentleman of independent means connected with Newmarket, takes three rooms in the hotel of the appellant, and invites two other persons, the one a jockey the other a trainer, to stay with him in those rooms. Now I do not say that there is any inference in law that three such persons would engage in gaming. But what I do say is, that it is not improbable they would do so. The landlady, knowing the character of these persons, goes to bed leaving the hall porter in charge of the house. Here comes the important part of the case. It was the duty of the hall porter to sit up and look after the wants of all the guests at the hotel. Now upon the first statement of the case, the justices find that the hall porter went away to the furthest part of the house, so that he did not hear the noise made of the gamblers which was heard in the street, and would have been heard by him if he had not changed his place. The justices drew the inference that he went away on purpose, and holding that his connivance was the connivance of his mistress, convicted her. In the amended statement I find they say that there was no direct evidence that the porter went away to an unusual place; but that the evidence was that he retired to the extreme end of the house, and that, "as the usual place for the hall porter's chair is in the hall," and his duty was to wait on the guests in the sitting-room, the justices drew the inference that he retired for the express purpose of not hearing what passed. Now I do not think that the necessary inference was that he went away on purpose. Nor was there any duty upon him to enter the room where the gaming was going on, or to listen at the door. But as his duty was to stay within call and he did not stay within call, might not the justices draw the inference that he went away for the express purpose of not being able to know of the gaming if it should take place? Whether I should draw such an inference myself I am not sure. But I think that Epsom justices might draw such an inference.

LUSH, J.—I am of the same opinion. It was not necessary to prove actual knowledge. The offence of "suffering" may be committed by connivance, and the connivance of the servant is the connivance of the master. Now there was some evidence of the connivance of the servant in this case. The justices might, and indeed were bound, to use their general knowledge, and we may assume that they had a general knowledge of the proper place for the hall porter's chair. Whether I should draw the inference which the justices have drawn I do not know. It is enough for us to say that

there was some evidence on which they might have drawn it.

Judgment for respondent.

Solicitor for the appellant, *Ambrose Haynes*.
Solicitor for the respondent, *The Solicitor for the Treasury*.

Saturday, Jan. 22, 1876.

WEST HAM LOCAL BOARD v. MADDAMS.

Limitation—Debt upon a statute—Concurrent remedy with summary proceedings (11 & 12 Vict. c. 63, s. 69; 24 & 25 Vict. c. 61, s. 24).

By sect. 69 of the Public Health Act 1848, a local board can recover expenses, to be paid by owners in default, in a summary manner; the limitation for such recovery being, by 11 & 12 Vict. c. 43, s. 11, six months.

By sect. 24 of a similar Act of 1861, proceedings for the recovery of demands below 20l. may, at the option of the local board, be taken in a County Court as upon a debt.

Held, upon appeal from a County Court, that proceedings under the last-mentioned section are barred by a six months' limitation, in the same way as if they were taken in a summary manner.

APPEAL from the Middlesex County Court holden at Bow.

This was an action brought to recover the sum of 13l. 18s. upon the following particulars:

This action is brought to recover a sum of 13l. 18s. payable by the defendant as the owner of certain premises in a certain street, called Victoria Dock-road, as the amount of a certain contribution towards the expenses incurred by the plaintiffs in sewerage, levelling, paving, flagging, and channelling the said street, after notice in writing duly given pursuant to the Public Health Acts and the other Acts incorporated therewith, to the owners and occupiers of the premises adjoining, fronting, and abutting upon such part of the said street as required to be sewerage, levelled, paved, flagged, and channelled pursuant to such Acts, such contribution being the proportion settled by the plaintiff's surveyor according to the frontage of the defendant's said premises as the amount to be paid by the owner of the said premises. And the plaintiffs claim the above amount by virtue of the various Public Health Acts, the Local Government Acts, and the West Ham Local Board of Health Act 1867 and the Acts incorporated therewith.

The cause was tried on the 2nd July 1875.

No witnesses were called, but the case was decided on admissions, and the following are the facts of the case:

The defendant was on the 9th Sept. 1862 and still is the owner of certain premises situated in a certain street called Victoria Dock-road. The plaintiffs are the local board which the said house and premises are situated in.

Previously to the 9th Sept. 1862 the said street was not sewerage, levelled, paved, flagged, and channelled to the satisfaction of the local board.

On the 9th Sept. 1862 the local board passed a resolution,

giving powers, that the said street should be sewerage, levelled, paved, flagged, and properly channelled.

The defendant

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proportion as shall be settled by the arbitrators.

in case of dispute, as shall be determined by the court (having regard to all the circumstances of the case) in the manner provided by the court. The expenses may be recovered from the owners in a summary manner, and the court may declare by order of the court that the private improvement expenses shall be paid by the owners.

as such in the manner hereinbefore

in all cases where no complaint shall hereafter be specially made concerning any such communication information in the absence of a complaint relating to each communication a complaint shall be made by the complainant shall be laid within an appropriate time when the matter is at issue.

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absurdity in the effect of any other conclusion confirms my opinion. It seems to me, too, that such demands ought not to be recoverable after six months.

FIELD, J.—I am of the same opinion, and on the same grounds. I observe that by the new Public Health Act 1875 (38 & 39 Vict. c. 55), s. 150, the old state of things is re-established, and the recovery of expenses can now be only in a summary manner.

Judgment for defendant, the respondent.

Solicitors for the plaintiffs, *Hillearys*.

Solicitors for defendant, *Wood and Hare*.

Tuesday, Dec. 21, 1875.

REG. v. JUSTICES OF TYNEMOUTH.

Justices—Discretion to refuse summons—Sufficient explanation of grounds of refusal—11 & 12 Vict. c. 42, s. 9.

Justices were applied to for summonses for a conspiracy to break the peace and to do grievous bodily harm to persons at a public meeting, upon statements which those who made them were present to swear. The statements, if true, clearly established such conspiracy, but the justices refused the summonses. Upon a rule for a mandamus to hear and determine the matter, the justices answered by affidavit that they heard the application at length, fully considered and discussed it amongst themselves for about fifty minutes, and then came to the determination that they should not be justified in granting summonses for conspiracy, as the facts before them were not in their opinion sufficient to establish that charge. They further said that two summonses for assault, arising out of the same events, had been granted against some of the persons charged with this conspiracy, and had both failed; that the applicant did not desire to be bound over to prosecute on the refusal of the summonses; and that they were willing to grant further assault summonses if the applicant had so requested.

Held that the evidence in the statements was so strong that the justices must have acted upon some extraneous consideration; that they thereby practically declined to exercise their jurisdiction on the merits of the matter; that their answer was not a sufficient explanation; and that the rule must be made absolute.

THIS was a rule nisi obtained by Philbrick, Q.C. on the 18th Nov., calling upon the mayor and other magistrates of the borough of North Shields, in the county of Northumberland, and also fourteen persons whose names were stated, to show cause why a writ of mandamus should not issue, directed to the said magistrates, commanding them or some of them to proceed to hear and determine the matter of an application by Roland Kiley for a summons against the said fourteen persons for unlawfully and wilfully combining and conspiring to break the peace and to do grievous bodily harm to several persons at the Albion Assembly Rooms, the Albion Hotel, and elsewhere at North Shields on the 14th Oct. last.

It appeared from affidavits that on the 2nd Nov. last, Mr. Edmund Kimber, the solicitor of the said Roland Kiley, the prosecutor, appeared before the said magistrates at their court of petty sessions, and read over certain written statements

made and signed by the prosecutor and five other persons, all of whom were there present and prepared to swear to the truth of the same. He applied for summonses against the said fourteen persons upon the charge stated in the rule, but the magistrates refused the application.

The prosecutor's statement was that he was a member of the Magna Charta Association, and that the association had hired the Albion Assembly Rooms for the evening of the 14th Oct. for the purpose of a lecture by Dr. Kenealy upon the Tichborne case. The meeting was advertised by public placards, and the charges for entrance were 2s, 1s, and 6d. The rooms were much crowded at the time of the lecture, and before it commenced a general row and free fight took place, in which the said fourteen persons charged were all concerned. They were in time turned out of the rooms, but they waylaid and assaulted the prosecutor and Dr. Kenealy, as the latter afterwards entered the Albion Hotel, where they were staying.

One of the other persons who made statements alleged that he picked a piece of gun cotton out of a crevice between the floor and skirting board, by which some of these fourteen persons had attempted to set the assembly rooms on fire. Another alleged that he saw one of them throwing cayenne pepper about the place, making many persons sneeze violently, and others letting off crackers and other fireworks in the rooms. It was also alleged by two of the persons, whose statements were read, that one of the fourteen charged, named Short, invited them beforehand to join his party; that Short before the meeting stood liquor at the Albion Hotel to about twenty people, and gave them instructions to go to the meeting and kick up a row. He also said "You must get hold of Dr. Kenealy and break his head; kill him if you can. You need not be frightened, as I will pay all damages and expenses." Some of these twenty people were afterwards seen dividing some money which Short had given them. One of the statements was made by John Mitcheson, the keeper of the hall and assembly rooms, who corroborated what the others stated concerning the rioting at the meeting, and added that one of the fourteen named Pye assaulted him and was summoned by him in consequence; that Pye's solicitor came to him the day before the hearing of the summons and offered him 2l. to withdraw the case; that at the last moment Pye would not agree to the terms proposed by his solicitor, and in consequence his (Mitcheson's) witnesses were not all present when the case came on to be heard. The Bench refused an adjournment and dismissed the case.

The justices of the peace for the borough of North Shields, who were sitting at petty sessions on the 2nd Nov., made an affidavit in answer to the rule.

After setting out the charge and application for summonses, this affidavit proceeded:

3. North Shields is in the borough of Tynemouth, and there is no borough of North Shields.

4. The said E. Kimber addressed us at considerable length, and referred to facts which he stated he was in a condition to prove, and read to us at length the whole of the statements comprised in the exhibit to the affidavits of R. Kiley and others dated the 4th Nov. last, and referred to in the rule in this case. He ~~then~~ ^{referred} upon such statements, and argued ~~that~~ ^{that} to grant

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summonses against the persons charged for the offence mentioned. He also addressed us as to the law of conspiracy.

5. At the conclusion of the address of the said E. Kimber, we retired to consider the application, we fully considered and discussed amongst ourselves and with our clerk the matters brought before us by the said E. Kimber for about fifty minutes, and then came to the conclusion that we should not be justified in granting summonses against any of the said persons for the offence of conspiracy, as the facts brought before us were not in our opinion sufficient to justify us in summoning the said persons, or any of them, to answer for such offence. On our return into court this deponent, H. E. P. Adamson (the then mayor), informed the said E. Kimber that the bench declined to grant the application.

6. We further say that we did, on the 2nd Nov. last, fully hear and determine the matter of the application made by the said R. Kiley through his solicitor the said E. Kimber for a summons against the said persons charged with the offence mentioned.

7. No sworn informations were laid before us in due form, but we did not refuse the application on that ground, as the said E. Kimber stated that the persons who had signed the statements which he read to us were prepared to swear to the truth of them.

8. We further make oath and say that no application was made to us on the refusal of the summonses or at any other time to take the recognisances of the said R. Kiley or any other person to prosecute the said persons charged with the offence, mentioned, under and in pursuance of 22 & 23 Vict. c. 17.

9. In answer to the statement of J. Mitcheson referred to in the said affidavit of R. Kiley and others, we say that on the 15th Oct. last the said J. Mitcheson informed the said E. Young, one of the deponents that J. Pye did, on the 14th Oct. last in the said borough, assault and beat the said J. Mitcheson. The assault referred to being an assault which was alleged to have been committed by the said J. Pye on the said J. Mitcheson at the meeting held at the Albion Assembly Rooms, and referred to in the affidavits and statements on which the rule was moved. The said E. Young at once granted a summons against the said J. Pye which was returnable on the 20th Oct. last at the police court aforesaid.

10. On that day the said J. Pye duly appeared in pursuance of the said summons before the said H. E. P. Adamson, one of the deponents, and others of Her Majesty's justices of the peace for the said borough, being the justices of the peace for the said borough then assembled and sitting, and the said J. Mitcheson and one T. Ellison were called as witnesses in support of such summons and others, G. Hodge and R. Atkinson, were called as witnesses on behalf of the defendant. After hearing the said case the said justices then sitting dismissed the said summons on the merits.

11. We further say that we were not aware that any offer had been made to settle that case out of court. An adjournment of the case was refused by the said justices then sitting, because they were of opinion that the complainant had had every opportunity of preparing his case between the date of the application for the summons, viz. 15th Oct. last, and the said 20th Oct. last, and further

that there was no sufficient cause shown to them why the same should be adjourned.

12. In addition to the summons before referred to, the said E. Young, one of the deponents, granted a summons against R. Kidd the younger, on the said 15th Oct. last for an assault, alleged to have been committed by him on the said R. Kiley at the said meeting on the 14th Oct. last.

13. This summons was returnable on the 20th Oct. last at half past ten o'clock in the forenoon, and the defendant duly appeared in pursuance thereof, when it was called on in its turn for hearing at about eleven o'clock; but the said R. Kiley, the informant, although duly called, did not appear by himself or his attorney, but some person in court, a barber by trade, applied to the justices then sitting, as a friend of the said R. Kiley, to adjourn the hearing of the summons. The said defendant objected to the adjournment, and stated that he was there ready with his witnesses to go into the case on the merits, and as no notice of an intended application for an adjournment had been previously given, and as no sufficient reason was given why the said R. Kiley was not in attendance to support his information, the said summons was dismissed.

14. And we further say that we were willing to grant summonses against any persons who had committed any assault or breach of the peace at the said meeting, and to fully hear and determine the case on the merits, but we declined to grant any summonses for conspiracy as requested, on the ground that the said R. Kiley had failed to satisfy us that there was sufficient evidence to warrant us in so doing.

15. No other summonses were applied for than those before mentioned.

Poland (with him *Hawkins*, Q.C.) showed cause. —Justices are the sole judges of whether a *prima facie* case is made out; and if they hear and determine the matter, no appeal lies from their decision. The words with which sect. 9 of 11 & 12 Vict. c. 42 commences are "That upon such information and complaint being so laid as aforesaid, the justice or justices receiving the same may, if he or they shall think fit, issue his or their summons or warrant respectively as hereinbefore is directed, to cause the person charged as aforesaid to be and appear before him or them" . . . "to be dealt with according to law." Here the justices did not think fit to issue summonses, and this court cannot interfere. Even if it be considered that these statements disclose an indictable offence, the justices, being without limit as to their discretion, might well have applied their knowledge obtained on the previous assault summonses, and have deemed the statements so exaggerated as to be insufficient to establish even a *prima facie* case. A further objection to this rule is that another remedy was open to the prosecutor. He might have applied to be bound over to prosecute under the Vexatious Indictments Act 1839. [*BLACKBURN, J.*—Does that provision apply where the summons is refused?] By the second section (22 & 23 Vict. c. 17) it is enacted "That where any charge or complaint shall be made before any one or more of Her Majesty's Justices of the Peace that any person has committed any of the offences aforesaid within the jurisdiction of such justice, and such justice shall refuse to commit or to bail the person charged with such offence to be tried for the same, then in case the prosecutor shall

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desire to prefer an indictment respecting the said offence, it shall be lawful for the said justice and he is hereby required to take the recognizance of such prosecutor to prosecute the said charge or complaint, and to transmit such recognizance, information, and depositions, if any, to the court in which such indictment ought to be preferred, in the same manner as such justice would have done in case he had committed the person charged to be tried for such offence." [BLACKBURN, J.—Can a prosecutor claim to be bound over when a summons is refused?] The words "depositions, if any," in this section go to show that the provision was intended to apply before as well as after the taking of depositions. With respect to this section, in the case of *Ex parte Wason* (L. Rep. 4 Q. B. 573), Cockburn, C.J., said, "I entirely agree that, supposing the matter brought before the magistrate had been matter cognisable by the criminal law, and upon which an indictment might have been prepared, the magistrate would have had no discretion, but would have been bound to proceed as directed by the statute; and if in such a case the magistrate had refused to receive the information, it would have been the duty of this court *ex debito justitiae* to grant a rule or issue a *mandamus* commanding the magistrate to take the recognizances."

The *Solicitor General* (Sir Hardinge Giffard, Q.C.) supported the rule.—Sect. 9 of Jervis's Act no doubt gives to magistrates a discretion as to granting or refusing summonses; but in this case it may be said they exercised no discretion at all, or at any rate on no legal grounds. This distinction was drawn in *Reg. v. Boteler* (4 B. & S. 959), where justices had refused to issue a warrant against the overseer of an extra-parochial place, which had just been made a parish, for levying the amount of a contribution order by the Union under 2 & 3 Vict. c. 84, s. 1. Justices are thereby empowered to issue such warrant if they "shall think fit." The only objection by the overseer was that the order was unjust and unreasonable, the new parish having no paupers of its own; the justices refused the warrant, as they stated, in the exercise of their discretion. Cockburn, C.J., asked during the argument, "Is not the refusal to issue the warrant virtually declining jurisdiction?" And he said in his judgment, at p. 364, "I do not intend in the slightest degree to encroach upon the doctrine that, where magistrates have a discretionary power to decide whether they will do an act or not, this Court will not order them to do it when they have exercised their discretion upon the merits of the matter. But it is clear upon the facts of the present case that they have not exercised that discretion which in law they would have been justified in exercising." In all these cases the limit of discretion must be a question of degree, and here the statements so clearly establish a *prima facie* case of conspiracy that the justices must have acted upon some other than legal grounds in refusing summonses. [COCKBURN, C.J.—We might think the magistrates were wrong, but can we review their decision? Can there be an appeal in this way from an erroneous act of discretion? BLACKBURN, J.—Probably the magistrates thought it better to put a stop to any further litigation about the matter. May not they exercise their discretion on that ground? POLAND.—That is not the ground they give. They say they decided upon the merits.

[BLACKBURN, J.—Unless these statements are false, there was clearly a conspiracy.] It is not for magistrates to put a stop arbitrarily to legal proceedings. They here give no grounds for this exercise of their discretion. Why are they to be, therefore, in a better position than if their admitted grounds were insufficient? They probably thought the applicant did not deserve any favour from them; but they ought not to have refused him justice.

COCKBURN, C. J.—Upon the whole, although this is a matter of some perplexity, I am of opinion that the rule should be made absolute. Nothing can be more clear than that this court has no appellate jurisdiction to review a decision of magistrates on a question of fact, after they have once heard and decided it in a manner within their authority. In a case like this, in which the statutes have given us no appellate power, if I could see my way to the conclusion that the magistrates had considered and acted upon this evidence, I should certainly say that, in conformity with the principles upon which we have always acted, we could not interfere further nor send the matter before the magistrates again. The *Solicitor General*, however, has called our attention to the statements upon which the charge was made, and it appears to me that the evidence they contain is very strong. And I cannot help thinking that when the magistrates refused to issue summonses upon it, they must have acted upon something of an extraneous and extra-judicial character which ought to have influenced their decision. If so, they have practically declined to exercise their jurisdiction on the merits of the matter as it was then before them. If they had this evidence from the witnesses on oath, after having issued the summonses, and had then determined that the witnesses were not trustworthy, and they did not believe their sworn testimony, the matter would have been one entirely in which they were the sole judges, and this court would have been precluded from interfering. But our conclusion is, that the magistrates here did not so consider the trustworthiness or credibility of the evidence before them. I dare say they thought they were acting rightly and for the good of the community; they were probably of opinion that the sooner the whole affair was buried in oblivion, the better for everybody concerned; and they were probably somewhat influenced by a perhaps justifiable distaste for the particular views and doctrines of the persons who were instigating them to move the law against their opponents. But these are considerations which ought not to have affected them at all. A meeting, convened for any purpose which is not a violation of the law, is entitled to the protection of the law, and persons holding such a meeting are not to be put down by clamour and violence, or by a breach of the peace. On the evidence contained in these statements we think the magistrates ought to have issued summonses to answer the charge preferred; in refusing to do so, they must have been influenced by extraneous considerations, and their answer to the rule is not a sufficient explanation. They have therefore declined the jurisdiction which they ought to have exercised. I think it would be more satisfactory if the matter could be taken before other magistrates than these, whose minds must be imbued with their previous knowledge; but that is for the consideration of the prosecutor. All we have

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to say is that the answer of the magistrates is not sufficient to lead the court to believe that they have exercised their discretion upon the facts presented to them.

BLACKBURN, J.—I have hesitated a good deal, but I agree that we may be justified in interfering. By the early law, which is re-enacted by Jervis's Act, when a magistrate refuses to hear a matter within his jurisdiction, we can clearly compel him; but when he hears and determines a matter we cannot overrule the exercise of his discretion. My difficulty here is to see how it can be that the magistrates have not exercised their discretion. If the charge preferred were that of attempting to blow up the Albion Assembly Rooms, or of a conspiracy to kill Dr. Kenealy, the justices might fairly say this is not evidence even for the granting of summonses; but it seems to me that these statements contain very clear evidence of a conspiracy to commit a breach of the peace. The magistrates do not say they disbelieve the statements, but they seem to have acted on the impression that they did not disclose even a *prima facie* case. Whether or not they have exercised some discretion in what they have done, we can sufficiently see that they must have acted upon some grounds not contained in the evidence before them, and the effect is the same as if they had declined jurisdiction. I fully concur in my Lord's recommendation to take further proceedings before other magistrates.

FIELD, J.—I am of the same opinion. I should be the last person to come to a determination which could tend to make us a court of appeal from magistrates on questions of fact. I think, however, that the magistrates in this case did not consider and determine the question submitted to them. They had to say whether these statements made a *prima facie* case of conspiracy against the persons charged. Had the magistrates been able to say they did not believe the statements, I would not have interfered with them. But I think they must have acted upon impressions produced from outside, and have not heard and determined the point before them upon the evidence.

Rule absolute.

Solicitor for prosecutor, E. Kimber.

Solicitors for defendants, Redpath and Holdsworth.

Friday, Feb. 4, 1876.

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River tolls—Fractional parts of mile—Description of boundaries—Local Act.

By the plaintiffs' Local Act of 1739, sect. 23, the plaintiffs are empowered to take from every person conveying goods upon the said river between Maidstone and Forest-row, or any part thereof (which all person and persons should and might lawfully do), such rates and duties for lockage and riverage as the plaintiffs should think fit, not exceeding the sum of 4d. per mile for every ton weight of goods from Maidstone up the river to Branbridge, and not exceeding the sum of 6d. per mile for every ton weight of goods from Branbridge up the river to Forest-row, and so in proportion for a greater or less quantity.

By sect. 28, the plaintiffs are from time to time to publicly fix up the duties for lockage and riverage charged by them.

By sect. 31, nothing in the Act is to be construed to

extend the plaintiffs' authority to the execution of any works below Mrs. Edmonds' wharf in Maidstone.

By sect. 38, any action, suit, or information for anything done in pursuance of this Act, or in relation to the premises, shall be commenced within three months after the facts committed.

Maidstone extends along the river upwards about three furlongs from Mrs. Edmonds' wharf to the College lock, constructed by the plaintiffs, Maidstone bridge being between the two. Plaintiffs, besides other works on the river, had scoured a shoal between the said bridge and Mrs. Edmonds' wharf, and on their annual survey they always disembarked at that wharf.

In 1874, plaintiffs amended their toll list, so as to charge, for the first time, tolls proportioned to a fractional part of a mile traversed.

Defendant, owner of oil mills situate on the Medway, less than a mile above the College lock, but more than a mile above Mrs. Edmonds' wharf, refused to pay to the plaintiffs any toll upon barges coming up the river to his mills.

Held that the plaintiffs were entitled to charge tolls proportioned to a fractional part of a mile traversed since the amendment of their list, without reference to the three months' limitation provided by sect. 38.

Held (per Blackburn, J.) that they could charge only from College lock.

Held (per Lush, J.), that they could charge from Mrs. Edmonds' wharf.

THIS was an action to recover the amount of certain tolls and dues claimed by the plaintiffs from the defendant as being payable in respect of the navigation by the defendant of a certain portion of the River Medway under the circumstances hereinafter mentioned.

The writ in the action was issued on the 12th Jan. 1875.

The declaration was for money payable by the defendant to the plaintiffs for certain tolls, rates, and duties, due and by right payable by the defendant to the plaintiffs for lockage and riverage under and by virtue of an Act of Parliament made and passed in the 13th year of the reign of his late Majesty King Geo. the Second, intituled "An Act to revive, explain, and amend an Act made and passed in the 16th and 17th years of the reign of his late Majesty King Charles the Second, intituled "An Act for making the River of Medway navigable in the Counties of Kent and Sussex," and otherwise for and in respect of goods, wares, merchandizes, commodities, and other things carried and conveyed by or caused to be carried and conveyed by upon and along the said river and navigation within the limits of the said navigation for the use whereof, within such limits, the plaintiffs are authorised by the said Act to charge such rates, tolls, and duties by the defendant, to and from certain mills known as the Tovil Oil Mills upon the said river and navigation; and for the use by the plaintiffs' permission of the said river and navigation within the limits appointed by the said Act.

The defendant pleaded—

Firstly, That he never was indebted as alleged; secondly, that the alleged causes of action did not accrue within six years of the commencement of the action; and, thirdly, that the alleged causes of action did not accrue within three months of the commencement of the action.

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The plaintiffs joined issue on all the pleas, and also demurred to the third plea.

The plaintiffs delivered particulars of their demand, in which they stated their claim to be for rates, tolls, and dues, in respect of all goods carried or conveyed along their navigation by or for the defendant, either to or from his mills at Tovil from the date at which he became the occupier of the said mills up to the 17th Aug. last.

The rate of toll upon which they claimed was stated in the particulars to be calculated on the distance from the site formerly known as Mrs. Edmonds' Wharf, but now sometimes called Vincent's Wharf, but in the present occupation of Mr. Wood, coal merchant, in Maidstone, to the said mills, that is for 1 mile 290 yards, or from such other point as the plaintiffs are entitled to measure the distance from at the following rates per ton per mile, and so on for the proportionate part of a mile, viz.: 1½d. per ton per mile completed, and a rate per ton in proportion to the above rates calculated on every ¼th of a mile completed, every fractional part of a farthing being charged as a full farthing.

The particulars also claimed specifically a sum of 30*l.* 15*s.* 11½*d.* as due for tolls from the 17th Aug. 1874 upon 142 barges containing in all 5913 tons, at the rate of 1½*d.* per ton for ¾ths of a mile, being the distance from College Lock to Tovil Oil Mills, and the plaintiffs further claimed to measure the distance from and to Mrs. Edmonds' Wharf, and to charge a proportionate sum in addition in respect of the additional distance.

The cause came on for trial before the Lord Chief Justice of England and a special jury, at the Maidstone Spring Assizes 1875, when a verdict by consent was taken for the plaintiffs subject to a special case.

The following case has accordingly been stated:

1. The plaintiffs are a company constituted and incorporated by an Act of Parliament made and passed in the year 1739, being the 13th year of the reign of his late Majesty King Geo. the Second, entitled "An Act to revive, explain, and amend an Act made in the 16th and 17th years of the reign of his late Majesty King Charles the Second, intituled 'An Act for making the River of Medway navigable in the Counties of Kent and Sussex,'" and the said company was in the said Act of Geo. 2, expressed to be constituted for the better carrying on, making, completing, and maintaining the navigation of part of the River Medway, as appears by sect. 2 of the Act. Copies of this Act and of the Act of Charles II. recited therein are to be taken as part of this case.

2. The defendant is the owner and occupier of the Tovil Oil Mills, which are situated on the Tovil Brook, a stream flowing into the River Medway, and were in existence prior to the year 1734. (The position of these mills is more particularly shown on the plan which accompanied and was to be taken as part of this case.)

3. The said mills were on the 7th June 1834, purchased by Mr. Steinmetz from the then Lord Romney. On the 29th Sept. 1858, the said Steinmetz leased the said mills to the defendant who thence continuously occupied them until the 24th Dec. 1862, when the defendant purchased the said mills of the said Steinmetz. Neither the said Steinmetz nor the defendant were ever called upon by the plaintiffs to pay tolls for the navigation of the said river to the said mills, nor

was any formal claim ever made upon either of them until the 13th Aug. 1874, when a claim was made by the plaintiffs on the defendant as hereinafter appears, but the matter was the subject of discussion between them in the course of the previous year.

4. By sect. 23 of the said Act of 13 Geo. 2, it was enacted that in consideration of the great charges and expenses the said company of proprietors, their successors and assigns, would be put to in making the said River Medway and streams navigable, and in repairing and keeping the same fit for such navigation, it should and might be lawful to and for the said company of proprietors, their successors and assigns, and they were thereby authorised and empowered at all times from and after the 20th May 1740, to keep boats, barges, lighters, or any other sort of vessels, and by themselves, their agents, workmen, servants, or any other person or persons, to employ and work the same for the carriage of all sorts of goods, wares, merchandise, commodities, and other things whatsoever as well upon such part of the said river and streams as should be by them made navigable as on any other part and parts thereof which were then navigable and passable, and to take and receive to their own proper use the profits, benefits, and advantages thereof, and also to ask, demand, receive, recover, and take of and from all and every person or persons who should carry or convey, or cause to be carried and conveyed, any goods, wares, merchandise, commodities, or other things whatsoever upon the said river and streams between Maidstone and Forest Row aforesaid, or any part thereof (which all person and persons should and might lawfully do) such rates and duties for lockage and riverage as the said company, their successors or assigns, should think fit, not exceeding the sum of 4*d.* per mile for every ton weight of goods, wares, merchandises, commodities, or other things which should be carried on any part of the said river between Maidstone and Branbridge, in the parish of Yalding, either upwards or downwards, and not exceeding the sum of 6*d.* per mile for every ton weight of goods, wares, merchandise, commodities, or other things whatsoever which should be so carried on any part of the said river or streams between Branbridge and Forest Row aforesaid, either upwards or downwards, and so in proportion for a greater or less quantity. Provided (sect. 24) that no toll rates or duties should be demanded or taken by the said company of proprietors of any person or persons navigating the said river until the same should be made navigable for boats carrying 40 tons from Maidstone to Branbridge aforesaid.

5. By the 25th section of the same Act it was enacted that all and every person and persons whatsoever should and might at all times thereafter have the free use and navigation of the said river, or any part thereof below East Farleigh Bridge, with boats, barges, lighters, or any other vessels coming to fetch or being loaded with stones or gunpowder, or any sort of materials for making gunpowder, without paying or allowing anything for their passing or repassing in by or through any of the locks, weirs, or piers for water to be erected by the said company by virtue of that or the said former Act, anything in either of the said Acts to the contrary notwithstanding.

6. By the 28th section of the said Act it was

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enacted that to the end that the navigation of the said river might be equally beneficial to all traders thereon, the said company of proprietors, when and as soon as they shall have made the said river navigable to Branbridge aforesaid, and from time to time as they should proceed to make the same navigable higher, should fix and settle the prices which they intended to charge and receive for lockage and riverage to be charged on all other persons navigating the said river for the like sorts of goods, wares, merchandise, and commodities, not exceeding the respective sums thereby authorised to be demanded and received, and that the said duties should be respectively entered in a book or books, to be kept or used by the said company of proprietors for that purpose, and should likewise be publicly fixed up at the several places where such duties should be demanded or received, and so, from time to time, as often as the said company of proprietors should think fit to alter or reduce such duties, and that they should charge and receive the said duties for lockage and riverage equally from all persons navigating the said river.

7. By sect. 31 of the same Act it was provided that nothing in that Act or in the said in part recited Act contained should extend or be construed to extend to authorise or empower the said company to cleanse, scour, dig, widen, or deepen the said river, or any part thereof below the lower part of Mistress Edmonds' Wharf in Maidstone aforesaid, or to authorise or empower the said company to erect, build, set up, make or hire any warehouses, storehouses, wharves, cranes, or other erections, to lay, load, or unload any iron, ordnance, timber, or other goods whatsoever, within the said parish of Maidstone aforesaid, or to authorise or empower the said company to erect, build, or set up any lock, wear, dam, or pen for water below the wall belonging to the gardens of the college near Maidstone Church.

8. By sect. 38 of the same Act it is provided :

That if any action, suit, or information shall be brought or commenced by or against any person or persons, or by or against the said company of proprietors of the said river Medway, for anything done in pursuance of this Act, or in relation to the premises, every such action, suit, or information shall be brought or commenced within three months after the facts committed, and not afterwards, and shall be laid and brought in the said counties of Kent and Sussex respectively, where the matters in dispute shall arise, and not elsewhere; and the defendant or defendants in such action or suit shall and may plead the general issue, and give this Act and the special matter in evidence at any trial to be had thereupon, and that the same was done in pursuance and by the authority of this Act, and if the same shall appear to be so done, or if any such action or suit or information shall be brought or commenced after the time before limited for bringing or commencing the same, or shall be laid or brought in any other county or place than where the matter in dispute shall lie, then the jury shall find for the defendant or defendants, or if the plaintiff or plaintiffs shall become non-suited, or suffer a discontinuance of his or her or their action or actions, or if verdict shall pass or judgment upon demurrer be given against the plaintiff or plaintiffs, the defendant or defendants shall have such remedy for the same as any defendant or defendants hath or have or may or can have for costs in any other cases by law.

9. Under and in accordance with the said powers and provisions, and the other powers and provisions contained in the said Acts, or one or other of them, the said company executed various works authorised by the said Acts, or one or other of them, and made the said river navigable both to

Branbridge and afterwards as high as Tonbridge. Their first lock was constructed at a point opposite the wall belonging to the gardens of the college near Maidstone Church aforesaid. This lock is known as the College or Church Lock, and is marked on the aforesaid plan by the name of College Lock. The company also constructed other locks at other points higher up the river, and from time to time executed and maintained whatever works appeared to them necessary for making and keeping the river navigable between Maidstone Bridge and Tonbridge aforesaid for the barges used on that portion of the river, in accordance with the provisions of the said Acts.

10. As evidence of their having executed works between Maidstone Bridge and Mrs. Edmonds' Wharf, the plaintiffs tendered three entries in a ledger belonging to them, under the respective dates 1742, 1743, and 1749, of payments made to persons employed by them for scouring Maidstone Shoal, which is between Maidstone Bridge and Mrs. Edmonds' Wharf. The court is to determine whether those entries are admissible as evidence on behalf of the plaintiffs. If they be not admitted there was no evidence of the company ever having caused any works to be executed, or any repairs to be done, between Maidstone Bridge and Mrs. Edmonds' Wharf. But they had for many years been accustomed, upon a fixed day in every year, to descend the river from Tonbridge in a barge, for the purpose of making an annual survey of the portion of the river over which they exercised control, and on such occasions they always disembarked at the Mrs. Edmonds' Wharf, where their survey was concluded.

11. The company further, in accordance with the provisions to that effect of the said Act of Geo. 2, fixed and settled from time to time the prices for lockage and riverage to be charged upon persons navigating the said river, in respect of the various sorts of goods, wares, merchandise, and other commodities for which they are authorised to take toll under the provisions of the said Act.

12. Upon the 10th Oct. 1742, the company passed a resolution ordering that the full tollage or riverage allowed by the Act of Parliament, viz., 4d. per ton per mile, be demanded and taken of all persons who shall navigate the river. The company have caused from time to time toll boards containing a list of the prices to be charged for lockage and riverage to be publicly fixed up at the College Lock aforesaid, and at the wharves of the said company at Branbridge and Tonbridge aforesaid.

13. During the whole period over which the claim in this action extends, until the revision of the rates hereinafter mentioned, the list or schedule of rates and tolls exhibited was in the form shown in schedule B to this case annexed, which is to be read as part thereof.

14. Since the dates of the said Act of Car. 2 and of the said Act of Geo. 2, although the town of Maidstone has very much increased in area and extent, yet it has not extended along the banks of the Medway upwards beyond College Lock.

15. The parish of Maidstone extends on the north bank of the said river to Farleigh Bridge aforesaid, a distance of 2 miles, 3 furlongs, and 154 yards from Mrs. Edmonds' Wharf, and on the south bank to a point at about 1 mile 5 furlongs, and 161 yards from the said wharf. The bounda-

ries of the borough are the same as those of the parish.

16. The said Tovil Oil Mills are at a distance above the said College Lock of 5 furlongs and 91 yards, and above Maidstone Bridge of 6 furlongs and 132 yards, and the distance between the said College Lock and Mrs. Edmonds' Wharf is 3 furlongs and 141 yards or thereabouts.

17. At the time of the passing of the Act 13 Geo. 2. the wharf called Mrs. Edmonds' Wharf, and the site where the College Lock now is, were at the extreme ends or nearly so, respectively, of the river frontage of Maidstone town. The plaintiffs in their annual survey have always surveyed the river downwards as far as the site of Mrs. Edmonds' Wharf. This wharf adjoins the site of the wharf which in the preamble of 5 Geo. 4, c. 148 (local and personal) hereinafter referred to is called the Lower Town Wharf on the eastern side.

18. The distance of the river from College Lock to Tonbridge is between 15 and 16 miles. Within the memory of persons now living there were milestones along the towing path from College Lock to Tonbridge, some of which are still in existence. These milestones were intended to mark the distance in measured miles from College Lock to Tonbridge. Upon the 15th milestone, counting from College Lock, there is the date 1750. There was no evidence as to by whom they were erected. The first of these milestones, counting from College Lock, is near a place called Pine Shoot, which is about a quarter of a mile above the Tovil Oil Mills.

19. Upon the 10th July 1874, the plaintiffs held a meeting, at which an amended toll list was read and approved, and ordered to be published. A new toll board was also ordered to be set up at the Church Lock, and the old board to be carefully retained by the manager, and an attested copy of the toll printed thereon made by the solicitors. And it was also ordered that as soon as the new toll board at Church Lock should be erected claim for toll should be made on Mr. Brook (the defendant in this action).

20. A new list of tolls was accordingly, on or about the 9th Aug. 1874, set up upon the toll boards at the plaintiffs' locks and wharves. Such list was in the form shown in schedule D annexed hereto, and is to be taken as part of this case.

21. Up to the said 9th Aug. 1874, the plaintiffs had never claimed to charge tolls proportioned to a fractional part of a mile traversed. Nor had they ever, until the year 1869, charged any toll where the whole distance traversed was less than a mile. When the distance traversed consisted of one or more completed miles and a fractional part of another mile toll had not been charged for the fractional part, unless such part exceeded half a mile, in which case it was charged as for a further mile completed.

22. In March 1869, the company instructed their lock keeper at College Lock to charge a toll of $\frac{1}{4}$ d. per ton on goods conveyed to a general landing wharf, which had been made some years before at Tovil, and was situate a short distance above the defendant's oil mills, but nearly a quarter of a mile below the first milestone at Pine Shoot. This toll was from that time paid upon goods conveyed to that wharf, but no notice of the charge was placed on the toll boards or otherwise publicly fixed up.

23. Until within the last ten years Tovil Oil Mills was the only place between College Lock and the first milestone at Pine Shoot on which goods could be landed. No toll was ever charged on goods conveyed to the Tovil Oil Mills until after the 9th of Aug. 1874.

24. During a considerable period, while Lord Romney owned the Tovil Mills (which were originally and at the time of passing the Act of 13 Geo. 2, used for the manufacture of gunpowder, but were afterwards converted into oil mills), the barges of his tenant for the time being passed to and from those mills without payment of any toll.

25. The defendant has constantly, since his occupation of the Tovil Mills, carried goods to and from the said mills along the said river and navigation through the said College Lock past Mrs. Edmonds' Wharf to and from various places down the Medway and thence into the Thames and elsewhere.

26. On the 13th Aug. 1874, the plaintiffs gave notice to the defendant that they should in future charge toll for all goods landed or shipped at the said Tovil Oil Mills, and carried upon the river, and that a settlement would have to be come to for past dues.

The defendant at once disputed his liability to pay such tolls, and has not paid them.

27. Since the publication of the said revised list of tolls in August 1874, and before action, the defendant has as heretofore used the navigation, passing through the College Lock, and to and from the point called Mrs. Edmonds' Wharf and Tovil Mills, but he has refused to pay tolls in respect to the passage of his goods, whether before or since the revision of the tolls.

28. In the year 1792 an Act of Parliament was passed, viz., 32 Geo. 3, c. 105, for the purpose of improving the navigation of the river Medway between the lock in the town of Maidstone, and a point in the said Act called the lower part of the orchard then in the occupation of G. Hunt, the younger, below Aylesford Bridge.

29. In the year 1802 the last mentioned Act was repealed by a further Act of Parliament, viz. 42 Geo. 3, c. 94, entitled "An Act for repealing an Act passed in the 32nd year of His present Majesty's reign for improving the navigation of the river Medway from the town of Maidstone through the several parishes of Maidstone, Boxley, Allington and Aylesford, in the county of Kent, and for the better and more effectually improving the navigation of the said river," whereby certain persons were incorporated by the name of the Company of Proprietors of the Lower Navigation of the river Medway. The navigation of the river below the point called Mrs. Edmonds' Wharf is under the control of that company.

30. In the year 1824 a further Act of Parliament, 5 Geo. 4, c. 148, was passed, entitled "An Act for the more effectually improving the navigation of the river Medway from Maidstone to Halling in the county of Kent, and to alter and enlarge the powers of an Act of the 42nd year of His late Majesty, for improving the navigation of the said river," whereby further powers were given for the improvement and maintenance of the lower navigation.

Either party is at liberty to refer to the above-mentioned Acts as part of this case.

31. The Lower Navigation Company have

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always caused to be executed whatever works appeared to them necessary for keeping the river navigable between Mrs. Edmonds' Wharf and Maidstone Bridge. They also on several occasions caused a shoal or bank to be removed from the bed of the river between Maidstone Bridge and the College Lock, where the river Len flows into the Medway, which shoal or bank interfered with the free passage of the barges of the Lower Navigation Company, which were larger and of greater draught than those of the plaintiffs. But they did no other repairs, nor otherwise interfered with the part of the river between Maidstone Bridge and the College Lock. The Lower Navigation Company have always charged a tonnage and not a mileage rate.

32. The lock in the town of Maidstone mentioned in sect. 1 of the 32 Geo. 3, c. 105, and also in sect. 1 of 5 Geo. 4, c. 148, is the same as the College Lock above mentioned. Hunt's orchard, mentioned in the same Acts, is about four miles below Maidstone bridge.

33. The court is to have power to draw all inferences of fact, and to make all necessary amendments.

The Ordnance Map, showing the course of the river Medway between Farleigh Lock and Aylesford Bridge, may be referred to by either party on the argument of this case.

The questions for the opinion of the court are:

First, whether the plaintiffs are entitled to recover in this action;

Secondly, what point the plaintiffs are entitled to measure from in computing the distance by which to estimate the amount of toll to be paid;

Thirdly, at what rate (if at all) the plaintiffs are entitled to recover tolls from the defendant, and

Fourthly, for what period of time (if at all) anterior to the date of the writ, the plaintiffs are entitled to recover toll from the defendant.

If the court shall be of opinion that the plaintiffs are not entitled to recover any tolls from the defendant up to the date of the action brought, judgment is to be entered for the defendant with costs.

If the court should be of opinion that the plaintiffs are entitled to recover any tolls, the amount to be recovered is to be ascertained, if the parties cannot agree, by an arbitrator, in accordance with the judgment and opinion of the court upon the questions submitted to them, and judgment is to be entered for the plaintiffs for the amount so to be ascertained, with costs.

SCHEDULE B.

Medway Navigation Tolls.

Coals and coke (per ton) to Farleigh, 6d.; Teston, 6d.; Wateringbury, 6d.; Yalding, 1s.; Brandbridges, 1s. 6d.; Norwoods Bridge, 1s. 6d.; Ford Green Bridge, 1s. 9d.; Hartlake, 2s.; Tonbridge, 2s.

Timber deals, slate, and cement (per ton per mile), 2d.; gunpowder, 6d.

Grain and seed of all kinds, flour and malt, hops, wool, bark, hay and straw, salt and saltpetre, soap and tallow, grocery, glass and earthenware, hides and leather, paper and white rags, porter, beer, ale, and cider (per ton per mile), 1½d.

Wines and spirituous liquors, oil and oil cake, hop poles, lime, lime ashes mixed with run or slack lime, sprats and other fish, stones for building or paving up the river, metals of all kinds, and all other goods and commodities not specified above or below (per ton per mile), 1½d.

Dung, mould, chalk, chalk rubbish, lime ashes, bones, woollen rags, potatoes, bricks, tiles, gravel, sand, clay, stones for repair of roads, stones for building, or any other purposes down the river (per ton per mile), ½d.

WM. GOBHAM,

Clerk to the Medway Company,
Oct. 1st, 1867.

SCHEDULE D.

Medway Navigation Tolls payable pursuant to Sect. 23 of 13 Geo. 2, c. 26.

1. Gunpowder (rate per ton per mile completed), 6d.

2. Timber deals, slate, and cement, 2d.

3. Grain and seeds of all kinds, flour, malt, hops, wool, bark, hay, building stone, salt, saltpetre, soap and tallow, groceries, glass and earthenware, hides and leather, paper and rags for manufacturing purposes, porter, and other malt and spirituous liquors, oil and oil cake, hop poles, lime, metals of all kinds, and all other goods not specified above or below, 1½d.

4. Manures, rags, sprats, and other fish, lime ashes, dung and mould, chalk, and chalk rubbish, bones, and other manures, bricks, tiles, gravel, sand, clay, stones for repairing of roads, ½d.

And for fractional parts of a mile where the distance is over a mile a rate per ton in proportion to the above rates calculated on every ¼ of a mile completed every fraction of a farthing being charged as a full farthing.

5. For an eighth of a mile or under, and for every additional eighth of a mile completed, where the distance is under a mile, upon all goods, wares, merchandizes, commodities, and other things whatsoever, one farthing per ton.

Coals to Farleigh (per ton), 6d.; Teston and Wateringbury, 6d.; Yalding, 1s.; Brandbridges, 1s. 6d.; Norwoods Bridge, 1s. 6d.; Ford Green Bridge, 1s. 9d.; Hartlake Bridge, 2s.; Tonbridge, 2s.

By order of the Committee of Proprietors,

F. SPENCER,

Managing Agent.

Cohen, Q. C. (with him F. M. White), argued for plaintiffs.

Brown, Q. C. (with him A. L. Smith) for the defendant.

The arguments on both sides are repeated in the judgments of the court.

BLACKBURN, J. — This case, which has been argued at some length, turns upon the construction of an Act of Parliament, and there are two points which we have to determine, one of which my brother Lush and myself are agreed upon. We think that the true construction of the 23rd section, imposing the rate is that, whatever be the limits within which it is to be imposed, all ships and barges carrying goods are to pay a rate proportionate to the distance they go; and that it is not the true construction of the Act to say that the toll is only to be placed upon them for every entire mile they go, the fraction of a mile being left untouched. The object of the Legislature, when we look at the words of the Act, seems to have been to impose a tax upon all barges carrying goods on the river between Maidstone and Forest Row. The words of the section are, "such rates and duties for lockage and riverage as the said company of proprietors shall think fit, not exceeding the sum of 4d. per mile for every ton weight of goods, wares, merchandizes, commodities, or other things which shall be carried on any part of the said river between Maidstone and Brandbridge, in the parish of Yalding, either upwards or downwards, and not exceeding the sum of 6d. per mile for every ton weight of goods, wares, merchandizes, commodities, or other things whatsoever which shall be so carried on any part of the said river or streams between Brandbridge and Forest-row aforesaid." So that the tax put upon barges going along the Medway from Maid-

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stone to Brandbridge is 4d. per ton per mile, and from Brandbridge to Forest-row, or any part of it, is 6d. per mile for every ton. I think it is clear that the tax is to be at that rate. It was never meant that they were to leave two fractions of a mile, one above Brandbridge and the other below, together making more than a mile, untouched, but that there was to be a rate at which barges were to be taxed according to the distance travelled—if above Brandbridge, 6d., and if below Brandbridge, 4d. I think that is the sense in which it is to be looked at. But then the objection is made that when the Legislature said for every ton so and so shall be paid, they have thought fit to add “and so in proportion for a greater or less quantity.” I think there is some force in the observation that has been made that, though the Legislature could use language to make it perfectly clear that there should be a proportionate quantity charged for, they have not used such language as to make it perfectly clear about the miles. That is true; but, as Mr. Cohen has said, it required language to be used with reference to the quantity, in order to make it clear and intelligible, whilst it did not require such words with reference to a proportionate part of a mile. All I can say upon that is this: It seems to me that tolls for a fraction of a mile within the limits are to be taken at that rate just as much as tolls are to be taken for a proportionate quantity. However, the Medway Company can only recover those fractions at the rate at which the company has thought fit to charge. It appears that, until Schedule D came into operation, they never thought fit to charge for a fraction, and they cannot therefore recover for a fraction before the time that came into operation. For a fraction of a mile within the limits from that time afterwards they would be entitled to recover, and for the entire mileage within the proper limits they are entitled to recover, subject to the six years’ limitation, as to which there is no dispute. Now, with reference to the other point which arises on the construction of the Act, unfortunately there is a difference of opinion between my brother Lush and myself. If our decision was final, or likely to be final, we should, under the circumstances, have been obliged to adjourn the case, and to have had it reargued, which would have necessitated a good deal of expense and trouble to the parties; but as the case can now be cheaply and quickly taken to the Court of Appeal, we do not think it necessary even to take time to consider our judgment, because each of us has looked at the matter carefully, and there is no reason to think that our opinions would, by a more mature consideration, be changed. We therefore think it better for each of us to give our reasons now, so that the case can, if necessary, be more quickly taken to the Court of Appeal than if the case were determined after reargument by a court differently constituted. It is for these reasons that we do not delay giving our judgment. Now this question entirely turns upon the construction of the 23rd section. Of course in interpreting the 23rd section we should look at the whole of the Act, and all the circumstances that were before the Legislature in order to see what the 23rd section means. The 23rd section gives the company of proprietors a right to levy tolls on every person or persons who shall carry or convey, or cause to be carried and conveyed, any goods and so on upon

the said river and streams between Maidstone and Forest Row. The question raised before us, and it is one of some difficulty, is where the terminus at Maidstone is to be considered to begin. Is it to begin, as the defendant avers, (and which in my opinion is the true construction) at College Lock, for that is what it practically comes to, and go upwards, or is it to be interpreted as meaning (and that is the contention on the other side) from Mrs. Edmonds’ wharf upwards? I will now render my reasons for thinking that it is to be from College Lock, which is the upper part of the town of Maidstone. It is found in the case that the town of Maidstone was in the 13th Geo. 2 the same as it is now in the sense of continuous buildings; that it ended where College Lock was placed, and still ends where college lock is placed. Now we have to consider whether that is the sense in which the words “between Maidstone and Forest Row” are used. For that purpose it is necessary to see how the Act is framed, how it is worded, and how it came to be worded in that way. There had been an Act passed in the reign of Charles II., incorporating a body of commissioners to whom powers were given to improve the navigation of the whole of the river Medway, and all streams flowing into the river Medway in the counties of Kent and Sussex, and so flowing down into the Thames. Power was given to improve the navigation, and then it was enacted that when the commissioners had improved it, provided they began it within one year, and for such portion as was completed within seven years (and they were to go no further than that), they were to reap a reward by having the monopoly of being carriers, subject to this condition, that they should not be able to hinder persons from using or employing boats of such burthen as had been used or employed before the passing of that Act. So that evidently what was then intended was this: you, the commissioners, having improved the river Medway and made it navigable for big vessels, where only little vessels could go before, shall have a monopoly with reference to big vessels, but little vessels are still to have the advantage which they had before. That would seem to have been an ingeniously contrived plan for raising contentions and disputes when that Act came into operation, but the commissioners did nothing, and it therefore becomes an immaterial consideration, except so far as this, that the river remained only partially navigable, though it was intended that the navigation should be improved. Then there came in the reign of Geo. 2. the present Act. It commences with a recital of the former Act, and then, having recited that former Act, sect. 1, says: “The proprietors and commissioners hereinafter mentioned constituted and appointed, shall have full power and authority to do and perform, and shall and may respectively do and perform all act and acts, deed or deeds, in such manner, and by the same power and authority as the proprietors and commissioners by the said before mentioned Act, nominated, constituted, and appointed, were respectively entitled to do and perform (save in such particulars as by this present Act is or are hereinafter altered, explained, or amended.)” Had that section stood without that parenthesis, it would have given the commissioners power to do anything to the river Medway down to the Thames, but the exceptions which are mentioned afterwards clearly show they are not to do so.

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Then comes the second section, beginning with this recital: "And whereas the several persons hereinafter particularly named are desirous at their own proper costs and charges to begin, carry on, and complete the navigation of such part of the ancient river Medway and streams falling thereinto, as run down from Forest Row, in the county of Sussex, to the town of Maidstone, in the county of Kent." Unless there be something therefore in the context, or something in that which follows, that puts a different sense upon it, that means their object and wish to be incorporated was to improve the navigation down to the town as it then existed, and unless there is something in the context to show that the words go further, that would show that they were not desirous of doing anything within the town of Maidstone at all, but that that which they were going to do would only come down to that which, as it is found in the case, was the terminus of the ancient town of Maidstone—viz., College Lock. It then recites that such laudable purposes should be carried out, and that to that end certain persons should be formed into a company, "for the purposes of making, completing, and maintaining the said navigation in manner as the proprietors in and by the said in part above recited Act," that is, the Act of Car. 2, "were authorised and empowered to do, and more particularly for making, carrying on, and completing such navigation from Forest-row to Maidstone aforesaid, according to the rules, orders, methods, and directions hereinafter expressed and laid down." Therefore the first section having said that all powers should be revived and given to the commissioners, except so far as specified, the 2nd section, after reciting that the commissioners were desirous of improving the navigation down to Maidstone, says—you, the commissioners, shall have certain powers, subject to certain exceptions that come afterwards, you shall have all the powers that the Act of Car. 2 gave you, and you shall use and exercise those powers for improving the navigation down to Maidstone, which is what you are desirous of doing. That, if it stood unlimited, would give them also power to make any improvements where they liked, down to the Thames. But now I come to the 31st section, and though it is not next in order, yet I think it is material to see what happens. The 31st section shows what the exceptions alluded to in the parenthesis at the end of sect. 1 are. "Nothing in this or the said in part recited Act contained shall extend, or be construed to extend, or authorise or empower the said company of proprietors to cleanse, scour, dig, widen, or deepen the said river, or any part thereof, below the lower part of Mistress Edmonds' wharf in Maidstone aforesaid." I pause here to say, that that says they shall not dig or interfere with the river at all, not below Maidstone, but below Mistress Edmonds' Wharf in Maidstone; the previous section having said as I understand it, You, the commissioners, are desirous of improving the navigation down to Maidstone, we will therefore give you, subject to the exceptions that are mentioned afterwards, all powers to do that down to Maidstone, and we will give you powers extending down to the Thames, such as the commissioners formerly had, subject to certain exceptions. Then there comes this exception: You, the commissioners, shall not "cleanse, scour, dig, widen, or deepen the said

river, or any part thereof, below the lower part of Mistress Edmonds' wharf in Maidstone aforesaid." Then it goes on to say, "this Act shall not authorise or empower the said company of proprietors to erect, build, set up, make, or hire any warehouses, storehouses, wharfs, cranes, or other erections, to lay, load, or unload, any iron, ordnance, timber, or other goods whatsoever within the parish of Maidstone aforesaid." That extends considerably above the town; then there can be no doubt that their powers are limited, though tolls in every construction of the Act are imposed on boats travelling on the part of the river that runs in the parish of Maidstone. The latter part of that section says that they shall not on any account erect, build, or set up any lock, weir, dam, or pen for water below the wall belonging to the gardens of the college near Maidstone Church, which, as we find from the statement in the case was then and is still part of the town of Maidstone. Now, taking it in that way, it seems to me the effect of the legislation is this, that they having stated that they were, as a commercial undertaking, desirous of maintaining the river to the place where College Lock is placed, had power given them to do it, and to make locks, and to do everything above that, and though they had incidentally left to them the power of deepening the river down as far as Mistress Edmonds' wharf in Maidstone, yet the great object of the enactment was to enable them to fulfil their undertaking and to make the river navigable above Maidstone Lock. Then comes the 23rd section upon which the question turns. Let us see what that is? It says first, that in consideration of the charges and expenses to which the commissioners are to be put, and I may say at once that it does appear that some charges were incurred by the commissioners above Mistress Edmonds' wharf and below College Lock, power is given to take tolls, but it seems to have been thought necessary to give them power to act as carriers "as well upon such part of the said river and streams as shall be by them made navigable as on any other part and parts thereof which are now navigable and passable." That, I think, means clearly enough that they are to act as carriers on the whole of the River Medway down to the River Thames, not only the parts that they are going to make navigable but all parts that were then navigable. Then the language is changed, "and also to ask, demand, and receive, recover, and take of and from all and every person or persons who shall carry or convey, or cause to be carried and conveyed" any goods and so on upon the said river and streams between Maidstone and Forest-row as aforesaid. Now what does that mean? *Prima facie* the meaning of the words between Maidstone and Forest-row would be from the top of Maidstone, from the College Lock to Forest-row; but what is there to oblige us to say that from Maidstone means from Mistress Edmonds' wharf as it is called in the recital of the Act which is lower down the river and would include part of Maidstone. It is so contended on this ground, as I understand this argument, and this is the most plausible ground upon which it can be put, that it was only reasonable and proper that tolls should be taken in all parts on which the proprietors expended money. It is true there is nothing objectionable in that, but the scheme of the Act is not that at all. Toll is to be taken all over

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the river though there may be reaches and places where the navigation has not been touched at all. It is a very common thing in English rivers to find shoals which make navigation very bad, except for very small vessels, although there may be a space for miles where the river is deep and can be navigated very well. The enactment is not that the proprietors shall take tolls for only those parts that they improve, but that they shall take tolls from all those who use the river between Maidstone and Forest-row, whether they improve it or not. It would also seem intelligible to say that though you, the proprietors, expend some money in improving the navigation between the beginning of Maidstone and Mistress Edmonds' Wharf, yet you shall not be entitled to charge tolls on that portion of the river, and for this reason: we will not let the trade of Maidstone be worried by having to pay the tolls of that part of the river where you do not do much good, but you shall have power to improve the navigation if you please, and your reward for that, so far as tolls go, is to be, that all who use the navigation between Maidstone and Forest-row shall pay tolls whether it be for a portion of the river on which you have spent money or not. I can find words that seem to indicate an intention to say, if you do not spend money on parts of the river between Maidstone and Forest Row you shall not levy tolls on the party who uses that part of the river between Maidstone and Forest Row, but I do not see anything to enable me to say that the words "to Maidstone" are to be changed, and that by these words it was meant "to Mistress Edmonds' wharf in Maidstone." There are several sections in the Act where the terminus is given. The section which recites what it is that the undertakers undertake to do says that they are desirous at their own proper costs and charges to begin, carry on, and complete the navigation of such part of the ancient river Medway and streams falling thereunto as run down from Forest Row in the county of Sussex to the town of Maidstone. The words used there are such as to show that it was clearly the town of Maidstone and not Mistress Edmonds' wharf. Now in another part the words used are "between Maidstone" and "from Maidstone." I do not know that one phrase throws more light upon it than the other, except that, *primâ facie*, the meaning of the words is "to the town of Maidstone," and I can see nothing to change that. I think there is nothing in the other sections of the Act material to consider. Something was said as to the 29th section. I own I do not think that the construction of that section is necessary for the decision of this case. I do not think that it at all bears on this question. That section stipulates that the bargeman shall, if required, inform the collector of tolls where he is going to take the goods on board his barge; and whether he can ask the bargeman when he has got into their part of the navigation or can ask him below, does not bear upon this question. As I said before, for the reasons which I have endeavoured to express, it seems to me the plaintiffs are wrong in saying that they can charge a toll for any portion of the distance that lies below College Lock. I think they are right in saying that they are entitled to charge for a fractional part of a mile according to their scale above College Lock; and I think they are right also in say-

ing that it is not a three months' limitation, but that they can go back six years to recover whatever may be due to them. I suppose it is not a sum of any great consequence. They cannot recover the fraction before that time, because they failed to put up a schedule in which they stated the fractions. I need further hardly say that I disregard altogether, and that I do not care what the Legislature or those framing private Acts afterwards stuck into them. I look back and construe this Act as if I had been sitting to decide this case in the year 1780, although I should then have had the advantage of getting more accurate information as to the degree to which the river was navigable before the 13 Geo. 2. The second Act does not take away any right that did exist, nor give the commissioners any right that did not exist. My brother Lush takes an opposite view to that which I have endeavoured to explain. I am, therefore, far from expressing my opinion without doubt. This is the result I have come to; and if the parties wish to have the matter settled, it can be done as quickly and as cheaply by taking the case to the Court of Appeal as if it were reargued here.

LUSH, J.—I also think that we are not at liberty to look at subsequent private Acts in order to enable us to put a meaning on the Act in question. If there had been anything in the subsequent private Acts to say that these particular Medway navigation proprietors should not be entitled to take tolls over the spot in question, or if there were any declaration that such was not intended, or anything of that kind, that would, of course, have controlled the meaning of this section. But nothing of that kind is to be found, and, therefore, we are not at liberty to argue one way or the other upon the construction of the Act from any recitals or ambiguous phrases in a subsequent Act. Now, as regards one point that has been argued, viz., that the company are entitled to charge for a fractional portion of a mile, I agree with my learned brother. I do not think that is a question which admits of any reasonable doubt. I quite adhere to the principle of construction established in the case of *Barrett v. Stockton and Darlington Railway Company* (2 M. & G. 134); but it does not appear to me, on reading the clause in question, that there is any ambiguity at all. It seems to me to be plain what the intention of the Legislature was, and that being so, we are bound to give effect to it. It appears to me that the Act by sect. 23, does in terms provide for the fractional distance as well as for the fractional quantity, that it is to be at the rate (for that is what the words mean) of 4d. or 6d. per mile per ton whether you go a shorter distance than a mile or not, or whatever part of the river you traverse you shall pay at that rate, and whatever quantity of goods you carry you shall pay at that rate. Now I wish I could concur in the opinion of my learned brother upon the other point, because I think it is not satisfactory that we should be unable to come to the same conclusion upon this Act of Parliament. However I have formed an opinion upon it, and it is that opinion that I am now bound to express. I quite agree with my learned brother that it is more expedient, considering the present facilities for going to the Court of Appeal, and that it would be less expensive to the parties and occasion less delay, if we at once pronounce our different opinions, and so leave one party or the other to go

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to a Court of Appeal at once rather than incur the expense and delay which would be occasioned by a rehearing of the case. I will now shortly express my reasons for thinking that the Medway Company are entitled to compute the distance from Mistress Edmonds' wharf. The Act of Geo. 2, which has been so often referred to, evidently treats it as a very desirable thing to open the navigation of the river Medway, and after reciting an Act of Parliament which had passed in the time of Car. 2, and become abortive, there being nothing done under it, and after reciting the expediency of having the navigation improved, it says, "Whereas the several persons herein-after particularly named, are desirous, at their own proper costs and charges, to begin, carry on, and complete the navigation of such part of the ancient river Medway, and streams falling thereinto, as run down from Forest Row, in the county of Sussex, to the town of Maidstone, in the county of Kent. To the end, therefore, that so good an undertaking may be carried on to advantage and put in full force and execution, be it further enacted;" then it authorises that a number of persons, their successors, or assigns, "shall be united into a company for the better carrying on, making, completing, and maintaining the said navigation in manner as the proprietors, in and by the said in part above recited Act were authorised and empowered to do, and more particularly for making, carrying on, and completing such navigation from Forest Row to Maidstone aforesaid, according to the rules, orders, methods, and directions hereinafter expressed and laid down." Then it says they shall be incorporated. They are then authorised to "cleanse, scour, dig, widen, and deepen the said river and streams, and to cut, dig, and make new new channels, trenches, and water-courses," and so on; and to erect locks, weirs, and so on, and to do whatever is necessary "to make the same navigable, passable, and portable for boats, barges, lighters and other vessels." Now the termini are, therefore, from Forest Row, in the county of Sussex, to the town of Maidstone, in the county of Kent. *Prima facie* those words would exclude the town of Maidstone itself. Then, in order to see what part of the town of Maidstone was meant, we must look either to the context of the Act or the locality, because a reference to either would, I apprehend, enable us to put a construction on those words, and see what part of the town of Maidstone was meant. The object was to open the navigation to the traders of Maidstone, amongst other things, and surely it would not be enough to accomplish that end if the navigation was made complete up to the extremity of the town, unless that happened to be where the wharves were. If it turned out, as it is found in the case, that there was below the lock in question and between College Lock and the bridge and Mistress Edmonds' Wharf (and the term Mistress Edmonds' Wharf denotes that that is the business part of Maidstone), a shoal that required constant attention in order to keep clear and not impede the navigation, I should have said, looking at the locality, and having that explanation before me, the meaning was this, that they were authorised to do so much as would be necessary in order to open the navigation to the business part of the town so that the business part of the town would have the advantage of the new navigation. But that is put beyond all doubt to my mind by the 31st

section, because it must be read as a proviso to the 2nd. The 2nd section, as my learned brother observed, in the early part of it, apparently gives power to do all that the former persons had power to do under the Act of Car. 2. Then there comes in a proviso to that, which is in these terms: "That nothing in this or the said in part recited Act contained shall extend or be construed to extend to authorise or empower the said company of proprietors to cleanse, scour, dig, widen, or deepen" (those are the very words used in the 2nd section) "the said river, or any part thereof, below the lower part of Mistress Edmonds' wharf, in Maidstone, aforesaid." Putting that as a proviso to the 2nd section, if nothing else could be referred to. I should say that, by implication, not only authorised them to go as far as Mistress Edmonds' wharf, but it shows that what they meant by the words "town of Maidstone" was that part of the town of Maidstone where the wharves are, and which would make the navigation a real improvement to the town. I therefore read it thus, that it authorises them to make the river navigable from Forest Row to Mistress Edmonds' wharf, in Maidstone. Now there is a further part of the 2nd section which has been referred to. It goes on to say, "And the said river and streams, so to be made navigable, and all lands, tenements, and hereditaments to be by them made use of for the benefit of the said navigation by virtue of the former and this present Act shall be and are hereby vested in the said company of proprietors." By a decision of this court which took place some years ago, which I remember I argued for Lord Romney, this court held that that vested absolutely the river in the proprietors, so that the county could not abstract the water from the river without the consent of the proprietors. Now if the proprietors did undertake and did act upon that 31st section, and scoured, cleansed, dug, widened, or deepened the river, or any part thereof, below the College Lock, then I think that from that time that part of the river became vested in them. Now I find by the statement of the case that there is evidence that they have from time to time made payments to persons employed by them for scouring a shoal which is between Mistress Edmonds' wharf and the bridge. So it appears that there was, as I have said, a shoal which impeded the navigation, which would have rendered the improvement of the other part of the river useless for the town of Maidstone, unless that was removed; they did take upon themselves to clear that away, and in doing so opened the navigation down to Mistress Edmonds' wharf, because they took away every impediment between the lock and the wharf. It appears to me therefore that they thereby acquired that legal property in the river which is given them by the 2nd section, that being a portion of the river which they were authorised to deal with. Now comes the question are they or are they not entitled to take toll upon that part of the river? I must say it does appear to me to be clear upon the reading of that toll clause 23. The words are these: They shall be entitled "to ask, demand, and receive, recover, and take of and from, all and every person, or persons, who shall carry or convey, or cause to be carried or conveyed, any goods, wares, merchandizes, commodities, or other things whatsoever upon the said river and streams between Maidstone and Forest Row aforesaid."

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Now that must mean between that part of Maidstone in which the navigation has been opened and Forest Row aforesaid, "such rates and duties for lockage and riverage as the said company of proprietors, their successors, or assigns, shall think fit, not exceeding" so much per mile. That I think would give them a toll up to Mistress Edmonds' wharf, and I cannot conceive that it was ever intended that they should go to the expense of keeping the navigation open down to that wharf, and take no toll whatever for that portion of the stream. I do not see any reason for it. The language of the 23rd section makes persons who navigate any part of the river liable to toll. I do not see any reason whatever for importing an exception that they should not pay within the limits of the town. It has been urged that there is a hardship on the townspeople to have to pay for navigation that was free to them before, but the answer to that is this, the Act considered it a public advantage to deepen the river to make it navigable for larger vessels up to the business part of the town, and the price that they have to pay for that advantage is the toll. My view is further fortified by reference again to the 31st section. The 31st section imposes restrictions upon the proprietors. It says they shall not interfere with the trade of the town of Maidstone because, although they are empowered to go and deepen the river down to Mistress Edmonds' wharf, they are not allowed to "build, set up, make, or hire any warehouses, storehouses, wharfs, cranes, or other erections, to lay, load, or unload any iron or ordinance timber or other goods whatsoever within the parish of Maidstone aforesaid, or to authorise or empower the said company of proprietors to erect, build, or set up any lock, weir, dam, or pens for water below the wall belonging to the gardens of the college near Maidstone church." So that they are prohibited from interfering with the established trade and business of the town, and I should have thought that if the intention had been that they should not take a toll or have any compensation whatever for the expenses they were to undergo in keeping clear the river between the lock and the bridge, it would have been found in this very clause. Nothing of the kind is inserted here. On the contrary, in my view, the scheme of the Act is that the public who are to receive great benefit from the improvement of this navigation are to pay toll for every part of the river improved by or under the directions of these proprietors. Upon these grounds it is that I am unfortunately led to differ from the opinion expressed by my learned brother, and to think that the distance ought to be computed from Mistress Edmonds' Wharf, and not from College Lock.

Judgment for plaintiffs on the first third, and fourth questions.

The Court, being equally divided, gave no judgment upon the second question.

Solicitors for plaintiffs, *Prior, Bigg, Church, and Adams*, for *Gorham and Warner*, Tonbridge.

Solicitor for defendant, *Smith, Stenning, and Croft*, for *G. and F. S. Stenning*, Maidstone.

HERTFORDSHIRE EPIPHANY QUARTER SESSIONS.

Reported by E. T. E. BESLEY, Esq., Barrister-at-Law.

Monday, Jan. 3, 1876.

(Marquis of SALISBURY, Chairman.)

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Rating Act 1874—Woodlands and sporting rights
—"Let and occupied in natural and unimproved state."

The appellant was rated in respect of woods and shooting in his occupation. Appeal against the rate on the ground of its being excessive. According to the Rating Act 1874, the woods ought to have been rated as if the land was let and occupied in its natural and unimproved state, that is, as mere waste, irrespective of the value of the right of sporting thereon.

Held, that the objections were valid, and rate accordingly decreased.

AN appeal by William Robert Baker, of Bayfordbury, against a poor rate made by the overseers of the parish of Bayford, on the 9th Oct. 1875.

W. A. Clark (with him Croome) for the appellant.—The principal objection to the rate is that the appellant has been overrated in respect to woodlands, which were called the Bayford and Black Tan Woods, of which the estimated extent is 306 acres, the gross estimated rental 229l. 10s., and the rateable value 220l.; and also in respect to the shooting rights thereon; the woods are rated at 15s. per acre, and it is assumed that the sporting rights are assessed at 2s. 6d. and the woods themselves at 12s. 6d. per acre. It is contended that instead of 15s. per acre, it should be 4s. or 5s. at the utmost.

The rate in question has been made under the Rating Act 1874, the object of which was to make certain property rateable which was not before so, and not in any way to increase the rates upon that property which was before rateable. The law of rating prior to the Act of 1874, depended upon the statute of 43rd Elizabeth, c. 2, which generally applied to lands, houses, tithes, coal mines, saleable underwood, &c., and according to the maxim of law, "*Expressio unius est exclusio alterius*," no other mines were rateable than coal mines, and no other wood than saleable underwood. Though the right to game was in no case separately rated, it still existed under certain circumstances, assessable, that is to say, where such rights were enjoyed in connection with the occupation of the land over which the right of sporting was, so that the land was enhanced in value, it was held that such enhanced value was to be taken into account in the assessment. For example, in the case of *Reg. v. Williams* (23 L. T. Rep. 76; 5 Jur. N. S. 821) the tenant, having both the land and game, was held rateable in respect of both; but in the case of *Reg. v. Thurlstone* (32 L. T. Rep. 275, 1 E. & E. 502) it was decided that where the tenant had not the right of taking the game he was not liable to be rated for it. In the case of *Reg. v. The Battle Union* (15 L. T. Rep. N. S. 180; L. Rep. 2 Q. B. 8) the court held that the owner of land which he occupied and the shooting of which he leased and received rent for, would be rateable in respect of the increased value of the occupation arising from the shooting, and that he did not void his liability when he made the right a concrete thing by

leasing it at a particular rent. In a subsequent case it was held that when the right of shooting was severed from the occupation of the land, it was an incorporeal hereditament not rateable at all. It is clear, therefore, that under the old law the right of shooting, if enjoyed in conjunction with the occupation of land, formed an element in estimating the rateable value of land; but that where held independently of the occupation of the land it was not so. The Rating Act 1874 (37 & 38 Vict. c. 54), however, altered the law in this respect. The 3rd section of the Act extended the rateability to land used as a wood or plantation, or for the growth of any saleable underwood, and not subject to any right of common, and to rights of fowling, of shooting, of taking or killing game or rabbits, and of fishing when severed from the occupation of the land. There is no alteration in the law as regards saleable underwood except in the matter of form, and no alteration in the law as regards sporting rights when not severed from the land. Having brought two things within the ambit of rating, having made plantations and woods rateable, and the rights of sporting when severed from the occupation of the land, the Act, in subsequent sections, went on to prescribe in precise terms the mode in which these particular properties should be rated. By sect. 4 it is directed that where land is used only as a plantation or wood, and not for the growth of saleable underwood, the gross and rateable value shall be estimated as if the land, instead of being a plantation or a wood, were let and occupied in its natural and unimproved state, that the value of the land used for the growth of saleable underwood shall be estimated as if the land were let for that purpose, and that where the land is used both for a plantation or a wood, and for the growth of saleable underwood, the value thereof shall be estimated either as if the land were used only as a plantation or wood, or as if the land were used only for the growth of the saleable underwood growing thereon. With respect to the woodlands in question, the assessment committee accordingly might have assessed them either as if they were used only as a plantation or a wood, or used only for the growth of saleable underwood. They have, however, elected to assess the property as woods, and not as saleable underwood. It ought, therefore, to be assessed as if it were waste land and as if it were divested of all timber and wood of any kind, and without taking into consideration any improvement which had been made, or of which the land might be capable. The word "occupied" signifies that the capabilities of the land are not to be taken into account, and that it is to be assessed as if it was to remain mere waste; that the land must be considered as simply and absolutely waste land, and as in the same state as it existed at the date of the creation, is borne out by the circular which has been issued by the local government board for the guidance of the assessment committees(a). The value of land

in its natural state, without the power of improving it or converting it to any profitable use, must be very small, particularly as the natural and unimproved state cannot include underwood.

The woods cannot be assessed as saleable underwood, as it has been decided under a former Act that shrubs and other things which happen to grow upon the land cannot be called saleable underwood. It must be underwood planted for the purpose of being saleable. Assuming that sporting rights were assessable, they must be rated as sporting rights over waste, uncultivated land, with no timber, no underwood, no cover of any sort whatever. It will simply be the right to shoot such wild birds and animals as are likely to be found on land of this description.

Besley (with him *Forrest Fulton*), for respondents.—It is admitted that the respondents, in making this rate, have adopted the words of the 1st sub-section of the 4th section, and have assessed the land as if, instead of being a plantation or wood, it was let and occupied in its natural and unimproved state; but it is contended that these words do not exclude the right which existed before the Rating Act 1874, of taking into account the enhanced value of real property arising from sporting rights, though those rights could not be separately assessed. Woods and plantations having been brought within the rating area, there attaches to them, as to other realty the enhanced value arising from sporting rights. The words natural and unimproved means, according to Mr. Fry, who was an authority upon the subject, simply that the land was to be valued as if the wood was not there. If, as argued for the appellant, it is to be considered as a desert waste, dry, arid, and incapable of cultivation, it would be useless as property, and not worthy of being rated. To ascertain the true meaning of this phrase, the Act for the valuation of land and heritages in Scotland (17 & 18 Vict. c. 91), in which a somewhat similar enactment is to be found, should be referred to. Sect. 6 of that Act provides that, when land consists of wood copse or underwood, the yearly value of the same shall be taken to be the rent at which such lands might in their natural state be reasonably expected to let from year to year as pasture or grazing lands. This, therefore, is a definition of the phrase "let and occupied in its natural and unimproved state," which, it is submitted, means the natural soil of the country without drainage, bearing the natural produce of the land, i.e., grass, capable of growing underwood or cereal crops. To regard the land as unproductive and incapable of becoming productive is not a proper reading of the Act of Parliament. The land must be assessed as being in its natural and unimproved state, with all the incidents to that state, and that, it is submitted, includes the sporting rights over it.

The CHAIRMAN, in delivering judgment, said.—The decision of the court is that the value of the woods described in the rate is fixed at an excessive

(a) It will be observed that the words used are as if the land, instead of being a plantation or wood, were let and occupied in its natural and unimproved state, and the word occupied was introduced in order to show clearly that the capabilities of the land for improvement were to be excluded from consideration in estimating the rent at which it might reasonably be expected to let from year to year, and that the land was to be valued as if it would continue to be occupied in its natural state with-

out any expenditure of capital in its improvement, or, in other words, as if it were waste lands.

Hitherto it has not been the land but its produce, viz., the saleable underwood, that has been assessable, and although the present Act reverses that rule and renders the land assessable instead, the mode of arriving at the value will virtually remain the same, as the value of the land can only be arrived at by estimating the value of its produce.

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amount, and that the rate be altered by the value of the woods being estimated as though the wood, instead of being a wood in plantation, were let and occupied in its natural and unimproved state, and therefore the rate will be 5s. instead of 15s. per acre. In coming to a conclusion our task has been rendered the more difficult because we have had to suppose the land rated to be very different to what it is, and it is left to our imagination to place an interpretation upon the words, "natural and unimproved state." It would be desirable to obtain as soon as possible the opinion of a Superior Court as to the proper meaning of these words.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Reported by C. E. MALDEN, Esq., Barrister-at-Law.

Friday, Jan. 21, 1876.

(Present: The Right Hons. The LORD CHANCELLOR (Cairns), LORD HATHERLEY, LORD PENZANCE, The Lord Chief BARON (Kelly), Lord Justice JAMES, Sir BARNES PEACOCK, and Sir JAMES HANNEN.)

KEET v. SMITH AND OTHERS.

ON APPEAL FROM THE ARCHES COURT OF CANTERBURY.
Inscription on tombstone—Word "Reverend"—

Nonconformist minister.

The word "Reverend" is nothing more than a laudatory epithet. It is not a title of honour to be exclusively possessed by the clergy of the Established Church, as having episcopal ordination.

The appellant was described on a tombstone as "The Rev. H. K., Wesleyan minister."

Held, (reversing the judgment of the court below,) that this was not a sufficient reason for refusing a faculty for the erection of such tombstone.

The appellant was a Wesleyan minister, residing at Owston Ferry, in the county of Lincoln, and the respondents were the vicar and churchwardens of the parish.

In 1874 a daughter of the appellant died, and was buried in the churchyard at Owston Ferry. He was anxious to erect over her grave a tombstone with the following inscription: "I.H.S. In loving memory of Annie Augusta Keet, the younger daughter of the Rev. H. Keet, Wesleyan minister, who died at Owston Ferry, 11th May 1874, aged seven years and nine months. Safe sheltered from the storms of life."

The vicar, Mr. Smith, objected to the erection of the stone, on the ground that a Nonconformist minister should not be described by the title "Reverend;" and sent a verbal message to Mr. Keet to that effect. Mr. Keet then applied to the bishop, but he took the same view as the vicar had done.

A petition was thereupon presented to the Chancellor of the Diocese, Dr. W. G. F. Phillimore, praying him to grant a faculty to erect the said tombstone, bearing the said inscription. The learned chancellor, after hearing counsel in support of the petition, declined to issue the citation as prayed. An appeal was then brought to the Court of Arches.

The learned Dean of Arches, Sir Robert Phillimore, gave judgment on the 31st July 1875, when he expressly declined to pronounce any opinion as to whether a Wesleyan minister could be properly described by the title "reverend;" but he laid down that, the churchyard being the freehold of

the incumbent, subject to the right of the parishioners, or of strangers who may die in the parish, to simple interment, but to no more, he has a *prima facie* right to prohibit altogether the placing of any gravestone, subject to the control of the ordinary. He then went on to say that he did not think it proper, or consonant with the practice of the court, to overrule the direct dissent of the incumbent, and the deliberate judgment of the bishop, in a matter not of strict law, but of discretion: and declined to issue the faculty as prayed. From this judgment the present appeal was brought.

The proceedings in both the courts below will be found reported in L. Rep. 4 A. & E. 398.

The respondents did not appear, and the appeal was consequently heard *ex parte*.

A. J. Stephens, Q.C. and Bayford, for the appellant, argued that the only question was whether the respondent had exercised a sound discretion; the character of the discretion to be exercised by an incumbent had been considered and defined by Sir John Nicholl in *Butt v. Jones* (2 Hag. Eccl. 424). The learned judge of the court below, instead of exercising his own discretion, appeared to have surrendered it to the bishop. He had no right to act on a private letter from the bishop to the appellant. [The court intimated that they concurred in this view.] In *Harper v. Forbes* (5 Jur. N. S. 275) Dr. Lushington decided in direct opposition to the deliberate judgment of the bishop. They also referred to

Sharpe v. Hansard, 3 Hag. Eccl. 335;
Breaks v. Wolfrey, 1 Curt. 880.

Further the word "reverend" is not exclusively applicable to ordained clergymen. In the 15th and 16th centuries many instances may be found in which it was applied to laymen, and even to women; and also many cases in which clergymen, even bishops, were otherwise designated. It was very frequently applied to the Judges of the Superior Courts. In the Church of Rome a lady abbess is so addressed at the present day. The title was not confined to the clergy before 1662 (The Act of Uniformity) at the earliest, and even then it was always applied to Presbyterian ministers. It has been given to Wesleyans by the Secretary of State on several occasions, in replying to addresses from the Wesleyan body; by the authorities of the War Office and the Admiralty, to army and navy chaplains; and in proceedings in the Probate Court. The assumption that it implies episcopal ordination has no foundation.

Their Lordships' judgment was delivered by

The LORD CHANCELLOR—In this case the appellant is a Wesleyan minister, residing at Owston Ferry, in the county of Lincoln; and being a parishioner in that parish, and having had the misfortune to lose an infant daughter in the year 1874, who was buried in Owston Ferry churchyard, he was desirous of erecting over her tomb a tombstone in a form a facsimile of which is given in page 6 of the appendix in the case. The Rev. Geo. Edward Smith is the vicar and incumbent of Owston Ferry. How far Mr. Smith might have objected to any tombstone being erected, or how far he might have objected to the tombstone in question being erected, upon the ground that in size or composition it was unsuitable for the place where it was proposed to be erected, it is unnecessary for their Lordships to consider, because no objection upon any of those grounds has been

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made by the vicar. In fact, in point of form no objection has been made by the vicar at all, because he has not communicated any objection in writing to the appellant, nor has he appeared at any of the stages of the case in the court below, nor has he appeared before their Lordships upon the present occasion. The only notification we have of his mind or feeling on the subject is derived in this way. It is stated in the petition that the appellant was informed by a stonemason that the vicar objected to the erection of the tombstone, and thereupon the appellant wrote to the vicar a letter, dated the 2nd June 1874 in these words: "Sir, The enclosed is a copy of the inscription we gave to Mr. Barningham"—he being the stonemason—"to be placed on the stone denoting where the remains of my dear child lie. I have been informed by him that you have an objection to it. Will you therefore please write me on the subject at your earliest convenience?" To that letter the vicar sent no reply, and on the 8th June the appellant addressed to him another letter in these words: "Sir, Having heard from Mr. Barningham that you object to the words 'Rev.' and 'Wesleyan minister' being inserted, and as I find similar expressions on tombstones in Epworth churchyard, will you kindly give me the reasons of your objection. It will be a great disappointment not to be able to have a stone. May I beg the courtesy of a reply per bearer." It is stated and not controverted that to this letter the appellant received only a verbal reply through a servant to the following effect: "Tell Mr. Keet that I saw Mr. Barningham last week, and that I have no more to say." Under these circumstances, their Lordships are obliged to assume that the vicar has no objection in the abstract to the erection of a tombstone; that he has no objection to the particular tombstone, as to its size or composition; and that his only objection is that which appears to have been stated in conversation to Barningham, that the inscription contains the word "reverend" with "Wesleyan minister." The inscription is in this form: In "Loving Memory of Annie Augusta Keet, the younger daughter of the Rev. H. Keet, Wesleyan minister, who died at Owston Ferry, May 11th, 1874, aged seven years and nine months." And then there is added, "Safe sheltered from the storms of life." Their Lordships, therefore, have to consider in their opinion this, and this only, whether the presence of the words "The reverend" before "H. Keet, Wesleyan minister," is a sufficient justification for refusing to allow this tombstone to be erected; and whether, therefore, a faculty should not issue authorising the erection of the tombstone. This appears to have been, in the minds of both the learned judges who have dealt with this case before, the question and the only question which they had to decide. Now, it appears to their Lordships to have been considered in the court below that the words "The Reverend" or the word "Reverend" prefixed to a proper name was to be treated in some manner as a title,—a title of honour or of dignity; and that titles being, as we all know, matters of right, and, as it were, of property, no person who could not show a particular legal right to use this word "Reverend" as a title of honour or of dignity could be permitted on any public occasion to make use of it; and further, it appears to have been the opinion of

the learned judges that the clergy of the Established Church in this country possessing episcopal ordination had, as holding orders, a right and an exclusive right,—exclusive, if not shared by the clergy of the Church of Rome, but in other senses exclusive,—to use that title "Reverend." In the opinion of their Lordships, the word "Reverend" is not a title of honour or of dignity. It is an epithet, an adjective used as a laudatory or complimentary epithet, a mark of respect and of reverence, as the name imports, but nothing more. It has been used for a considerable length of time, not by any means for a very great length of time, by the clergy of the Church of England; for the time has been when that title was not commonly borne by them. It has been used in ancient times by persons who were not clergymen at all. It has been used for a considerable time, and it is used at the present day, in common parlance and in social intercourse, by ministers of denominations separate from the Church of England, by ministers of the Wesleyan church, by ministers of bodies holding a congregational form of government, and by Presbyterian ministers. It is a title which in ordinary life is conceded to them, and which, as among each other, they use. Under those circumstances, it appears to their Lordships impossible to treat this word as a title of honour exclusively possessed by the clergy of the Church of England, so that a minister of another denomination claiming to place it upon a public inscription should be refused permission so to do. To this it may be added, that if ever there were a case in which no possible misapprehension could arise even in the minds of those, if those there be, who think that the Church of England alone should possess the title, it is this case; because upon the face of this inscription there is not merely the use of the word "Reverend," but there is appended to the name "The Reverend H. Keet" the words "Wesleyan minister." Therefore, the inscription in substance states that although the person placing it there uses as a prefix the term "Reverend," he does not thereby claim to be a person in holy orders, but claims to be, and to be nothing more than, what in fact he is, a minister of the Wesleyan body. Their Lordships, therefore, dealing with this, which is the only objection made to the erection of this tombstone, are compelled to say, and they say without any hesitation, that in their judgment it does not afford a sufficient reason for refusing to allow the erection of the tombstone. They are, therefore, of opinion that a faculty should issue for this purpose; and they will humbly report to Her Majesty that the suit be remitted to the Arches Court in order to give effect to this recommendation.

Solicitors for the appellant, *Brooks and Co.*

Jan. 19, 20, and 21, and Feb. 16, 1876.

(Present: The Right Hons. The ARCHBISHOP OF CANTERBURY (Dr. Tait), The LORD CHANCELLOR (Lord Cairns), The ARCHBISHOP OF YORK (Dr. Thompson), Lord HATHERLEY, Lord PENZANCE, The LORD CHIEF BARON (Kelly), LORD JUSTICE JAMES, Sir BARNES PEACOCK and Sir JAMES HANNEN.)

JENKINS v. COOK.

ON APPEAL FROM THE ARCHES COURT OF CANTERBURY.
Ecclesiastical law—Refusal to administer Communion—Rubric to Communion Service—Canon 27

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—Stat. 1 Edw. 6, c. 1, s. 8—Clergy Discipline Act (3 & 4 Vict. c. 86).

The *prima facie* right of a parishioner to partake of the Holy Communion being distinctly declared by Stat. 1 Edw. 6, c. 1, s. 8, the only cause which is sufficient under the rubric to justify a minister in repelling him of his own authority, is that he is "an open and notorious evil liver;" and under the 27th Canon, that he is "a common and notorious depraver of the Book of Common Prayer." The appellant, a man of irreproachable moral character, published a book entitled "Selections from the Old and New Testaments," for use at family worship, and also a book of family prayers compiled from the Prayer Book. Afterwards, at the request of the respondent, the vicar of the parish, he wrote a private letter to him in which he stated that he omitted certain parts of the Bible from his family reading because he did not concur in the construction which in his opinion was usually put upon them.

Held (reversing the judgment of the court below),

(1) that the respondent was not justified in repelling him from the Communion, either under the rubric or the canon; omission not being rejection, nor rejection necessarily depravation. (2) That the conduct of the respondent, being unjustifiable when it took place, could not be affected by anything which occurred afterwards between him and his bishop, there being nothing in the rubric or canon to shift the responsibility to the latter. (3) That proceedings were properly taken against the respondent, under the Clergy Discipline Act, without a previous appeal to the bishop.

THIS was a suit under the Clergy Discipline Act (3 & 4 Vict. c. 86), in which the office of the judge was promoted by Mr. Henry Jenkins, of Clifton, against the Rev. F. S. Cook, Vicar of Christ Church, Clifton, for an offence against the laws ecclesiastical, in having illegally, and without any just cause or reason, and contrary to his duty, refused to administer to him the Holy Communion.

The case came before the Court of Arches by virtue of letters of request from the Bishop of Gloucester and Bristol.

The Dean of Arches (Sir R. Phillimore), gave judgment for the respondent, and from his judgment the present appeal was brought.

The case is reported below in 33 L. T. Rep. N. S. 127, and L. Rep. 4 A. & E. 463.

The facts of the case, and the whole of the correspondence which passed between the parties and the bishop, are fully set out in the judgment in the court below.

Dr. Deane, Q.C., and J. F. Stephen, Q.C., for the appellant, argued that the case was novel and of very great importance to the appellant, for if the judgment of the court below was right, a parishioner so repelled had no remedy whatever against the clergyman. The appellant has been found guilty of constructive heresy on the ground that every passage omitted from his book is, in the words of his letter, "incompatible with religion and decency," whereas by statute and the common ecclesiastical law of the land every parishioner is entitled to receive the Communion unless he falls under the classes excluded by the rubric or the 27th Canon, which we submit do not touch the appellant's case; the respondent has, therefore, committed an ecclesiastical offence, and has laid himself open to proceedings under the Clergy

Discipline Act; the only object of giving notice to the bishop is that he may proceed against the offending parishioner. The mere omission of passages is not an offence contemplated by the rubric or the canon; and there is nothing proved against the appellant except the publication of the book, and the letter of 20th July; all the rest is mere hearsay.

A. J. Stephens, Q.C. and Jeune, for the respondent, contended that the respondent had committed no breach of ecclesiastical law, and was, therefore, not liable to be proceeded against criminally under the Clergy Discipline Act. Repelling might be in two ways, either by admonition out of church, or actual repulsion in church; it is then the duty of the clergyman to report to the bishop and abide by his order and direction. The respondent had "lawful cause" for repelling the appellant; he acted *bona fide*, and took the proper steps for securing the order of the bishop. The appellant was an "evil liver," having committed a spiritual offence. The clergyman must have a discretion. The fact of the repulsion, and the reasons for it, were sufficiently notorious.

Dr. Deane, Q.C., in reply.

The following authorities were cited in the course of the arguments:

Cripps on the Laws of the Clergy, p. 807;
Farrar's Life of Christ, vol. 1, p. 236;
Gerham v. Bishop of Exeter (Moore's Spec. Rep.);
Wilson v. Fendall, 2 Moo. P. C., N. S., 375; 9 L. T. Rep. N. S. 787;
Hale's Pleas of the Crown;
Neale's History of the Puritans, vol. 3, p. 419;
vol. 4, p. 27;
Martin v. Mackonochie, L. Rep. 2 A. & E. 116; 18 L. T. Rep. N. S. 245;
Barton v. Wells, 1 Hagg. Const. 31;
Cardwell's History of the Conferences on the Book of Common Prayer, pp. 293, 317, 363.

Feb. 16.—Their Lordships' judgment was delivered by the LORD CHANCELLOR (Cairns):—In this case the appellant, a parishioner of Christ Church, Clifton, instituted proceedings under the Clergy Discipline Act, in the Court of the Bishop of Gloucester and Bristol, against the respondent, the vicar of the parish, for an offence against the laws ecclesiastical in refusing to administer to the appellant the sacrament of the Holy Communion. The case was sent by letters of request to the Court of Arches, and on the 16th July 1875, a sentence was pronounced by the Dean of Arches, dismissing the suit against the respondent and condemning the appellant in costs. From this sentence the appellant appeals to Her Majesty. There are no facts in dispute in the case, and the allegations as to the refusal complained of, and as to the grounds of the refusal, are extremely simple. The appellant alleges that on the 28th Sept. 1874, he gave notice in writing to the respondent of his intention to present himself to receive the Holy Communion at the mid-day service on the following Sunday, the 4th Oct. 1874, and that having presented himself accordingly, he was, without lawful cause, repelled, and the respondent refused to administer the sacrament to him. To this allegation the respondent answers that he on the day in question did refuse to deliver to the appellant, or to permit the appellant to receive, the elements of the Holy Communion when he presented himself to receive the same, for, and on account of the writing and publishing by the appellant of certain letters particularly referred to, and

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for and on account of his causing to be printed and published a certain volume of selections from the Old and New Testament, and for no other cause or reason whatsoever. These allegations, therefore, raise the issue, and the only issue, between the parties. In order, however, to appreciate properly the justification relied upon by the respondent, it is necessary to refer more particularly to the letters and volume referred to in the defensive allegation, and to the circumstances under which those letters were written. [His Lordship then went through the history of the case, and the correspondence as set out in the report in the court below, and continued:] These, then, are the letters written by the appellant, and this is the character of the volume the writing and publishing of which are stated by the respondent to have constituted the only cause for which he refused to permit the appellant to partake of the Holy Communion. The question is, do they constitute a sufficient cause. The *primâ facie* right of a parishioner to partake of the Holy Communion might probably be maintained irrespective of any specific statutory enactment; but as the right is distinctly declared by the Statute 1 of Edw. 6, chap. 1, sect. 8, their Lordships may conveniently refer to the words of that enactment as it is set out in page 530 of the first volume of the revised statutes:

And also that the preist which shall minstre the same shall at the least one day before exhorte all persons which shalbe present likewise to resorte and prepare themselves to receive the same, and when the daie prefixed cometh after a godly exhortacon by the minister made, wherein shalbe further expressed the benefitt and comforte promised to them which worthelie receive the saide hollie Sacrament, and daunger and indignacon of God threatened to them wch shall presume to receive the same unworthelie, to thende that everie man maye trye and examyn his owne conscience before he shall receive the same, the saide minister shall not withowt lawfull cause denye the same to any parsons that woul devoutlie and humble desire it, anny lawe, statute, ordenance, or custome contrarie therunto in any wise notwithstanding.

In the argument before their Lordships, it has not been contended that, for the purpose of this case at all events, the "lawful cause" mentioned in the statute, was to be sought for elsewhere than in the rubric of the Book of Common Prayer prefixed to the Communion Service, or in the canons of 1603, and their Lordships therefore find it unnecessary to consider whether there could be any further or other "lawful cause" within the meaning of the statute. Neither is it necessary for their Lordships to decide, and they do not decide, that the canons, which do not, as such, bind the laity, could, of their own authority, prescribe "causes" which would be sufficient or "lawful" within the meaning of the statute. In this particular case the "lawful" causes relied upon are that the appellant must be taken, under the circumstances, to have been "an open and notorious evil liver" within the meaning of the rubric, and to have been "a common and notorious depraver of the Book of Common Prayer," within the meaning of the 27th Canon. Their Lordships will assume that the last named cause, that mentioned in the canon, would be, if made out, as valid and lawful a cause as that of being "an open and notorious evil liver," within the meaning of the rubric. The learned judge, from whose sentence the present appeal is brought, has expressed his opinion upon this point in the following words: "I am of opinion that the avowed and persistent denial of the existence and personality of the devil

did, according to the law of the Church, as expressed in her canons and rubrics, constitute the promoter 'an evil liver,' and 'a depraver of the Book of Common Prayer and administration of the Sacraments,' in such sense as to warrant the defendant in refusing to administer the Holy Communion to him, until he disavowed or withdrew his avowal of this heretical opinion; and that the same consideration applies to the absolute denial by the promoter of the doctrine of the eternity of punishment, and, of course, still more to the denial of all punishment for sin in a future state, which is the legitimate consequence of his deliberate exclusion of the passages of Scripture referring to such punishment." Their Lordships must, in the first place, observe that the learned judge appears to have considered that, in the rubric to which reference is here made, the words defining a cause for repulsion are "an evil liver," and, in the canon, "a depraver of the Book of Common Prayer." This, however, is not the case. The rubric after stating that "So many as intend to be partakers of the Holy Communion shall signify their names to the curate at least some time the day before;" proceeds as follows: "And, if any of those be an open and notorious evil liver, or have done any wrong to his neighbours by word or deed, so that the congregation be thereby offended, the curate, having knowledge thereof, shall call him and advertise him not to come to the Lord's table until he hath openly declared himself to have truly repented and amended his former naughty life, that the congregation may thereby be satisfied, which before were offended; and that he hath recompensed the parties to whom he hath done wrong, or, at least, declare himself to be in full purpose to do so as soon as he conveniently may." The words again of the 27th Canon, which is the canon relied on, are these:—"No minister, when he celebrateth the Communion, shall wittingly administer the same to any but to such as kneel, under pain of suspension; nor, under the like pain, to any that refuse to be present at public prayers according to the orders of the Church of England; nor to any that are common and notorious depravers of the Book of Common Prayer and administration of the sacraments, and of the orders, rites, and ceremonies therein prescribed, or of anything that is contained in any of the articles agreed upon in the convocation, one thousand five hundred and sixty-two, or of anything contained in the book of ordering the priests and bishops; or to any that have spoken against and depraved His Majesty's sovereign authority in causes ecclesiastical; except every such person shall first acknowledge to the minister, before the churchwardens, his repentance for the same and promise by word (if he cannot write), that he will do so no more, and except (if he can write), he shall first do the same under his handwriting to be delivered to the minister, and by him sent to the bishop of the diocese, or ordinary of the place. Provided, that every minister so repelling any, as is specified either in this or the next precedent constitution, shall, upon complaint, or being required by the ordinary, signify the cause thereof unto him, and therein obey his order and direction." The "cause," therefore, which under the rubric is sufficient to warrant a minister of his own authority, and without any trial, in repelling a parishioner from the Holy Communion is that he is "an open and notorious evil liver," who thereby

gives offence to the congregation, and, under the Canon, that he is "a common and notorious depraver of the Book of Common Prayer." Their Lordships therefore will proceed to consider whether the appellant is brought under either of these descriptions. And in the first place their Lordships must observe that if they had here to examine whether the appellant has in point of fact either entertained or expressed the opinions attributed to him by the learned Judge, or if they were called upon to decide that those opinions or any of them could be entertained or expressed by a member of the Church, whether layman or clergyman, consistently with the law and with his remaining in communion with the Church, they would have looked upon this case with much greater anxiety than they now feel in its decision. They desire to state in the most emphatic manner, both that there is not before them any evidence that the appellant entertains the doctrines attributed to him by the Dean of Arches, and that they do not mean to decide that those doctrines are otherwise than inconsistent with the formularies of the Church of England. This is not the subject for their Lordships' present consideration. What, and what alone they have to inquire is, whether the appellant can be properly held to be "an open and notorious evil liver" within the meaning of the rubric, or whether in the words of the canon he was "a common and notorious depraver of the Book of Common Prayer." As to the first of these inquiries there is absolutely no evidence whatever that the appellant was an evil liver, much less an open and notorious evil liver. The term "evil liver," according to the natural use of the words, is limited to moral conduct, and the distinction between conduct and belief is clearly recognised in the canons, especially in the contrast between the 109th and 110th. Against the moral character of the appellant there is no evidence and no imputation; and it appears from statements which are uncontroverted to have been irrefragable. Their Lordships therefore put aside this justification of the respondent as wholly inapplicable to the case, and they can only express their regret that through an inaccuracy in the use of words an imputation so misplaced and so irksome in its nature should have been made. Is, then, the appellant a common and notorious depraver of the Book of Common Prayer? The only specific reference to the Book of Common Prayer which is traced to the appellant is the statement that the Book of Family Prayer already mentioned was compiled by him entirely from the Book of Common Prayer, and that in a letter from him to the bishop, dated in Sept. 1874, he writes that he values the Book of Common Prayer "only second to the Bible itself." The mode, however, in which it is said that the appellant was a depraver of the Book of Common Prayer is this: It is assumed that all parts of the Holy Bible not printed in the "Selections" are omitted because they are rejected on the ground of the doctrine which they teach, and it is said that some parts so omitted are found in the Book of Common Prayer, or that doctrines in the Common Prayer are supported by some of these omitted passages. And it is contended that omission is rejection, and rejection depravation. In none of these propositions, nor in their logical connection can their Lordships concur. Omission is not rejection. If it were, the Lectionary in the Prayer Book would be open to this grave charge. Nor is rejection,

however censurable or heretical, necessarily depravation. The terms "deprave or depraver," in their more ancient signification, are now little used, but their meaning in the sixteenth century may be well collected from the statute of Edw. 6, already referred to, where we find these expressions applied to the Sacrament of the Holy Communion:—"Whatever person shall deprave, dispise, or contempne the saide moeste blessed Sacrament by any contemptuouse wordes, or by anny wordes of depravinge, dispising, or reviling, shall suffer imprisonment," &c. But was the appellant "a common and notorious depraver of the Book of Common Prayer?" Now, it was admitted in the court below, and in the argument before their Lordships, that the publishing and circulation of the book termed "Selections" could not possibly amount of itself to a depravation of the Book of Common Prayer, and could not indeed be construed to be an offence of any kind. But it was contended that these selections, coupled with the expressions in the letter of the 20th July, 1874, amounted to the offence in question. That letter must be construed with reference to the interview between the respondent and Mrs. Jenkins, which took place on the same day, and out of which interview the writing of the letter arose. It is obvious that the words, "the parts I have omitted," cannot refer to all the portions of the Bible not printed in the Selections; but must be limited to those parts which were more particularly referred to by the respondent at the interview. Construing the letter in connection with what passed at the interview, the expressions in it, which are not very distinct or intelligible, do not go farther than this, that the construction which the appellant placed upon certain parts of the Bible not being the same as the construction which, in his opinion, was generally placed upon those parts, he omitted them from his family reading. What his own construction is, or what he supposes to be the generally received construction, is not stated, and it would not be allowable, even if it were necessary, to arrive at either construction by surmise or suspicion. But it does not appear to their Lordships to be necessary to criticise more minutely the expressions in this letter, for the important question still remains, whatever be the construction of the letter, can the appellant in consequence of it be said to have been "a common and notorious depraver of the Book of Common Prayer?" Now the letter was not written by the appellant spontaneously. A message was sent to him through Mrs. Jenkins inviting him to write a letter to the respondent. It was proposed that the letter should be, and the letter was sent as, a friendly and private, as it was also a solicited, communication. It appears to their Lordships that even were there anything in the letter which could amount to a depravation of the Book of Common Prayer, which they do not suggest or think there is, still it would be impossible to hold that the writing of such a letter, under the circumstances which they have mentioned, could make the appellant "a common and notorious depraver." These observations would dispose of the case, were it not that their Lordships think that they should notice an argument much pressed at the bar, but to which their Lordships can attach no weight, namely, that by reason of the intervention, or possible intervention, of the bishop of the diocese, another remedy was, or might have been, open to

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the appellant, and that he ought not to have taken proceedings under the Clergy Discipline Act. This argument in fact divided itself into two parts. It was said, in the first place, that the respondent had duly reported to the bishop the grounds on which he had repelled the appellant from the holy communion, and that he was then entitled to wait until he received some order from the bishop on the subject, and that no such order was given. The other form of the argument was that the appellant had, under the rubric and canons, a right of appeal to the bishop personally, and that he either had not so appealed, or, if his communications with the bishop amounted to an appeal, the bishop had expressed his opinion against the appellant, and in favour of the respondent. As to the first part of this argument, their Lordships are clearly of opinion that the repelling by the respondent of the appellant must be judged of at the time when it took place, and could not be affected by anything afterwards occurring between the respondent and the bishop. At the time it took place it was either justifiable or unjustifiable. If justifiable, the respondent is, of course, entitled to succeed; but, if unjustifiable, the appellant must be immediately entitled to a remedy, and their Lordships can discover nothing which shifts the responsibility from the respondent and places it upon the bishop. Their Lordships also think that the remedy to which the appellant is entitled is that which in this case he has sought for. He complains that the respondent has committed an offence against the laws ecclesiastical by wrongfully refusing him admission to the holy communion, and he has followed the process prescribed by the Clergy Discipline Act. Their Lordships do not find in the rubric prefixed to the communion office any indication of an appeal to the bishop by a parishioner repelled from the communion. They find that an intimation is to be given to the bishop by the minister, but this is apparently for a purpose entirely different, namely, that the bishop may proceed against the person repelled to punish him *pro salute animæ*. With regard to an appeal under the canon, their Lordships do not understand how an appeal given by a canon, even if it were given, could take away a higher right to maintain proceedings for a violation of a right protected by statute. But their Lordships do not understand that the canon referred to in this case, the 27th, professes to give the repelled person any right of appeal; and even if it did, the Bishop in the present case appears throughout to have expressed the opinion that he ought not himself to decide the question between the appellant and the respondent, but that it should be decided in proceedings such as have been taken. On the whole, their Lordships are of opinion that they must advise Her Majesty to reverse the sentence of the Dean of Arches, and in remitting the cause to admonish the respondent, the Rev. Flavel Smith Cook, for having, on the 4th Oct. 1874, without lawful cause, refused to deliver to the appellant, or permit the appellant to receive, the elements of the Holy Communion, and, further, to admonish him to refrain from committing the like offence in future. Their Lordships have no doubt that the respondent has acted throughout in good faith, and in the conscientious belief that he was discharging a duty imposed him, and they have also not failed to observe that this controversy appears to have been preceded by an uncalled for,

and, as they think, uncourteous letter, written by the appellant to the respondent, his minister, protesting against and condemning a sermon preached by him. Their Lordships cannot, however, hold that there is in these circumstances sufficient to warrant them in departing from the general rule according to which the respondent must pay the costs in the court below and on appeal.

Solicitors for the appellant, *Pritchard and Sons*, for *O. Taddy*, Bristol.

Solicitors for the respondent, *Moors and Currey*, for *Brittan, Press, and Inskip*, Bristol.

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT WESTMINSTER.

Reported by GILBERT G. KENNEDY, Esq., Barrister-at-law.

Tuesday, Jan. 18, 1876.

(Before Lord COLERIDGE, C.J., JAMES and MELLISH, L.J.J., BAGGALLAY, J.A., and CLEASBY, B.)

PYM v. HARRISON.

ERROR FROM THE QUEEN'S BENCH.

Devise of right of way before Wills Act—Words of limitation—Intention of testator—Personal privilege—Excessive user.

Plaintiff's and defendant's lands adjoined each other, plaintiff's land being on the south and defendant's on the north, and about the middle of the boundary was a gate into defendant's land at the end of a lane or road leading to this gate from the public street, and passing through the plaintiff's land. On the eastern side of the defendant's land adjoining the highway, was a house in a ruinous state, which was once, in 1830, a dwelling-house, and in the centre of defendant's land, equidistant from the gate and the house, and surrounded by a garden, was a separate building, then used as a kitchen for the house. The remainder of defendant's land had been partly and at different times garden, orchard, grass, &c. The owner of plaintiff's and defendant's premises, who died in 1830, by his will devised to his nephew, the defendant's predecessor, the said kitchen and garden. The will then continued as follows: "I will and direct that my said nephew, John Harrison, shall have the privilege or right of a road for loading coals and dung, and other necessary things, through the said gate, to the said kitchen and garden."

This right of a road, which was the lane or road above mentioned, was at that time the only approach to the said kitchen and garden. Shortly afterwards the remainder of the premises now occupied by defendant came by inheritance into the possession of John Harrison, whereby he had other access to the highway through the ruined dwelling-house, though the only approach for a horse and cart was through the way in dispute. The defendant, who carried on the business of a coal higgler, used the said kitchen as a stable for his horse, and made use of the said way with his cart and horse.

Held (reversing the decision of the Queen's Bench); that this grant of a right of way was merely a

personal privilege for the life of the grantee; for that by the words of the devise merely a life estate in the easement passed, and it was manifestly the intention of the testator that the right should not extend beyond the lifetime of the devisee.

THIS was an action of trespass brought by the plaintiff against the defendant. The action came on to be tried before Baron Pollock at the Derby Summer Assizes, 1873, when, by order of the learned judge and by consent of the parties, a case was stated for the opinion of the court without pleadings.

The three questions in dispute were: First, the right of defendant to use a private roadway over ground occupied by plaintiff; secondly, if he had the right whether the user was excessive; and, thirdly, whether the defendant had, by non-interference on the part of the plaintiff and his predecessors, obtained a prescriptive right to use this road.

The plaintiff's and defendant's lands adjoin each other along their greatest length, the plaintiff's land lying to the south, and coloured green on the plan annexed to the case, the defendant's land lying to the north, and coloured pink, orange, and blue on the plan; both lands extended to the east as far as a public street and highway. About the middle of the boundary is a gate at the end of the lane or road leading to this gate from the said highway over the plaintiff's land.

On the defendant's land, opposite and close to the said gate, is a separate building (coloured pink), surrounded by a garden (also coloured pink); on the eastern side of defendant's land abutting on the said highway is a house (coloured blue), and extending from this house westward, up to, and beyond the said separate building is the property of the defendant (coloured orange).

In 1786, Abraham Harrison the elder, surrendered a messuage, bakehouse, and garden, coloured orange on the plan hereto annexed, to the use of himself for life, and after his death to the use of his son, Abraham Harrison the younger, for his life, and after his death to the use of Elizabeth, the wife of Abraham Harrison the younger, for her life, and after her death and the death of the survivor of Abraham Harrison the younger and Elizabeth his wife, to the use of the heirs of the body of Abraham Harrison the younger, and in default of such issue, to the use of his own right heirs.

At the same time, Abraham Harrison the elder surrendered the messuage coloured blue on the said plan, to the use of Ann Harrison, his daughter-in-law, for her life, and after her death to the use of John Harrison, her eldest son, and the heirs of his body, and for default of such issue to the use of his own right heirs.

The said Abraham Harrison the elder, died in or about the year 1787.

The said Abraham Harrison the younger, in addition to the life estate in the property coloured orange, to which he succeeded on the death of his father, Abraham Harrison the elder, was also entitled to the copyhold property coloured pink and green on the said plan.

During the life of the said Abraham Harrison the younger, the building shown on the property coloured pink, was used by him as a kitchen, the eastern half of the property coloured pink on the said plan was used by him as a garden, while the western half was used by him as a croft. Access to the garden was obtained over the road marked on

the plan, which was used by the said Abraham Harrison the younger soon after he acquired the property coloured pink, and which has been used since the death of the said Abraham Harrison the younger, in manner hereinafter mentioned.

Abraham Harrison the younger, by his will dated the 25th Jan. 1830 (the material parts of which are set out in this paragraph) devised to his wife, Elizabeth Harrison, for her life, with remainder to Thomas Richardson and the heirs of his body, the dwelling-house, crofts, outbuildings, and appurtenances, and piece of land therein described (being the premises coloured green in the said plan appended to this case), and, after making several other devises, the testator gave and devised all his other freehold and copyhold hereditaments unto his executors thereafter named, during the life of his wife, in trust, to apply the rents and profits for the purposes of his will, and after the decease of his wife the testator gave and devised to his nephew, John Harrison, and to his heirs and assigns for ever, all that kitchen standing behind a dwelling-house wherein Thomas Herrod then lived (such dwelling-house being the premises coloured orange on the plan), and also the garden behind the said dwelling-house and premises occupied by the said Thomas Herrod, and so much of the upper and lower croft adjoining as would enlarge the garden so as to extend to the bottom of the lower croft, and so as to be eighteen yards in width from the top or kitchen end all the way down to the bottom (the kitchen and garden so devised to the said John Harrison, form the part coloured pink in the plan). The said will then proceeds as follows:—"And I will and direct that my said nephew, John Harrison, shall have the privilege or right of a road for loading coals and dung and other necessary things, through the large gate opening from Bridge-street, near to the cow-house in the said upper croft over the said upper croft to the said kitchen and garden."

The said testator, Abraham Harrison, died on the 6th Feb. 1830, and his will was proved in the same year.

The testator's widow, the said Elizabeth Harrison, entered into possession of the premises so devised to her, and died on 9th Nov. 1839. Thereupon the said Thomas Richardson was admitted on 2nd March 1841, to hold as customary tenant in tail the lands and tenements devised to him as aforesaid according to the custom of the manor of Beaureper, and the said John Harrison entered into possession of the lands and tenements respectively devised to him in the said will.

Upon the death of Elizabeth Harrison, the tenant for life, John Harrison became entitled as customary heir of Abraham Harrison the elder, and entered into possession of the property coloured orange, but was not formally admitted until 17th July 1852.

Upon the death of his mother Ann Harrison in 1831, the said John Harrison entered into possession of the property coloured blue on the plan to which he had become entitled under the surrender made by Abraham Harrison the elder in 1786, but was not formally admitted until 17th July 1852.

On 17th July 1852, John Harrison surrendered the property coloured blue to uses to bar the estate tail therein.

From the death of Elizabeth Harrison in 1839,

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down to the year 1860 or 1861, John Harrison or his tenant used the road in question in connection with their use and occupation of the building on the property coloured pink as a kitchen, and of the remainder of the property coloured pink as a garden and orchard in the manner hereinafter mentioned.

In 1860 or 1861, the said kitchen ceased to be used as a kitchen and became a pig-stye, and from 1871 until the present time has been used as a stable. From and after such change of user in 1860 or 1861 down to the death of the said John Harrison, which took place on 7th March 1865, the said John Harrison or his tenants used the road in question in connection with their use and occupation of the said building as a pig-stye, and of the remainder of the property coloured pink, as a garden and orchard in manner hereinafter mentioned.

John Harrison, by his will dated 7th May 1861, devised the properties coloured blue, orange, and pink respectively, to Joseph Wright and Michael Jessop, upon trust to sell the same, and the said Joseph Wright having disclaimed the property so devised to him, the said Michael Jessop was admitted alone on 10th May 1866.

On the same day Michael Jessop surrendered the properties so devised to him in trust for sale to Joseph Wright, in fee, to whom he had sold the same. The defendant is and was at the time of the alleged trespass the tenant to Joseph Wright of the properties coloured blue, orange, and pink.

From the death of John Harrison down to the sale to Joseph Wright, Michael Jessop, and from the sale to Joseph Wright down to 1871, Joseph Wright or their respective tenant used the road in question without interruption in connection with their use and occupation of the said building as a pig-stye, and from 1871 to 12th June 1872 as a stable, and of the said remainder of the land coloured pink as a garden and orchard.

From 1839 to 1848, whilst the defendant's premises were in the occupation of one Thomas Herrod as tenant, the road in question was constantly used by him for the purposes of driving cows, sheep, and pigs, and for carrying cabbages, manure, straw, coals, firewood, and other things of like character in a wheelbarrow. The said road was also used by him with his horse and cart at the time of hay harvest when he carried his hay from some other grass land in his possession and stacked it upon the said croft coloured pink.

From 1848 to 1868, whilst the defendant's premises were in the occupation of one George Berresford as tenant, the said road was constantly used by him for the purposes for which the said Thomas Herrod constantly used the same as in the last paragraph mentioned. Bricks, sand, mortar, lime, and stone, had also at one or more times been carried in a cart drawn by a horse along the said road for the purpose of being worked up or used by him upon the said croft in the way of his trade as a stonemason, but such user was not shown to be of a general or continuous character, but was of an exceptional and temporary character in connection with some temporary arrangements with regard to his said trade as a stonemason.

No interruption, interference, or dispute of any kind had at any time arisen with respect to the said road until after the plaintiff had entered into

possession in June 1872, nor had any notice whatever been given to the owners from time to time of the premises now in the occupation of the plaintiff of any difference in or enlargement of the user of the said road until after the plaintiff had entered into possession in June 1872.

Save the road in question there is not now and never has been any access for carts, horses, or cattle to the said property coloured pink, and save the road in question there is not and never has been any access for persons on foot to the said property except through the sitting-room of the house coloured orange. The said house is now in a ruinous state, and can be and has occasionally been used as a passage for persons on foot passing from the High Street to the said property, and cows can be and have occasionally been driven down the said passage and through the said sitting-room. The said passage is too narrow to admit of the passage of a cart.

The property so as aforesaid devised to the said Thomas Richardson (coloured green upon the plan accompanying and part of this case), included the upper croft, and now belongs to the plaintiff's landlords, viz.: the Right Honourable Lord Belper, Anthony Radford Strutt, Esquire, and George Henry Strutt, Esquire, as tenants in common, they or their predecessors in title having purchased it from the said Thomas Richardson, who had previously made a surrender on the 6th July 1852, of the premises with a view to cutting off the entail created by Abraham Harrison's will. A copy of the court roll containing such surrender accompanies and forms part of this case.

The plaintiff became tenant to Lord Belper and Messrs. Strutt, of the premises coloured green on the plan in 1872, and sues for the injury done to his occupation by the use of the road in question by the defendant as hereinafter mentioned.

The defendant, who is a coal higgler and stationer, uses the building upon the property coloured pink, as a stable for the horse kept by him in the way of his business, and places his cart in the garden coloured pink, and the defendant makes use of the said road in question passing over the same to and from the said stable and garden with his cart and horse.

Mellor, Q.C. and *G. G. Kennedy* for the plaintiff, the present appellant. — This will was drawn before the Wills Act, and according to the then strict construction of law, "that a devise without words of limitation conveys but a life estate to the devisee," John Harrison, under whom the defendant claims, took but a life estate in this right of way. But more than that, it is evidently the intention of the testator that nothing more than a life estate or personal privilege in this easement shall pass to John Harrison. The testator, or the person who drew up his will, must have been some one conversant with legal words, and one who knew the effect of such words, for the will abounds with words of art and other limitations, such as "heirs," "heirs-at-law," "to the use," "tenants in common," and there is also another right of way devised in fee. [*MELLISH, L.J.*—Had John Harrison any other access to the property?] Not at that time. [*COLERIDGE, C.J.*—If the testator had meant to give this road unto John Harrison until he had other access, he might have said so.] But we contend he has impliedly said so, for the testator must be taken to have known, at the time he made his will, that John

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Harrison was entitled, subject to the life estate of his mother, to the property coloured blue as tenant in tail, and to the property coloured orange, as heir-at-law of Abraham Harrison the elder, and that therefore John would in all probability shortly come into possession of the properties coloured blue, orange, and pink, whereby he would have other access to the kitchen; these devolutions of property did in fact take place during the lifetime of John Harrison; so that the intention of the testator to give this right of way for a short time proved sufficient for the purpose for which it was intended, namely, to give John Harrison access to the property over the defendant's land, until he came into property which would give him access through land of his own. The use he is to make of this right of way strengthens this contention, it is not a general right of way, but a way for limited purposes. [MELLISH, L.J.—Where there is a devise of land in fee, and also of something appurtenant to that land, is not the devise of the thing appurtenant coextensive with that of the land?] Not always; in the case of a rentcharge it is not: (*Nichols v. Hawkes*, 10 Hare 342.) [MELLISH, L.J.—That would not be the same thing. *JAMES, L.J.*—Suppose a devise of land in fee, and with it a devise of hedge bote and fire bote out of an adjoining close?] In that case the devise of the hedge bote and fire bote would be for life only: (*Reay v. Rawlinson*, 30 L. J. 330, Ch.) Secondly, there has been an excess of user by the plaintiff, whereby the easement has been rendered more burdensome to the servient tenement than the testator intended it should be, and the easement is thereby extinguished.

Hemming v. Burnett, 8 Ex. 1;

Allen v. Gomme, 11 A. & E. 760;

Williams v. James, L. Rep. 2 C. P.;

Wood v. Saunders, L. Rep. 10 Ch. 582;

Cowling v. Higginson, 4 M. & W. 245.

Wills, Q.C. (Cave, Q.C. with him), for the defendant.—The intention of the testator was to grant this right of way as appurtenant to the land. [MELLISH, L.J.—Did Abraham Harrison the younger use this way?] Yes, he had no other access. If this way had not been mentioned, there would have been a devise of a kitchen and garden without any access at all, and this shows that the way was not meant to be a mere personal privilege. [JAMES, L.J.—Supposing the land belonged to John Harrison, how would you then construe the devise of this way?] In that case the land would be land without any access. [MELLISH, L.J.—Is it not the law that the way of necessity ceases when the necessity ceases?] In all the cases in which that has been decided, the land over which the way has led fell into the possession of the person claiming the right of way. [MELLISH, L.J.—How did the owner of orange get through the highway, but through blue?] It is found in the case there is no way for carts through blue. We have also a right by prescription. [MELLISH, L.J.—If you prove a right by prescription, do you prove a right for all purposes?] For all purposes. [BAGGALLAY, J. A.—I find in the will a devise of another right of way for the owners and occupiers of certain other property devised by the testator in fee.]

Mellor, Q.C., in reply.—It is decided in *Holmes v. Goring* (2 Bing 76), that the way of necessity will cease when the necessity ceases. On the question of prescription, no amount of user without

the knowledge of the owner can bind the servient tenement.

COLERIDGE, L. J.—In this case we have to construe a provision in a devise of the year 1830, and therefore a devise before the Wills Act came into operation; consequently we have to be guided by the rules of law existing at that time. We have, moreover, to deal with matters of a complicated nature, but which when explained and arranged by counsel are clear, and form themselves into four distinct matters of devise. They are distinguished on the plan by the colours blue, orange, pink, and green, and it appears that John Harrison, under whom the defendant claims, took in various ways the lands coloured blue (the ruined dwelling-house), pink (kitchen and garden), and orange (the remainder of the property); he never had green, and the question is to what extent had he a right of way over green to pink? He took pink by devise, and orange at the same moment by inheritance as right heir of the settlor, by a settlement which had been made in 1786. He was also tenant in tail to blue with remainder to himself in fee under the settlement, but he did not come into possession of blue at the same time with pink and orange. Such being the state of the property, the defendant under and by virtue of the proviso in the will, claims to be entitled to this right of way, as a way for all purposes, and at the same time a more convenient way to the kitchen and garden; this claim is now in dispute, and we find that, although the way was more convenient, yet that he now has other access to the property through the ruinous house which is coloured blue, though, at the date of the testator's will, this road in dispute was the only access to the property. Such being the state of things, the question arises what is the effect which the court is to give to the following devise? "I will and direct that my said nephew, John Harrison, shall have the privilege or right of road for loading coals and dung, and other necessary things, through the large gate opening from Bridge-street near to the cow-house in the said upper croft over the said upper croft to the said kitchen and garden." There can be no doubt that at the time the will was written, according to the rules of law which then existed (before the Wills Act had come into operation), the words in dispute would not have been sufficient to convey the fee to John Harrison, and the court is bound to give effect to those rules unless, from an inspection of the whole document, it is apparent that the intention of the testator would be frustrated, and in that case, if it was evidently the intention of the testator to pass the fee, the court would give effect to such intention. Here, however, the court have looked into the will itself, which appears to have been drawn by someone conversant with terms of art, and it appears, moreover, that the devise of this right of way occurs between two separate devises in fee. [His Lordship read from the will.] In addition to that, as Sir Richard Baggallay has pointed out, in other parts of the will rights are bequeathed in which legal terms are used, and in another part of the will there is a devise of a right of way which is distinctly granted as appurtenant to certain premises devised. At the same time other estates in fee are also created, showing that the will we have to deal with was drawn up by some person who knew the effect of legal terms. The inflexible rule of law is that legal words are to be given their

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legal interpretation, and seeing that in this will there is nothing to compel or induce the court to turn aside from the ordinary rules of interpretation, I come to the conclusion that when the testator uses the words "I will and direct that John Harrison shall have the privilege or right of road, &c.," he means what he says. It has been suggested, very reasonably, that a way of necessity must be given, because, without any mention of a right of way, the law would have put one in as a way of necessity, but if this were so, I am not sure but that would only apply to a certain reasonable length of time, namely, up to the time when John Harrison came into possession of pink, orange, and blue. The moment he became possessed of all these properties, he would have other access, and the right would cease, and authority has pointed out that the way would cease when the necessity ceases; in point of fact, in five or six years the necessity for this way would have ceased, and John Harrison would have other access to it. I say now, what I said in the argument on the limited construction of this devise, John Harrison got all the testator meant to give him, he meant at all events that John Harrison should have this right of way for his lifetime. He knew that John Harrison would soon have other access to the property, and it seems to me, by the true construction of the will, that the right and privilege was limited to the lifetime of John Harrison, and that therefore the defendant cannot succeed. Then it has been suggested that the defendant can make out the right he claims by user, because there has been from 1839 to 1868 a user by John Harrison or John Harrison's tenants sufficient to gain the right. Now without going into the difficult and unsettled question of what would be the effect of coming into a limited right, and then endeavouring by user to enlarge such right, or what effect a tacit assent might have on such user I do not say, but I conceive it to be impossible for the defendant to enlarge this from a personal right to a fee, which is the only effect such user could have; and I come to the conclusion that whether under the will or not, nothing has been made out to justify the defendant's right to use this way.

JAMES, L.J.—I am of the same opinion. It was conceded that if at the time of the direction in this will relating to the right of way in dispute, John Harrison had been possessed in fee of the land to which the way leads, that then these words, "I will and direct that John Harrison," &c., would not have given anything more than the right to John Harrison for himself. But let that be so, how are we to give a different meaning to these words than that which they ordinarily would bear? Is there any inference we can draw from the will to say that something else was the meaning of the testator? It would be very singular for the testator simply to give this right for life, when he could have easily expressed a larger right; he might have known that John Harrison would not abuse this right. We have no means of knowing this one way or the other, for we are dealing with words themselves, and the meaning of those words is to give the right to John Harrison alone, and not to John Harrison, his heirs and assigns. On the first point, therefore, I am unable to agree with the Court of Queen's Bench. With regard to the second point, which was, assuming this right of way to be a

right in fee simple, whether, originally a gift for limited purposes, it has been altered by user? With regard to that, there was a case recently decided by the Court of Appeal with reference to a right of way over Wimbledon Common, and there, entirely adopting the rule of law as laid down in *Williams v. James* (*ubi sup.*), we decided that the use must be limited to the reasonable use, for the purposes of land in the state in which it appeared to be when the right arose (a).

MELLISH, L. J.—We have here to decide whether a devise of a right of way is to be construed to be a way for all purposes and for all times, whether by the will or by user, or by necessity, or whether it is to be a right limited to the lifetime of the devisee. The material matter on which we have to proceed is the will, and this, beyond all question, uses words which, according to their natural interpretation, would give an interest for life only. Whether this way is appurtenant or not is not necessary to decide. This case is not alleged to belong to that class of cases decided before the Wills Act in which the courts have enlarged the estate devised; still, if from reading the whole will we can discover any intention to grant a larger estate than here is strictly given, we would decide in favour of such intention; but when we look at the will, and the reasons for conferring on the devisee an estate only for life, we cannot but come to the conclusion that that is all the testator meant to give. The reason given against this is, that, if we do not hold this to be a devise in fee, on John Harrison's death, the way would be a way of necessity, and the testator could not have contemplated that. Now if there really had been no other way, then considerable weight would attach to that argument, but the strong probability was that John Harrison before his death would come into the blue property as tenant in tail. He was possessed in fee of the remainder of the property, and therefore on his death this would not be a way of necessity. It therefore comes to be a question of probability. Are these probabilities sufficient to induce the court to hold this to be a devise in fee, or are they not? I am of opinion they are not. There is then under the will no such right of way as is claimed. Is there then a right of way by necessity? It is clear there is not. It is no answer to this to say there is another way only narrower, because in such case the owner can enlarge it. In the next place, is there any way by user? John Harrison did not get this right of way for all purposes, and in that case no user would give any greater right. No doubt there is the question whether the change in the premises has not affected the right, but it is not necessary to decide that, as there must be a substantial change. It is not necessary to give an opinion on this, because the inference of fact we should draw is that the user was intended to be a user under the will, and was so understood by all parties.

BAGGALLAY, J. A.—I am of the same opinion and for the reasons given.

CLEASBY, B.—I come to the same conclusion and for the same reasons.

Judgment reversed with costs.

Solicitor: *Henry G. Field*, for *J. G. Jackson*, of *Belper*; *Bevan and Daniel*, for *Worthington*, of *Derby*.

(a) The case to which James, L.J., here refers is the case of *The Wimbledon and Putney Common Conservators v. Dixon*, reported 33 L. T. Rep. N. S. 679.

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SAUNDERS v. WHITTLE—CLEMSON (app.) v. HUBBARD (resp.).

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HIGH COURT OF JUSTICE.

DIVISIONAL COURT FOR APPEALS
FROM INFERIOR COURTS.

Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

Thursday, Jan. 27, 1876.

SAUNDERS v. WHITTLE.

*Master and servant—Leaving service—Wages of current week.**Plaintiff was hired by defendant as a painter, by the week, his wages to be sevenpence per hour, payable every Saturday at noon. The full week was fifty-four and a half hours, concluding at 5.30 p.m. on each Friday, but overtime was paid at the same rate. The engagement was determinable by either party at a week's notice.**Plaintiff left the service without notice, on a Friday at noon, having completed fifty-seven hours, including overtime, since the previous Friday.**Held, upon appeal from a County Court, that the plaintiff could not recover his wages for the current week of his leaving the service.*

APPEAL from the County Court of Lancashire, holden at Warrington.

*This was an action brought to recover the sum of 1l. 13s. 3d., claimed by the plaintiff as due to him from the defendant for wages.**The plaintiff is a journeyman painter, and the defendant a painter, plumber, and glazier, carrying on business at Warrington, in the county of Lancaster.**Plaintiff was hired by defendant as a painter, by the week. His wages were to be 7d. per hour, payable every Saturday at noon. Either party was to be at liberty to determine the engagement by giving to the other one week's notice of his intention to do so.**The plaintiff entered upon the service, and a time sheet, showing the number of hours worked by the plaintiff during the week, was brought in every Saturday morning by the plaintiff, and the amount of wages he received varied according to the hours he had made during the week. The full week consisted of fifty-four hours and a half, calculated from 6 a.m. on Saturday to 5.30 p.m. on the following Friday; overtime was paid for at the same rate per hour as the ordinary time. The hours of each day were calculated from 6 a.m. to 5.30 p.m., except Saturday, which ended at noon, and Monday, when the hours were calculated from 7 a.m. instead of 6 a.m.**In the course of a week defendant had occasion to complain of plaintiff's work, and the latter took offence and refused to finish the job in hand, and left at mid-day on a Friday, without having given defendant any notice.**The amount sought to be recovered by the plaintiff in the action was for fifty-seven hours work, calculated (including some overtime) up to noon on the Friday.**On the trial of the action, on the 12th Aug. last, it was contended on behalf of the defendant that the plaintiff, by leaving his work unfinished and before the expiration of the current week, and without notice, had forfeited any right to be paid for the hours he had worked up to the time of his so leaving, inasmuch as, although the plaintiff's wages were to be calculated at a certain price per hour, the engagement was in fact a weekly one, with all the consequences incident to such a hiring.**On the other hand, it was contended, on behalf of the plaintiff, that the hiring was of such a character as to entitle the plaintiff to his wages for the hours which he had actually worked, so that, although he had left his work without notice, he was entitled to be paid for every complete hour that he had worked up to the time of his leaving, and *Button v. Thompson* (L. Rep. 4 C. P. 330) was relied on. His Honour the judge, concurring in this view, gave a verdict for the plaintiff.**The question for the opinion of the court is, whether, on the facts as stated in this case, the plaintiff was entitled to recover.**B. Pollock argued for appellant, the defendant.**—The case referred to, *Button v. Thompson*, is not in point; the plaintiff was a sailor at monthly wages, and all that was held, even by the majority of the court, was that he was entitled to wages for the month preceding that during which he was left behind by his ship through his own misconduct. Brett, J., considered he was not entitled to any wages unless he completed the voyage. *Walsh v. Walley* (L. Rep. 9 Q. B. 367) was decided upon an agreement that wages should be forfeited under the circumstances which took place; but in his judgment Cockburn, C.J., said, "the wages of the current week would have been forfeited by the general law." The old cases are all cited in the notes to *Cutler v. Powell* (2 Sm. L. Cas., 7th edit., pp. 11 to 49).**No one appeared for the respondent.**CLEASBY, B.—This question is concluded by the statement of the case. The plaintiff was employed by the week, although his payment was computed by the hour. *Button v. Thompson* merely decided upon a peculiar contract, that a servant was entitled to wages earned during the month before that in which he absented himself. It is no authority that he would have been entitled to his current wages. Here the plaintiff was engaged by the week, and having left his service during a week, he could have no claim for the wages he would have earned at the end of it.**GROVE, J.—I am of the same opinion. This case is not touched by *Button v. Thompson*, but is clearly within the well established rule of the other authorities cited.**FIELD, J.—I am of the same opinion.**Judgment for defendant, the appellant.**Solicitors for appellant, Gregory, Rowcliffes, and Co.*

CLEMSON (app.) v. HUBBARD (resp.)

*Employers and Workmen Act 1875 (38 & 39 Vict. c. 90), s. 4—Dispute under the Act—Breach of contract—Summary jurisdiction.**Sect. 4 of the Employers and Workmen Act 1875 enacts, that a dispute under the Act (defined by sect. 3 as any dispute between an employer and a workman, arising out of or incidental to their relation as such) may be heard and determined by a court of summary jurisdiction.**Held, upon a case stated by justices who had declined jurisdiction, that a dispute under that section included a claim by an employer for damage caused by his workman's absence without notice, no explanation having afterwards taken place between them; and that the justices must hear and determine it.*

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THIS was a case stated pursuant to 20 & 21 Vict. c. 43, by three justices for the borough of Derby.

On the 29th Sept. 1875, John Clemson, of the said borough, boot manufacturer, applied at the court of petty sessions for the said borough, for a summons against Edward Hubbard, a workman then in his employment, and delivered, pursuant to rule No. 1, made under the Act 38 & 39 Vict. c. 90, the following particulars of his cause of action:

Edwd. Hubbard,
1875. Dr. to Mr. John Clemson.
Sept. 27. To damage and loss caused by your abs-
enting yourself from my employment from
this date, without giving previous notice,
and whereby I have suffered damage to the
amount of 5*l.* and upwards 2*s*

Summons having been thereupon issued and served, the said Edward Hubbard, pursuant thereto, appeared before us at the Police Office, Town Hall, in Derby aforesaid, on the 6th Oct. 1875. The attorney for the said John Clemson opened his case by stating that the proceedings were under the Employers and Workmen Act 1875; that the then defendant had contracted with the plaintiff, his client, as a cutter-out in his trade of a boot manufacturer, at weekly wages; that on Saturday, the 25th Sept. 1875, the defendant having finished his current week's work, and received his wages, but having given no notice or intimation whatever of his intention to leave the complainant's service, had absented himself on Monday morning, the 27th, and had not afterwards resumed his work, nor offered any explanation of his conduct; that by this sudden and unexpected absence the defendant had occasioned serious inconvenience and loss to the plaintiff, who would have suffered little or none if the defendant had given (as it was contended he was bound to have done) a week's notice of his intention to leave the plaintiff's service.

Hereupon the defendant's attorney objected that the plaintiff, on his own showing, was out of court; that here there was no dispute (in the words of the Act) arising out of or incidental to the relation of employer and workman, inasmuch as the defendant, until the present moment, had had no distinct intimation that the plaintiff claimed from him a week's notice, and hence had had no opportunity of disputing that claim; that the foundation of the justices' jurisdiction, in all cases under the Act, is the fact of the existence of such a "dispute;" that here the plaintiff's particulars showed that the present was a simple action for damages for breach of contract, which the County Court might well entertain under its Common Law Jurisdiction, but which neither it nor the justices had power, under the Employers and Workmen Act, to try. The plaintiff urged that a dispute in fact existed, sufficient to found the magistrates' jurisdiction, or, at all events, would do so if the other side would now *pro forma* do what it did in fact, viz., deny the plaintiff's claim. The defendant's attorney, however, declined either to admit or deny the claim, and contended that, even if he should deny it, his denial would not give the court jurisdiction, inasmuch as the cause of action would then be something which had arisen since, and which did not exist when the action was brought by the entry of the plaint; that the only question was, whether a dispute existed at that time, and that it was immaterial whether a dispute existed at the present moment or not.

It appearing to the justices that the objection urged on behalf of the defendant to this jurisdiction was well founded, and that the intention of the Employers and Workmen Act 1875, as indicated in its title, and all its provisions, is not to give justices any general authority like that possessed at common law by the County Court to try actions for breach of contract, but to confer upon them conjointly with the County Court an entirely new jurisdiction, viz, to arbitrate in an equitable rather than strictly legal sense "disputes" between employers and workmen who are unable to adjust them amicably, the justices dismissed the case.

Laurance argued for appellant, the complainant.

—The sole question is, whether this was such a case as was intended to be included in the summary jurisdiction given to justices by sect. 4 of the Employers and Workmen Act 1875 (38 & 39 Vict. c. 90). The words are: "A dispute under this Act between an employer and a workman may be heard and determined by a court of summary jurisdiction, and such court, for the purposes of this Act, shall be deemed to be a court of civil jurisdiction, and in a proceeding in relation to any such dispute the court may order payment of any sum which it may find to be due as wages, or damages, or otherwise, and may exercise all or any of the powers by this Act conferred on a County Court: Provided that in any proceeding in relation to any such dispute the court of summary jurisdiction—(1) shall not exercise any jurisdiction where the amount claimed exceeds 10*l.*; and (2) shall not make an order for the payment of any sum exceeding 10*l.*, exclusive of the costs incurred in the case; and (3) shall not require security to an amount exceeding 10*l.* from any defendant or his surety or sureties."

Buszard appeared on behalf of the justices, and argued in support of their decision for the defendant.—The justices' jurisdiction in this case depends upon the meaning of "a dispute under this Act." It is explained in the 3rd section, where such matters as this are expressly provided to be determined in a County Court. The words are: "In any proceeding before a County Court in relation to any dispute between an employer and a workman arising out of or incidental to their relation as such (which dispute is hereinafter referred to as a dispute under this Act), the court may, in addition to any jurisdiction it might have exercised if this Act had not passed, exercise all or any of the following powers; that is to say—(1) It may adjust and set-off the one against the other all such claims on the part either of the employer or of the workman, arising out of or incidental to the relation between them, as the court may find to be subsisting, whether such claims are liquidated or unliquidated, and are for wages, damages, or otherwise; and (2) if, having regard to all the circumstances of the case, it thinks it just to do so, it may rescind any contract between the employer and the workman upon such terms as to the apportionment of wages or other sums due thereunder, and as to the payment of wages or damages, or other sums due, as it thinks just; and (3) where the court might otherwise award damages for any breach of contract it may, if the defendant be willing to give security to the satisfaction of the court for the performance by him of so much of his contract as remains unperformed, with the consent of the plaintiff, accept such security, and other performance of the con-

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tract accordingly, in place either of the whole of the damages which would otherwise have been awarded, or some part of such damages." A further explanation of a dispute under this Act may be obtained by considering the words used in previous statutes upon this subject; by 20 Geo. 2, c. 19, s. 1, "all complaints, differences, and disputes" between employers and workmen were to be heard and determined by justices; 31 Geo. 2, c. 11, s. 3, uses the same words. By 4 Geo. 4, c. 34, s. 3, a further power is given to justices to hear and determine upon complaint of employers certain breaches of contract, besides their previous jurisdiction. And the last Act before this of 1875 (30 & 31 Vict. c. 141), gives by sect. 4, jurisdiction on breach of contract, "or wherever any question, difference, or dispute shall arise as to the rights or liabilities of either of the parties, or touching any misusage, misdemeanor, misconduct, ill treatment, or injury to the person or property of either of the parties under any contract of service." It is clear that the Legislature intended to materially limit the justices' jurisdiction by the Act of 1875; and as "a dispute" alone can now be heard and determined by them, and then they are to be deemed a court of civil jurisdiction, it must follow that sect. 4 relates to arbitration by a justice upon a submission made by both parties, not to such matters as a breach of contract, which can be settled under the ordinary jurisdiction of a County Court. Sect. 9 introduces the 5th section of the Debtors' Act 1869, therefore a court of summary jurisdiction can enforce its orders by imprisonment. This was never intended except with the consent of the parties. If such a claim as this can be so determined, the workmen will be worse off than they were before.

CLEASBY, B.—I do not think we need hear Mr. Lawrance in reply. The question is, whether this claim for damage, caused by a workman's absence from his employment without notice can be recovered by the employer from the workman under the summary jurisdiction granted by sect. 4 of the Employers and Workmen Act 1875? It turns upon the meaning of "a dispute between an employer and a workman arising out of or incidental to their relation as such." The argument for the respondent is, that as two minds must consent to a contract, so there must be two consenting minds to constitute a dispute. I think it a monstrous interpretation to put upon this legislation that the summary remedy provided for an aggrieved person should be available only if both parties consent. Such a construction of the word "dispute" would nullify many of the provisions of the Act; it is sufficient to refer to the 1st subsection of sect. 3: The additional or equitable powers given to a County Court Judge by sect. 3 can be exercised only in a proceeding in relation to the same disputes under this Act which can be heard and determined by a court of summary jurisdiction under sect. 4; one of these powers is by the 1st subsection, to "adjust and set-off the one against the other all such claims on the part either of the employer or the workman arising out of or incidental to the relation between them as the court may find to be subsisting, whether such claims are liquidated or unliquidated, and are for wages, damages, or otherwise." There is nothing there about agreeing to dispute such claims, and it would be impossible to apply that clause with any effect if it were necessary to obtain such

agreement. We can see what was the summary jurisdiction of justices in these matters before the Act of last year, by referring to sect. 4 of 30 & 31 Vict. c. 141. It seems to me that the extent of the jurisdiction has not been altered at all, and that it would be unreasonable to hold that the word dispute has the limited sense suggested. Although the justices here have acted with prudence and propriety in doubting their jurisdiction under this new legislation, yet this case must be remitted to them to try it on its merits.

GROVE, J.—I am of the same opinion. It would be very peculiar if a dispute which justices have power to decide were to arise upon a notice of leaving, and not upon an absence without leave. The summary jurisdiction is not merely by consent; a dispute would come within it if caused by words between the parties or by the acts of either of them, or if it arose from a breach of contract. The statutes authorise imprisonment only when a person, upon whom a penalty is imposed, has means and refuses to pay. Both employers and workmen are liable for damages for breach of contract, and such damages are recoverable by summary jurisdiction. The case must go back.

FIELD, J.—I am entirely of the same opinion, and clearly so, for the reasons given. I merely add, that it would be a bad day for workmen if for all small claims by or against them they were compelled to go to the County Courts.

Judgment for appellant with costs.

Solicitor for appellant, H. Tyrrell, for A. J. Flint, Derby.

Solicitors for the justices, Whiston and Cooper, Derby.

Friday, Jan. 28, 1876.

HOWES (app.) v. PEAKE (resp.).

Refreshment house—Entertainment—23 Vict. c. 27, s. 6.

The appellant's shop, which he kept open until two or three o'clock in the morning, consisted of one room only, open in front, without seats of any kind; and the persons who frequented the shop simply drank ginger beer or lemonade at the counter and went away.

Held, by Grove and Field, JJ. (Cleasby, B., dissenting), affirming the conviction of a magistrate, that this was a shop kept open for public refreshment, resort, and entertainment, within 23 Vict. c. 27, s. 6, and required a licence as a refreshment house.

This court will hear only one counsel on each side upon appeals from inferior courts.

THIS was a case stated under the statute 20 & 21 Vict. c. 48, by Ralph Benson, Esq., one of the magistrates of the police courts of the Metropolis, sitting at the Southwark Police Court.

The appellant, upon the 30th March 1875, and by various adjournments to the 12th May 1875, appeared before the said magistrate on a summons taken out against him by the respondents, and framed on the 6th section of the Act 23 Vict. 2. 27, which summons was as follows:

Metropolitan Police District, } You are hereby to take notice that an
to wit. } information hath this day been laid
and exhibited against you before me,
Ralph Augustus Benson, Esq., one of the Metropolitan
Police magistrates, sitting at the Metropolitan Police
Court at Southwark, in the county of Surrey, within the
Metropolitan Police District, by James Peake, officer of

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excise, in and by which information it is alleged that, after the passing of a certain Act of Parliament, made and passed in the year 1860, and intituled "An Act for granting to her Majesty certain duties on wine licences and refreshment houses, and for regulating the licensing of refreshment houses and the granting of wine licences," and within six calendar months before the day of exhibiting the said information, to wit, on the 21st Feb. now last past, and within the limits of Chief Office of Inland Revenue in London, to wit, at the parish of St. George the Martyr, Southwark, in the county of Surrey, you kept a refreshment house, for which a licence was and is required by the said Act, without taking out or having taken out or having in force, a proper licence in that behalf, granted to you under the authority of the said Act, whereby and by force of the said Act you have forfeited a sum not exceeding 20l. And you will further take notice, that the said information is appointed to be heard, adjudged, and determined, on Tuesday, the 30th March now instant, at two of the clock in the afternoon of the same day, at the Metropolitan Police Court at Southwark, in the said county and district, before such Metropolitan Police magistrate as shall be then and there present and have jurisdiction to hear and determine the same; at which time and place you are to appear, and plead to and attend the hearing of the said information, to make your defence, or otherwise the said magistrate will proceed to the hearing and determination thereof as if you were present.

Dated at the Metropolitan Police Court aforesaid, in the said county and district, this 17th March 1875.

RALPH A. BENSON.

To Mr. James Howes.

If you have any witnesses who can disprove or extenuate the offence imputed to you, you must bring them with you at the time appointed for the trial.

If you bring counsel or attorney, you are requested to give four days' notice to the Solicitor of Inland Revenue at Somerset-House.

The said magistrate convicted the appellant of the said offence, and adjudged him to pay a penalty of 5l.

The following facts were either proved or admitted before him by both parties on the hearing of the complaint:

That the appellant was not licensed for the sale of beer, cider, wine, or spirits respectively, and had not taken out any licence to keep a refreshment house.

It was not contended by the respondents that the appellant sold articles which required any excise licence beyond the refreshment house licence.

That the appellant's shop consisted of one room only, open in front, without seats of any kind, and that the persons who frequented the shop simply drank their ginger beer or lemonade at the counter and went away.

That the appellant kept his shop open until two or three o'clock in the morning.

On the part of the appellant it was contended that he did not keep a refreshment house requiring him to take out a licence, within the meaning of the statute; that the words "refreshment, resort, and entertainment," in the said 6th section of the Act, must be read together, and could not be separated; that ginger beer and lemonade were not "refreshments" within the statute; that there were no means of resting or sitting down upon the appellant's premises, and, therefore, there was no "entertainment" within the statute.

The said magistrate was of opinion that the contention on the part of the appellant was wrong, and therefore convicted him.

McIntyre, Q.C. (with him John Thompson) argued for appellant, the defendant.—By sect. 6 of 23 & 24 Vict. c. 27, "All houses, rooms, shops, or buildings, kept open for public refreshment, resort, and entertainment, at any time between the hours of

nine of the clock at night" (altered to ten o'clock by 24 & 25 Vict. c. 91, s. 8) "and five of the clock of the following morning, not being licensed for the sale of beer, cider, wine, or spirits respectively, shall be deemed refreshment houses within this Act, and the resident owner, tenant, or occupier thereof shall be required to take out a licence under this Act to keep a refreshment house; and every person who shall keep any house, room, shop, or building for the purpose of selling therein any victual or refreshment to be consumed on the premises where the same shall be sold (except beer, cider, wine, and spirits, sold respectively under a proper licence in that behalf), and every person who shall keep any house, room, shop, or building for the consumption therein by the public of any refreshment (except as aforesaid), although the same shall not be sold therein, may, if he shall think fit, take out a licence under this Act to keep a refreshment house; and in all proceedings, and upon all occasions whatever, it shall be sufficient to describe by the term refreshment house, any house, room, shop, or building in which any such article as aforesaid (except as aforesaid) is sold to be consumed, or is consumed as aforesaid, without further or otherwise designating or describing the same." Ginger beer and lemonade can scarcely be called refreshment of the kind intended to be referred to in this statute; but even if included in that description, it cannot be said that the appellant's open stall is a place of resort or of entertainment. It has been judicially held that a licence of this kind is necessary only when the place combines each of the three qualifications, "refreshment, resort, and entertainment." The first case is *Taylor v. Oram* (1 H. & C. 370), where the evidence was that the defendants kept a dancing saloon. The entrance from the street led to a room fitted with chairs, looking glasses, and a number of shelves holding glasses, measures, and pots. This room opened into the dancing room. When the house was visited by the police, one of the defendants was behind a counter at the entrance of the dancing room pouring beer from one jug into another. A number of persons were in the room, some dancing, some drinking beer; men were sitting at a table drinking and singing, and there were a number of quarts of beer in persons' hands, from which glasses were filled and handed to others. No sale of anything was seen. Threepence was charged for admission, and if a pot of beer was wanted, the persons paid sixpence first, and one of the defendants went for it. The magistrate before whom the information was laid, was of opinion that there was no sufficient evidence that it was a house kept open for public refreshment and entertainment, conceiving that the word entertainment meant not diversion or amusement, but the provision of food, drink, and whatever might be reasonably required for the personal comfort of guests. It was held, *per totam curiam*, that the finding of the magistrate was conclusive; *per Pollock, C.B.*, that the magistrate's construction of the word entertainment was correct; *per Martin, B.*, that the evidence was sufficient to support a conviction; and *per Bramwell, B.*, that the decision of the magistrate was correct in law and fact. If the circumstances of that case did not constitute the premises a refreshment house within that section, it is difficult to understand how the magistrate could be right in this case. The other authority is *Muir v. Keay* (L. Rep. 10 Q.B. 594), where the magistrate held

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the premises to be a refreshment house, and the court affirmed his decision; but the facts justified that conclusion far more than the facts of this case can do so. The defendant's house was there called 'The Café'; it was found open during the night, and seventeen females and twenty gentlemen were there, and were supplied with cigars, coffee, and ginger beer, which they consumed. Lush, J., said in his judgment, "But the main objection is, that there was no public entertainment, for that means a musical or other public performance. I think that is wrong. I think entertainment is something connected with the enjoyment of refreshment rooms, tables, and the like. It is something beyond refreshment; it is the accommodation provided, whether that includes a musical or other amusement or not." 'This is a penal statute, and the constituents of the offence created ought to be strictly construed. If the appellant must have a licence for his counter, every chemist who allows a customer to drink a bottle of Apollinaris water after ten o'clock would be liable to a conviction for keeping a refreshment house. [GROVE, J.—If the public resorted to his shop for that purpose, and his chemicals were merely a pretence, it would be the same case as this.]

Thompson rose to follow on the same side, but was stopped.

CLEASBY, B., after consultation with the rest of the court.—We see no reason for altering in this division the old rule concerning appeals from inferior courts, that one counsel only is to be heard on each side.

BOWEN, contra.—I may rely upon *Muir v. Keay* as established law, and if that case be not followed here, the courts will have decided that lemonade, if consumed by persons sitting down, constitutes an entertainment; but if the consumers are obliged to stand up, it is refreshment only. The case finds that this place is a shop, one of the words used in the statute; and both the authorities on the subject affirm the *prima facie* conclusion that the nature of the place is far more a matter of fact than of law. It cannot be maintained, as a point of law, that the magistrate was wrong on this question of fact.

McINTYRE, Q.C., in reply.—The bare facts are here stated in order that the court may determine whether they are within the purview of the section. The point was not so raised in either of the previous cases.

FIELD, J.—In this case, there being a difference of opinion, as junior judge I give my judgment first. I think the conviction was right. Let us consider the object and scope of the statute; it is an Act for granting to her Majesty certain duties on wine licences and refreshment houses, and for regulating the licensing of refreshment houses and the granting of wine licences. There is a twofold object with respect to refreshment houses, being partly to raise taxes and partly to regulate the houses. The latter is carried out chiefly by the form of licence contained in the first schedule, which shows to some extent the purposes for which the licence is required. The keeper of the refreshment house is thereby authorised and empowered to keep open the said house as a refreshment house, and to sell any victual or refreshment to be consumed therein and in the premises thereunto belonging (provided that for the sale of any excisable liquor he shall have in force a proper licence granted to him in that behalf). Now a

refreshment house is defined by the 6th section to include a shop; this is clearly a shop, for although only a room, it is so found to be in the special case; it must be a shop kept open for public refreshment, resort, and entertainment, between certain hours. I think this place was a shop kept open for these purposes. People could go there at will, and drink ginger beer or lemonade which was there for sale. That is sufficient to constitute a place of public resort and refreshment. It must be a question of degree under all the circumstances, and a chemist's shop might even be found as a fact to be within the definition. The words are, no doubt, cumulative, and I must in maintaining this conviction, hold this shop to have been open for public entertainment as well as for refreshment and resort. I see nothing in the case inconsistent with its being so, I think there is no authority against it, and I cannot say the magistrate is wrong in finding as a fact that it is so. *Taylor v. Oram* was a decision that the magistrate's finding was not necessarily wrong, but some doubt was expressed by the judges as to its being right, and that same doubt seems to have been entertained by the Court of Queen's Bench when the subsequent case was decided. *Muir v. Keay* seems to me to be in no way against the magistrate's conviction in the present case. Lush, J., certainly says that entertainment is something beyond refreshment; and that it there was the accommodation provided, apparently referring to the seats in the café; but I cannot think the opportunity of sitting down can distinguish the premises in the two cases. If a refreshment house in one case, it may well be so in the other. I think the conviction by the magistrate was right, and should be affirmed.

GROVE, J.—I have come to the same conclusion as my brother Field, and I think the conviction should be affirmed. This is what may be called a marginal case, and it must be a question of degree. "The question," Blackburn, J., says, in *Muir v. Keay*, "must always be one of more or less, and the facts of each particular case must be looked at as they arise." It is difficult to lay down any hard and fast line, but at all events I cannot say this shop is not a refreshment house. Entertainment is the word of difficulty in the interpretation of the section, and we cannot possibly decide the question before us merely upon its etymology. Various definitions are given to it, but they none of them help us. We must take the three words together—refreshment, resort, and entertainment—and the two first must together limit and define the third. No doubt this was a place of refreshment and resort, and the question for us is whether the magistrate was wrong in holding it to be within the section. I think not; indeed I think he was right.

CLEASBY, B.—I cannot agree with the conclusion of the rest of the court, because I am not satisfied that the appellant here kept open a place of public entertainment. In most cases I admit it must be a question of fact, but here, upon the facts found, it must turn upon the construction of the section. The question for us is, whether these facts, about which there is no dispute, amount to a breach of the statute. How can it be said that this counter was resorted to as a place of public entertainment? It may be that it was kept open for public refreshment and resort. The words of the section and the authorities require something more to make it necessary that the appellant should take out a

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licences. I can see nothing more upon the facts found. I have a difficulty in believing that the Legislature intended that a place of refreshment and resort merely, with nothing else, could be the same as a place of refreshment, resort, and entertainment. *Muir v. Keay* shows conclusively that there must be something else besides the first two to make a place require a licence, and it points to what is necessary. Blackburn, J., did not think that entertainment need be something in the nature of refreshment: "It is rather the correlative of resort—the reception and accommodation of the public who resort to the place in question. It is not a useless word. It does not apply to the mere giving of refreshment, nor to the mere fact of persons coming in; it means public reception." In my opinion there is nothing of that kind here, and upon these facts the complaint ought to have been dismissed. The majority of the court, however, thinking otherwise, the conviction will be affirmed.

Judgment for respondent, with costs.

Upon the application of *McIntyre*, Q.C., for the appellant, the court granted leave to appeal.

Solicitors for appellant, *Hicklin and Washington*.
Solicitor for respondent, *Solicitor of Inland Revenue*.

Friday, Jan. 28, 1876.

STEVENS (app.) v. EMSON (resp.)

Occasional licence—Consent of justice usually acting for place of sale—Justice of another division—25 & 26 Vict. c. 22, s. 13.

By 25 & 26 Vict. c. 22, s. 13, and 26 & 27 Vict. c. 33, s. 20, an excise officer may, with the consent in writing of a justice of the peace usually acting at the petty sessions for the petty sessional division within which the place of sale is situate, grant to a licensed person an occasional licence for certain purposes; and any person who shall have taken out such occasional licences shall not be liable to any penalty or forfeiture for selling the articles mentioned in it at the time and place specified, if at the time of such sale he shall produce such licence when requested to do so by an officer or constable.

The appellant, a licensed victualler, obtained from a justice of the peace a written consent for an occasional licence to sell at a place out of the petty sessional division where the justice usually acted, and the excise officer granted an occasional licence in pursuance thereof.

Held, quashing a conviction for selling liquors at this place, without a licence, that the occasional licence was not invalidated by the consent of a wrong justice.

This was a case stated by two justices of the peace in and for the county of Somerset, under the statute 20 & 21 Vict. c. 43.

At a petty sessions holden at Temple Cloud, in the petty sessional division of Temple Cloud, in the county of Somerset, on the 17th Aug. last, an information preferred by James Emson, superintendent of police (hereinafter called the respondent), against William Stevens (hereinafter called the appellant), under the several licensing Acts now in force, charging for that he the said appellant, on the 21st July last, at the parish of Chew Magna, in the said county of Somerset, did sell intoxicating liquors by retail, not having a licence

duly authorising him so to do, was heard and determined by the said justices respectively, he being then present, and upon such hearing the appellant was duly convicted before them of the said offence, and they adjudged him to forfeit and pay for his said offence the sum of 2l. 10s., to be paid and applied according to law, and also to pay to the said respondent the sum of 11s. 1d. for his costs in that behalf.

Upon the hearing of the information it was proved on the part of the respondent, and found as a fact, that the appellant, who is a licensed victualler, carrying on business at 51, Broad-street, in the city of Bristol, by his agent one George Huntley, on the said 21st July 1875, on the occasion of an Odd Fellows Fête, sold certain intoxicating liquors in a tent erected in a field, situate at Chew Magna aforesaid, and within the petty sessional division of Temple Cloud aforesaid.

The respondent, on the day in question, requested the said George Huntley to produce his licence authorising such sale, whereupon he, the said George Huntley, produced and handed to the respondent an occasional licence, duly drawn in the ordinary form; the respondent then inquired of the said George Huntley the name of the magistrate who gave the written consent to such occasional licence being granted, who told him that it was signed by Mr. Miles. The respondent replied that Mr. Miles was not a magistrate of this district, but the said George Huntley notwithstanding continued to sell intoxicating liquors for the rest of the day.

The respondent, at the hearing of the information, tendered evidence to show the circumstances under which this occasional licence was obtained by the appellant; this evidence was objected to by the appellant's attorney, but the justices overruled the objection, and the facts proved before them in relation thereto were as follows:

On the 6th July last, the said George Huntley, on behalf of the appellant, applied to the justices of the peace then sitting in petty sessions at Temple Cloud aforesaid, for a justice's consent to an occasional licence to be granted to the appellant to sell beer, spirits, wines, and tobacco on the then ensuing 21st July, at the place and on the occasion mentioned, and set forth in the occasional licence before referred to. The justices, on such application being made, inquired of the said George Huntley who Mr. Stevens (the appellant) was, who told them that he was an innkeeper residing in Bristol, when the justices told George Huntley that Mr. Stevens (the appellant) should apply himself, and that there would be another petty sessions on the 20th July, when he could make his application.

The appellant did not apply at such sitting of the justices, as directed, nor to any justice usually acting in the petty sessional division within which the place of sale was situated, but he applied to Mr. Miles, a justice of the county of Somerset, not actually acting in that division, but from whom the appellant had obtained the like consent on like occasions, though not for any place in the petty sessional division aforesaid, and the said Mr. Miles, gave the appellant the consent hereinafter mentioned.

The statement in the annexed consent paper, that the said W. H. Miles usually acts at the petty sessional division within which the place of sale therein mentioned is situated is incorrect, the fact being that the said W. H. Miles does not act in

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that division; and it is known to the justices that there are two magistrates residing in the parish and usually acting in the division in which the place of sale is situated.

Upon obtaining the consent signed by the said W. A. Miles, the appellant applied to Mr. Drinkwater, the officer of excise duly authorised by the Commissioners of Inland Revenue in that behalf, and upon such consent being handed to him and the sum duly paid by the appellant, the said Mr. Drinkwater granted the occasional licence before referred to.

Upon the foregoing facts, and on our referring to sect. 13 of 25 & 26 Vict. c. 22, and sub-sect. 1 of sect. 20 of 26 & 27 Vict. c. 33, which require that a consent in writing should have been given by some justice of the peace usually acting at the petty sessions of the petty sessional division within which the place of sale was situate, before the officers of excise could legally grant an occasional licence, and as no such consent had been given in this case, the justices considered that the so called occasional licence, obtained by the appellant in the way before mentioned, was not a licence within the meaning of the Act, and did not justify him in selling intoxicating liquors thereunder; and the justices therefore convicted the appellant and fined him the penalty and costs before mentioned. And the question of law arising from the above statement is, whether or not they were right in holding sales under the so called occasional licence obtained in the way aforesaid to be illegal.

The consent alluded to was in the form furnished by the Inland Revenue officers to any licensed person requiring an occasional licence:

I, the undersigned, being a justice of the peace usually acting at the petty sessions for the petty sessional division in which the place of sale hereinafter mentioned is situated, do consent to an occasional licence for the sale of beer [or spirits, or wine, or refreshments] on the day of _____, at _____ on the occasion of _____ being granted to _____, he being duly licensed to sell the above-named articles.

Charles argued for the appellant.—By 25 & 26 Vict. c. 22, s. 13, "It shall be lawful for the Commissioners of Inland Revenue, whenever they shall consider it conducive to public convenience, comfort, and order, and with the consents in writing of two justices of the peace usually acting at the petty sessions for the petty sessional division within which the place of sale is situate, to authorise any officer of excise to grant to any person who shall be duly authorised to keep a common inn, alehouse, or victualling-house, and who shall have taken out the proper excise licences to sell therein beer, spirits, wine, or tobacco, an occasional licence under this Act empowering him to sell the like articles, for which he shall have taken out such licences as aforesaid, at any such other place, and for and during such space or period of time, not exceeding three consecutive days at any one time, as the said Commissioners shall approve, and as shall be specified in such occasional licence; and any person who shall have taken out such occasional licence shall not be liable to any penalty or forfeiture whatever by reason or on account of his selling the articles mentioned in the said licence during the time and at the place specified therein; provided that," amongst other things, "the said licence shall not protect any such person in the sale of any of the articles hereinafter mentioned, unless he shall at the time of such sale produce such licence when requested to do so by any officer

of excise, or by any constable or police officer." 26 & 27 Vict. c. 33, s. 20, after reciting the said 13th section of 25 & 26 Vict. c. 22, makes some alterations and amendments therein; the only thing material is sub-sect. 1, "That the consent of one justice of the peace, as in the said section mentioned, only, shall be necessary." It is not suggested but that everything was done *bond fide*, the only mistake being that of the magistrate who signed the consent. The conviction, therefore, was wrong. [FIELD, J.—The argument of the other side might be that "such occasional licence" in the Act refers only to a licence procured as there directed.] There is no authority to an excise officer or constable to inquire concerning anything but the licence, which is here good on the face of it.

No one appeared for the respondent.

CLEASBY, B.—I think "such occasional licence" must mean the licence *de facto* obtained; and although it may have been improperly granted, if good on the face of it, the licensed person can not be liable to penalty or forfeiture for acting in pursuance of it.

GROVE, J.—It seems to me very clear that this conviction was wrong. I have only hesitated because no one has appeared to support it.

FIELD, J.—I am of the same opinion.

Judgment for appellant, with costs.

Solicitors for appellant, Gregory, Rowcliffes, and Co., for Benson and Thomas, Bristol.

Friday, Jan. 28, 1876.

BARNES (app.) v. EDLESTON (resp.)

Smoke nuisance—Prohibition—Liability incurred under a repealed enactment—18 & 19 Vict. c. 121, s. 13; 38 & 39 Vict. c. 55, s. 343.

On the 24th May 1875 the respondent was ordered by justices, under 18 & 19 Vict. c. 121, s. 13, to abate a smoke nuisance, and by the same order the justices prohibited a recurrence thereof.

The Public Health Act 1875, which passed on the 11th Aug., repealed the said Act, amongst others, and re-enacted similar provisions as to nuisances. By sect. 343 the repeal was not to affect any liability acquired, accrued, or incurred under a repealed statute.

On the 24th Aug. the respondent was charged upon information, with disobedience on the 12th of that month to the justices' prohibition of the 24th May. The justices found he had disobeyed the order, but dismissed the charge on the ground that the repeal put an end to the order.

Held, that the respondent was under a liability incurred under the previous statute; that he was within the saving clause of the repeal section; and that the justices ought to have convicted him.

The following case was stated for the opinion of the Queen's Bench Division, under the provisions of the statute 20 & 21 Vict. c. 43.

On the 24th Aug. 1875 an information was laid by the appellant John Barnes, against the respondent Robert Edleston, charging that the said R. Edleston, of Sowerby Bridge, in the West Riding of the county of York, dyer, on the 12th Aug. 1875, at Sowerby Bridge, in the Riding aforesaid, then being the occupier or owner of certain premises there situate, called Asquith Bottom Dye-works, unlawfully, knowingly, and wilfully had not

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obeyed a certain order in writing under the hands and seals of W. H. Rawson and Samuel Shaw, esquires, two of her Majesty's justices of the peace in and for the said Riding, bearing date the 15th May 1875, whereby the said justices, in pursuance of the statute in such case made and provided, ordered the said occupier or owner of the said premises, on the service of the said order to discontinue the nuisance therein complained of (viz., the sending forth of black smoke in such a quantity as to be a nuisance), and did prohibit a recurrence thereof; and he had unlawfully infringed the said order by continuing to send forth black smoke, contrary to the form of the statute in such case made and provided.

That a summons was issued upon the said information which was duly served on the said respondent, and was returnable on the 28th Aug. 1875, but the hearing of the same was adjourned until the 2nd Oct. 1875.

That on the hearing of the said summons it was proved and admitted that an order was duly served on the respondent on the 24th May 1875, by leaving the same on the premises where the chimney complained of stood, with one John Wilson, a clerk of the respondent's, and the said order was in the following words and figures, that is to say:

Smoke nuisance. Prohibition of recurrence.

To Robert Edleston, of Sowerby Bridge, in the parish of Halifax, in the West Riding of the county of York, dyer, and to his servants or agents, and to all whom it may concern.

West Riding of the county of York.—Whereas, on the 28th April 1875, complaint was made before Henry Akroyd Ridgway, esquire, one of her Majesty's justices of the peace in and for the said West Riding of the county of York, and acting in and for the same, by John Barnes, then being an inhabitant of the parish of Halifax, in the said West Riding, and within which parish the district of Sowerby Bridge in the said Riding is situate, that in or upon certain private premises in the district of Sowerby Bridge aforesaid, the said R. Edleston unlawfully did send forth black smoke from a certain chimney belonging to certain premises there occupied by him (not being the chimney of a private dwelling-house), in such quantity as to be a nuisance, and that the said nuisance was caused by the act or default of the said R. Edleston, and was likely to recur.

And whereas the said R. Edleston has been duly summoned to appear before us, W. H. Rawson and Samuel Shaw, esquires, being two of her Majesty's justices of the peace in and for the said West Riding of Yorkshire, sitting in petty sessions, holden on the 15th May 1875, at our usual place of meeting, to answer to the matter of the said complaint of the said John Barnes. Now, upon proof here had before us that the said summons was duly served on the said R. Edleston, and that the said John Barnes was and is an inhabitant of the said parish, and that the nuisance so complained of doth exist on the said premises and is likely to recur, and that the same was caused by the act or default of the said Robert Edleston; and being of opinion that the same or a like nuisance is likely to recur, we, in pursuance of the statutes in such case made and provided, do order and direct the said R. Edleston shall and do, on the service of this order or a true copy thereof, according to the said statutes, discontinue the said nuisance. And we further, in pursuance of the said statutes, do prohibit the recurrence of the said nuisance.

And we also adjudge the said R. Edleston to pay to the said John Barnes, the sum of 16s. 6d. for his costs in this behalf, and if the said sum be not paid forthwith, we order that the same be levied by distress and sale of the goods and chattels of the said R. Edleston; and in default of sufficient distress we adjudge the said R. Edleston to be imprisoned in the House of Correction at Wakefield, in the said West Riding, for the space of fourteen days, unless the said sum, and all costs and charges of the said distress shall be sooner paid.

Given under the hands and seals of two of her Majesty's justices of the peace in and for the said West Riding of Yorkshire, this 15th day of May 1875.

WILLIAM HENRY RAWSON, (L.S.)
SAMUEL SHAW, (L.S.)

That on the hearing of the said information it was also duly proved and admitted that on the day mentioned in the information, viz., on the 12th Aug. 1875, dense black smoke was emitted from the said chimney mentioned in the said order in such a quantity as to be a nuisance.

That the respondent contended before the justices that, inasmuch as on the 11th Aug. 1875 the Public Health Act (38 & 39 Vict. c. 55) had come into operation, and had repealed 18 & 19 Vict. c. 90, by virtue of which the said order of the 15th May 1875 was made, and the offence alleged having been committed on the 12th Aug., and after the repeal of the last-named statutes, this information was not a legal proceeding in respect of a penalty incurred before the repeal of the said enactments.

The appellant contended that, inasmuch as the order of the 15th May 1875 was something "duly done" under one of the repealed enactments, and as the hearing of the summons then before the justices was "a legal proceeding in respect of a penalty incurred" against one of the repealed enactments, such investigation and legal proceeding might be carried on as though the Act of 38 & 39 Vict. c. 55, had not been passed, and that the respondent ought to be convicted.

The justices decided in favour of the respondent's view of the law, but granted this case for the opinion of the Queen's Bench Division thereon.

Anstie argued for the appellant.—The order of the 24th May 1875 was duly made and delivered to the respondent under 18 & 19 Vict. c. 121, s. 13. The following section provides a penalty not exceeding 10s. per day during default of obedience to this order. By sect. 343, and the schedule to the Public Health Act 1875 (38 & 39 Vict. c. 55), this Act is entirely repealed, except so far as it relates to the Metropolis; but by sects. 91 and 98 almost exactly similar provisions are re-enacted. Therefore, although the new Act came into operation and the old one was repealed on the 11th Aug. 1875, the day before the alleged offence was committed, yet there is nothing to invalidate the old order of abatement, nor to prevent a conviction under the new Act. Moreover, with a view to this very objection, sect. 343 of the Act of 1875, which repeals the statutes named in the schedule, expressly provides "that this repeal shall not affect: (a) Anything duly done or suffered under any enactment hereby repealed; or (b) any right or liability acquired, accrued, or incurred under any enactment hereby repealed; or (c) any security given under any enactment hereby repealed; or (d) any investigation, legal proceeding or remedy in respect of any such right, liability, security, penalty, forfeiture, or punishment as aforesaid; and any such investigation, legal proceeding and remedy, may be carried on as if this Act had not been passed." This order, made previously to the passing of the Act, clearly comes within both the exceptions (a) and (b) to the repeal.

Maule, Q.C. for the respondent.—It must be taken that the only exceptions to the repeal by the new Act are those mentioned in the saving clauses to sect. 343. Now by sect. 105 power is given to an individual to make complaint of a nuisance; but before, such power belonged only to

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a local authority; and the provisions in sects. 91, 96, and 98, are by no means identical with those of the previous Act. It cannot, therefore, be said that this smoke on the 12th August was either anything duly done or suffered under a repealed enactment, nor was it any right or liability acquired, accrued, or incurred under such enactment.

Anstie in reply.

CLEASBY, B.—This appeal must be allowed. I think the magistrates were acting in error in dismissing the complaint. The effect of the enactment in sect. 343 of the new Act, and of the saving clauses, is to repeal the statutes mentioned in the schedules—not absolutely, but *sub modo*; it does not alter the force of any proceeding pending, or any liability already incurred. It is not necessary to allude to the sub-section (a), but when we come to sub-section (b) it seems to me that the respondent is exactly under the liability there described, a liability acquired, accrued, or incurred under an enactment repealed. Under sect. 13 of the repealed Act of 1855, the justices ordered the abatement of this nuisance on the 24th May 1875, and they added to that order a prohibition under the latter part of the section: “and if the justices are of opinion that such or the like nuisance is likely to recur, the justices may further prohibit the recurrence of it, and direct the works necessary to prevent such recurrence, as the case may in the judgment of such justices require.” Without saying anything about whether the abatement order is or is not within the saving clause, surely the respondent's is a plain case of liability incurred under the order of prohibition. This was a special liability created by the respondent's previous breach of the law, and clearly comes within the saving clause (b) of the repeal section. The case must go back to the justices.

GROVE, J.—I have had some doubt about this point, and I do not say it is entirely removed. It is not, however, sufficient to induce me to differ from the rest of the court.

FIELD, J.—I am very clear that the justices ought to have convicted the respondent.

Case to be remitted, with costs against the respondent.

Per CURIAM.—The rule in this court is, that when both parties appear, costs follow the event, except upon application in peculiar circumstances. When the unsuccessful party does not appear costs will not follow unless expressly ordered.

Solicitors for appellant, *Layton and Jaques*, for *Holroyd and Smith*, Halifax.

Solicitors for respondent, *Bower, Son and Cotton*.

Friday, Jan. 28, 1876.

WILKINSON (app.) v. GOFFIN (resp.).

Trespassing on railway premises—Claim of right
—3 & 4 Vict. c. 97, s. 16.

The respondent kept his van standing for twenty minutes outside a public-house, during part of which time he was refreshing himself within. The ground upon which the van stood was part of the premises of a railway company, whose station was close by, but the only access to the public-house was across this ground, and the customers frequently went there with vehicles. The respondent was charged, under 3 & 4 Vict. c. 97, s. 16, with wilfully trespassing on railway premises, but the justices considered the respondent's claim of right

to use the ground as a customer of the public-house to be bonâ fide, and their jurisdiction to be ousted thereby:

Held, upon a case stated, that as there might be a legal foundation for this claim of right, the justices came to a proper conclusion.

THIS was a case stated by two justices in and for the county of Suffolk, under the statute 20 & 21 Vict. c. 43, on the application of the appellant, who was dissatisfied with their determination upon the question of law which arose before them as hereinafter stated, on the 16th July 1875, at the petty Sessions at Beccles, in the said county of Suffolk, the appellant having duly entered into a recognizance to prosecute the appeal.

Upon the hearing of the information preferred by the said James Ling Wilkinson, the appellant (the Station Master of the Great Eastern Railway Company's Station at Beccles), against the respondent John Goffin, under the Act for Regulating Railways (3 & 4 Vict. c. 97), s. 16, for that the said respondent, on the 4th June 1875, at Beccles, in the said county of Suffolk, did unlawfully and wilfully trespass upon certain premises connected with a certain railway there situate, the property of the Great Eastern Railway Company, and did refuse to quit the same upon request to him the said respondent for that purpose made by the said appellant, an officer of the said railway company, the said justices dismissed the same.

The section of the Act referred to is as follows:

And be it enacted, that if any person shall wilfully obstruct or impede any officer or agent of any railway company in the execution of his duty upon any railway, or upon or in any of the stations or other works or premises connected therewith, or if any person shall wilfully trespass upon any railway, or any of the stations or other works or premises connected therewith, and shall refuse to quit the same upon request to him made by any officer or agent of the said company, every such person so offending, and all others aiding or assisting therein, shall and may be seized and detained by any such officer or agent, or any person whom he may call to his assistance, until such offender or offenders can be conveniently taken before some justice of the peace for the county or place wherein such offence shall be committed, and when committed before such justice as aforesaid (who is hereby authorized and required, upon complaint to him upon oath, to take cognizance thereof, and to act summarily in the premises) shall, in the discretion of such justice, forfeit to her Majesty any sum not exceeding 5*l.*, and in default of payment thereof shall or may be imprisoned for any term not exceeding two calendar months, such imprisonment to be determined on payment of the amount of the penalty.

It was proved that the respondent, on the 4th June last, drove a horse and van into an open space adjoining the railway station at Beccles aforesaid, and placed the same opposite to the door of the public-house there, the property of Messrs. Cobbold, of Ipswich, brewers, the site of which public-house formerly belonged to the railway company, and was sold by them to Messrs. Cobbold for the purpose of erecting a public-house, and which public-house adjoins the said open space. That the van remained there from fifteen minutes past two o'clock till thirty-five minutes past two o'clock, and there was evidence to show that in the meantime the respondent had entered the public-house for the purpose of refreshment. Outside of the van was a placard, stating that a badger was to be seen inside. It was proved that while the van remained as above stated, two persons entered the van, and that they gave money to the respondent; but it was not proved that the respondent made

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any specific charge or solicited money for admission to the van.

The open space where the respondent's van stood is thirty or forty yards wide, and there was in fact no obstruction of the free passage of the public across it.

A plan was put in evidence, and it was proved that the roadway which constitutes the open space above mentioned is repaired and lighted by the railway company, and the justices found as facts that the place whereon the respondent's van stood is part of the premises connected with the station of the Great Eastern Railway Company, notwithstanding that there is nothing in the appearance of the said open space, nor any gate, fence, or other enclosure, to distinguish it from the open street adjoining thereto. But the justices also found as a fact, that the only means of access to the front door of the public-house opposite to which the respondent's van stood, was over such open space, part of the premises of the railway company.

It was proved that a great number of customers had at different times gone to the public-house in question with vehicles.

The appellant, the officer of the railway company (after the respondent's van had been standing on the spot above described for the period above mentioned, and while it still remained there), requested the respondent to remove the same, and at the respondent's request pointed out to him the extent of the company's premises, but the respondent refused to move. A scuffle ensued, and ultimately the van was removed.

On the part of the respondent it was contended that he and his van were on the place above described in exercise of the respondent's right as one of the customers of the public-house belonging to Messrs. Cobbold and Co.

The justices were of opinion that the claim of the respondent was made *bonâ fide*, and that the case could not properly be adjudicated upon without a previous determination of the limits and nature of the rights of access attached to the public-house, the property of Messrs. Cobbold, and that such determination was not within their jurisdiction.

The question of law arising hereupon is set out in the preceding paragraph, and the opinion of the court is requested on such question, and whether the said justices ought to have convicted the respondent on the facts before them.

Marriott, for appellant.—In *Foulger v. Steadman* (L. Rep. 8 Q. B. 65), a cabman was convicted under this section for standing his cab on some ground belonging to a railway company. Blackburn, J., said, "Here the defence only amounted to this, that the respondent believed he had a right to stand his cab upon ground which was the premises of the company without their leave. This belief does not prevent the respondent from being a wilful trespasser." The respondent's defence in this case was exactly the same, and he ought to have been convicted. No doubt a substantial *bonâ fide* claim of right ousts the justices' jurisdiction, but there was no evidence here, nor any pretence for saying that this was a *bonâ fide* claim on the part of the respondent.

No counsel appeared for respondent.

CLEARBY, B.—We are all of opinion, and for myself I may say I feel very clearly, that we cannot interfere with the decision of the justices. The

respondent kept his van standing for twenty minutes outside a public-house, on ground which forms part of the railway company's premises. If he alleged no reasonable excuse for so doing, the circumstances would have been exactly those of the case cited. But the justices find as a fact that the only means of access to the front door of this public-house was over this ground, and that the customers of the house went there frequently with vehicles. Whilst his van was standing there the respondent was himself taking refreshments inside the public-house, and he claimed to occupy this ground as a customer of the house. The justices have satisfied themselves that he thought he had this right; I myself think he had—at all events, it is not unreasonable that he should have it—and in consequence of this *bonâ fide* claim of right the justices' jurisdiction was ousted. If the respondent's van was in the wrong place, or if on any ground, the appellant had a right to send it away, the matter can be tried in an action for trespass. The justices' judgment will be affirmed.

GROVE, J.—I am of the same opinion. The question for us is, whether this claim of right by the respondent, which was made *bonâ fide*, could be legally supported. It appears that there was a right of way for customers of the public-house over this ground, and the extent of right could not be a matter for the justices to decide. It does not appear that the respondent's object in keeping his van on this spot was the exhibition of his badger; he was a customer of the public-house, and there was nothing illegal in the claim he set up. Whether he had a good foundation for the claim was a question which the justices were right in refusing to decide.

FIELD, J.—I am of the same opinion.

Judgment for respondent.

Solicitor for appellant, W. H. Shaw.

Friday, Jan. 23, 1876.

RUTHER (app.) v. HARRIS (resp.)

Salmon fishery—Forfeiture of net—Fish not caught
—24 & 25 Vict. c. 109, s. 21.

By the Salmon Fishery Act 1861, s. 21, no person shall fish for, catch, or kill, except by rod and line, any salmon during the weekly close time; and any person acting in contravention of this section shall forfeit all fish taken by him, and any net or movable instrument used by him in taking the same, and in addition thereto shall incur a penalty, and a further penalty in respect of each fish so taken.

Held, that catching a fish was not a condition precedent to the forfeiture of a net used by persons contravening this section.

This was an information and complaint preferred by Joseph Ruther, of Berkeley, in the county of Gloucester, water bailiff, for and on behalf of the Board of Conservators of the Severn Fishery District, who prosecuted in that behalf, taken and made the 19th May 1875, before one of her Majesty's justices of the peace in and for the said county, who said that William Harris, of Woolaston, in the county of Gloucester, fisherman, and John Cook, of the same place, fisherman, on the 10th May 1875, at the parish of Lydney, in the said county, did resist and obstruct one Joseph Ruther, a water bailiff appointed under the provisions of the Salmon

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Fishery Acts 1861 to 1873, in the execution of his duty as such water bailiff, contrary to the statutes in such case made, whereby they each incurred a penalty of 5*l.* for the said offence, and after hearing the parties and the evidence adduced by them, the said justices thereupon dismissed the said information and complaint with costs. And the said board of conservators, alleging that they were dissatisfied with the said determination, as being erroneous in point of law, did within three days thereafter apply to the said justices to state and sign a case setting forth the facts and the grounds of such determination for the opinion thereon of the Queen's Bench Division of the High Court of Justice, and in pursuance of the said statute in such case made and provided, they stated and signed the following case:

The defendants having appeared upon summons in answer to the above information and complaint before the said justices, it was thereupon proved on the part of the said board of conservators—

That the said Joseph Ruther was duly appointed in writing under the hand of the acting chairman of the said board of conservators as a water bailiff, and, therefore, by virtue of the Salmon Fishery Act 1873, s. 36, empowered to seize all fish and other articles forfeited in pursuance of the Salmon Fishery Acts 1861 to 1873, within the Severn Fishery District.

That before six a.m. on the morning of Monday, the 10th May 1875, at the parish of Lydney, in the county of Gloucester, a place within the said Severn Fishery District, the said Joseph Ruther, with another water bailiff of the said board, and one of the officers of the Gloucestershire police force, being then on duty, found the defendants and a number of other men fishing for salmon in the river Severn, with nets used for the catching of salmon.

That the said Joseph Ruther, as such water bailiff, thereupon demanded the net from the said defendant William Harris, but the said William Harris refused to give up the same. Both the defendants at the time knew that the said Joseph Ruther was a duly appointed water bailiff of the said board.

That the said Joseph Ruther, in the supposed execution of his duty as such water bailiff, thereupon attempted to seize such net, but the defendants resisted and obstructed him and prevented his seizing the said net.

It was not proved on behalf of the said board of conservators that the said defendant William Harris had actually caught any salmon.

It was proved that the defendants were, during the weekly close time, contrary to the 21st section of the Salmon Fishery Act 1861, on the river Severn fishing for salmon by other means than with a rod and line, and had with them nets for the catching of salmon; and for this offence they were convicted before the said justices and fined 5*l.* each and costs.

It was urged before the said justices on behalf of the said defendants, that a water bailiff has no authority, under the Salmon Fishery Acts 1861 to 1873, to seize any net or movable instrument used in fishing for salmon during the weekly close time, unless salmon have been actually caught therein. That the 36th section of the Salmon Fishery Act 1873, sub-sect. 3, only authorises the water bailiff to seize all fish and other articles forfeited in pursuance of the Salmon Fishery Acts 1861 to 1873,

and that the 21st section of the Salmon Fishery Act 1861 only provides that a person acting in contravention thereof shall forfeit all fish taken by him and any net or movable instrument used by him in taking the same, and that as it was not proved that any salmon were actually taken, no forfeiture arose.

On the part of the conservators it was urged that the instruments were forfeited by any one acting in contravention of the 21st section of the Salmon Fishery Act 1861, and that section forbade not only the catching and killing, but also the "fishing for" salmon, and that it having been proved that the defendants were acting in contravention of this section, the net was thereupon forfeited and liable to seizure.

Whereupon the said justices adjudged and determined that though the said defendants were convicted and fined for fishing for salmon between the hour of twelve of the clock at noon on Saturday, and the hour of six of the clock on Monday morning on the day in question, and that they did resist and obstruct the said water bailiff Joseph Ruther in seizing the said net so used by the said defendant William Harris in fishing for salmon, yet as it was not proved to the said justices that the said William Harris had actually taken any salmon on the said occasion, such net was not forfeited under the Salmon Fishery Acts 1861 to 1873; and that the said Joseph Ruther, as such water bailiff, was not therefore empowered under the said Salmon Fishery Acts 1861 to 1873, to seize the said net, although the said William Harris was fishing for salmon, contrary to the 21st section of the Salmon Fishery Act 1861, for which he was convicted and fined as aforesaid; and, therefore, the said William Harris and John Cook were not guilty of resisting and obstructing the said Joseph Ruther in the execution of his duty as such water bailiff.

If the court shall be of opinion that the said net was an instrument forfeited under the Salmon Fishery Acts 1861 to 1873, then the court shall remit the said information and complaint for rehearing; but if the court shall be of a contrary opinion, then the said dismissal shall be confirmed.

Willis-Bund argued for the appellant, the officer of the Severn Fishery Conservators.—By the Salmon Fishery Act 1861 (24 & 25 Vict. c. 109), s. 21: "No person shall fish for, catch, or kill by any means other than a rod and line, any salmon between the hour of twelve of the clock at noon on Saturday and the hour of six o'clock on Monday morning; and any person acting in contravention of this section shall forfeit all fish taken by him, and any net or movable instrument used by him in taking the same, and in addition thereto shall incur a penalty not exceeding 5*l.* and a further penalty not exceeding 1*l.* in respect of each fish so taken between twelve of the clock at noon on Saturday and six of the clock on Monday morning." The justices have held that the actual catching of fish is a condition precedent to the forfeiture of the net. If this were correct, the penalty also could only be imposed upon the same condition; but the justices have imposed the penalty, although they have inconsistently refused to convict on the charge of resistance. That this section was intended to authorise the forfeiture of nets, without proof of fish being caught, appears not only from the words themselves—"any net or movable in-

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strument used by him in taking" (not catching) "the same"—but also by analogy with the provisions for penalties incurred during the annual close time. By sect. 17 of the Act of 1861, there was no provision for such forfeiture, but this omission was amended by 28 & 29 Vict. c. 121, s. 58: "Where any person has been convicted of an offence under sect. 17 of the Salmon Fishery Act 1861, he shall, in addition to the penalties thereby incurred, forfeit any net or movable instrument used in committing such offence, and the convicting justices shall direct the same to be sold or destroyed, and the proceeds of such sale shall be paid to the conservators of the district." The information which the justices dismissed was laid under 36 & 37 Vict. c. 71, s. 36, sub-s. 3: "Any water bailiffs appointed under the Salmon Fishery Acts 1861 to 1873, acting within the limits of his district, may do all or any of the following things: (that is to say)" . . . "3. Search and examine all nets, baskets, bags, or other instruments used in fishing or in carrying fish by persons whom there is reasonable cause to suspect of having possession of fish illegally caught; seize all fish and other articles forfeited in pursuance of the Salmon Fishery Acts 1861 to 1873; and any person refusing to allow any nets, baskets, bags, or other instruments used in fishing or in carrying fish, to be searched or examined, or resisting or obstructing any water bailiff in any such search or examination, shall for every such offence be liable to a penalty not exceeding five pounds."

No counsel represented the respondents.

CLEASBY, B.—The question in this case is, whether the respondent's net was forfeited under the 21st section of the Act of 1861. The magistrates thought not; it depends upon words of the section which are open to either construction, but I think they have not adopted the better one. The respondents were admittedly acting in contravention of this section, and they thereby forfeited all fish taken by them, and any net or movable instrument used by them in taking the same, and in addition thereto a penalty. There was here no proof that any fish was caught, and the question arose whether the net the respondents were using was forfeited. The most rational construction is, not to limit the forfeiture to cases where the offenders have succeeded in catching fish, but to extend it to any instrument used for the purpose of contravening the section, whether any fish was caught or not. The magistrates were no doubt bound to see their way to this construction before they convicted the respondents upon this charge; but I think they took an erroneous view, and upon the facts stated they should have held the net forfeited and the charge proved.

GROVE, J.—I am of the same opinion. It appears to me that this matter cannot be open to doubt. By the construction put upon the section by the justices, the whole provision would be a mere nullity unless the offender were seen to catch a fish. The condition, if it applies at all, applies equally to the penalty imposed. I admit the words are not used as accurately as they ought to be, but I have no doubt about the proper interpretation.

FIELD, J.—I am of the same opinion, and on the same grounds.

CLEASBY, B.—The case will be sent back to be reheard, but without costs.

Judgment for appellant.

Solicitor for appellant, H. C. Godfrey.

Friday, Feb. 18, 1876.

DRYDEN (app.) v. CHURCHWARDENS AND OVERSEERS OF PUTNEY (resp.).

Metropolis Local Management Acts—Paving a new street—Discretion of Vestry as to Acts—Statutes 18 & 19 Vict. c. 120, ss. 98 & 105, and 25 & 26 Vict. c. 102, ss. 77 & 112.

By 18 & 19 Vict. c. 120, s. 98, a vestry have power to pave or repair all streets within a parish. By sect. 105 of the same Act, and 25 & 26 Vict. c. 102, s. 77, in the case of "new streets" which are paved by a vestry, the expenses are to be borne by the owners of houses and land adjoining such "new street." An old highway in the parish of P. had been kept in repair for forty years by rates raised from the ratepayers at large. At the time of the passing of the Metropolis Local Management Act 1855, on a portion of the south side of the highway there was an irregular row of houses and a good footpath, while on the other side there was no regular footpath and but two cottages. Since 1855 these two cottages were pulled down and new houses were gradually built along the north side. In 1874, when the line of new houses were approaching completion, the vestry, in pursuance of their powers, paved the footpath on that side, and charged the expenses to the general distinct rates.

Held, that they had no power to do so, inasmuch as the street in question was a "new street" within 18 & 19 Vict. c. 120, s. 105, and consequently the owners of property adjoining the street were bound to pay the expenses incurred in paving.

APPEAL under 12 & 13 Vict. c. 45, s. 11, against an order of John Bridge, Esquire, one of the police magistrates for the Metropolitan District, made on the 10th day of April, 1875, directing a levy to be made on the goods of the appellant for the sum of 1s. 6d. and costs, such sum of 1s. 6d. being part of a sum of 1l. 11s. 6d. for which the appellant was assessed in respect of a general rate made by the respondents on the 5th day of October, 1874, in pursuance of the Metropolis Local Management Act 1855.

Notice of appeal against the said order to the Court of General Quarter Sessions of the Peace for the County of Surrey was duly given by the appellant to the respondents on the 15th day of April, 1875, and the parties hereto, by consent and by order of Mr. Manley Smith, agreed to state the facts relating to such distress in the form of a special case for the opinion of this court, and that each party should bear its own costs of this appeal and case.

CASE.

1. The appellant has for some years past been, and still is, the occupier of a house situated in the High-street, Putney, in the county of Surrey, at some distance from, and quite separate from, the Upper Richmond-road hereinafter referred to, and the distress hereinafter referred to was made in respect of part of a rate to which the appellant was assessed in respect of his said house in High-street aforesaid. The appellant has never been the owner or occupier of any house or land adjoining the Upper Richmond-road aforesaid.

2. The said Upper Richmond-road is an old highway in the parish of Putney, and now forms the main carriage and footway from Wandsworth and Putney to Richmond, and it has been kept in repair for the last forty years or more by rates

raised from the ratepayers of Putney at large. Prior to the establishment of railways this road was comparatively unimportant, the main traffic from Wandsworth and Putney to Richmond then passing by another road through Barnes.

3. Before and at the time of the passing of The Metropolis Local Management Act 1855, which embraced the parish of Putney, in the district of the metropolis called the Wandsworth district, the condition of that portion of this road which is in question in this case, and which extends for about 734 yards in length, namely from point "A" to point "B" on accompanying plan, and is hereinafter referred to as "the road," was as follows: On the south side, running westward for about 300 yards, there was an irregular line of houses, some of them detached, some of them contiguous, and there were two small, isolated houses along the remaining 434 yards, the rest of the road along this 434 yards being bounded by market gardens. On the north side the road for the whole 734 yards was bounded by market gardens, except at two places marked "C" and "D" on the said plan, where there were two small houses or cottages. The plan accompanying this case shows the road and points in question, the sites of the houses existing in 1855 being coloured red on the plan, and those built since 1855 being coloured blue.

4. Along the south side of the road there was, in 1855, a good raised gravel footpath of several feet in width, and almost all the foot traffic along the road passed along this south side. Along the north side there was, in 1855, a narrow and ill-defined foot track between the hard carriage way of the road and the boundary hedge, very little foot traffic passing along that side of the road, and no regularly formed footpath then existing along that side of the road.

5. Since the year 1855 the two cottages marked "C" and "D," on the north side of the road, have been pulled down, and the whole of the frontage land adjoining the north side of the road has been covered with a continuous line of detached and semi-detached houses, space being left at one spot for a new road running out of the old highway at right angles, and on the south side portions of the frontage along the 434 yards have also been covered with detached villas, and the rest of the frontage is now on offer as building land.

6. In the course of building the houses on the north side the old boundary hedge, which was somewhat crooked, has been removed, and a new and straight line of fence formed by the entrance gates, and railings or palisades to the new houses, strips of land being here and there thrown into the highway, so as to straighten the fence and afford room for a spacious footpath on that side of the road, the width of the carriage-way, being at some places slightly decreased and at others slightly increased.

7. At intervals from 1864 to 1870 the Wandsworth District Board of Works fixed a granite kerb along the footpath on the north side of the road and made up the path with gravel over the whole width of the path from this kerb to the line of fence of the new houses.

8. This kerb and the making up of the path were paid for by the said district board out of the "general rates" of the parish. Since then this footpath has been from time to time repaired by the district board and used as part of the highway of the Upper Richmond-road.

9. The ordinary repairs of all the highways in the parish have since 1855 been paid for by the district board out of the "general rates," these general rates being usually made half yearly and assessed upon all the ratepayers of the parish at large.

10. In the year 1874 the line of new houses on the north side of the road was approaching completion, and the district board thereupon took into consideration the propriety of paving the footpath on that side of the road, and in accordance with a resolution of the district board the footway from A to B on the north side of the road was paved by the district board with Val de Travers asphalt laid on a bed of Portland cement concrete, and the cost of this paving was included in the general rate.

11. Prior to the execution of the said paving the appellant having in the month of June 1874 heard that the district board contemplated paving the footway in question and paying for it out of the general rate for Putney urged upon the district board that under the circumstances the road had become a new street within the meaning of the Metropolis Local Management Act 1855 and the Metropolis Local Management Amendment Act 1862, and that under those Acts the cost of paving the footpath of the road ought to be borne not by the ratepayers of Putney at large out of the general rate but by the owners of the houses and land abutting on the footpath in question.

12. The district board, however, refused to accede to the appellant's suggestion, contending that the road was not a new street within the meaning of those Acts.

13. The appellant refused to pay the sum of 1s. 6d., being part of the amount at which he was assessed to the general rate, on the ground that the said sum represented the proportion charged for the paving of the said footway, an expense improperly included in the general rate, and in consequence of such refusal the sum of 10s. 4d. was levied on the goods of the appellant by virtue of the said order.

14. It is admitted that the said sum of 1s. 6d. is the proper proportion of the said rate of 1l. 11s. 6d., which is attributable to the cost of the paving in question, and that if the appellant was not liable as the occupier of his said house in the High-street aforesaid to contribute to the cost of such paving the said rate of 1l. 11s. 6d. ought to be reduced by the said sum of 1s. 6d.

The questions for the opinion of this honourable court are whether under the circumstances above set forth, and having regard to the provisions of the Metropolis Local Management Act 1855 and the Metropolis Local Management Amendment Act, the appellant as occupying the said premises in the High-street, Putney, aforesaid was liable to contribute to the expense of the above-mentioned paving of the said footpath on the north side of the said Upper Richmond-road.

If this court shall be of opinion that the appellant was not liable to contribute to such expense or that such expense was not properly payable out of the said general rate for the parish of Putney the decision of this court is to be in favour of the appellant and judgment of the allowance of the said appeal on the ground aforesaid and for repayment to the appellant of the sum of 10s. 4d. distrained for shall be entered at the sessions accordingly, but if this court shall be of

the contrary opinion its decision is to be in favour of the respondents and judgment for dismissing the appeal is to be entered at the sessions accordingly.

The appellant in person.—This street is a "new street" within the meaning of the Metropolis Management Acts, and the vestry had no power to levy a general district rate for the expenses incurred in paving it. By 18 & 19 Vict. c. 120, s. 98, "it shall be lawful for every vestry and district board from time to time to cause all or any of the streets within their parish or district, or any part thereof respectively, to be paved or repaired when and as often, and in such form and manner and with such materials as such vestry or board think fit." That is a general clause not applicable to the paving of "new streets," which is provided for by the 105th section, which enacts that "if a vestry or board deem it expedient or necessary that a new street shall be paved, then and in either of such cases the vestry or board shall well and sufficiently pave the same street, and keep such pavement in good and sufficient repair; and the owners of the houses forming such street shall on demand pay to such vestry or board the amount of the estimated expenses of providing and laying such pavement." By 25 & 26 Vict. c. 102, s. 77, the owners of land "bounding or abutting such street" are likewise liable to contribute to the expenses of paving. See also sect. 112 as to definition of a "new street." From the statements in the case it is clear that this is a "new street." (See *Pound v. Plumstead Board of Works*, 25 L. T. Rep. N. S. 461; L. Rep. 7 Q. B.; 41 L. J., 51 M. C.; and *R. v. Fulford*, 10 L. T. Rep. N. S. 346; 33 L. J., 122 M. C.). Secondly, assuming this to be a "new street," the vestry have no discretion as to the mode of procedure for recovering the expenses incurred. The words of sect. 77 are, the owners, &c., "shall pay." Moreover, it has been held that the provisions of sect. 159, which enacts that when any expenditure has been incurred for the special benefit of a particular part of a parish, a vestry "may by any order direct the sum necessary for defraying such expenses to be levied on such part" are important: (*Howell v. London Dock Company*, 27 L. J. 177, M. C.; 3 Ell. & B. 212). He also cited:

Churchill v. Crease, 5 Bing. 177.

Edward Clarke for the respondents.—This is not a new street within the meaning of the statutes in question. It is not denied that this may be a street, but the question is whether such a change has taken place in the thoroughfare as to make it a new street. It is submitted not; at all events, the vestry have a discretion given them by the terms of the 159th section, and were not bound to exempt the defendant from all payment. *Howell v. London Dock Company* (*ubi sup.*) is a different case, for there no benefit was derived, but it cannot be said that the appellant, who was in the neighbourhood, is not to some extent benefited by the paving of a street such as this is.

GROVE, J.—Though a good deal of ground has been gone over, I think the question before us is confined to a narrow issue. The appellant is the occupier of a house in High-street, Putney, at some distance from the Upper Richmond-road, and has never owned or occupied any house or land adjoining the Upper Richmond-road. The case gives a history of the Old Richmond-road. [His Lordship went into the facts as found in the

case.] It is important to observe the progress of the road in consequence of the question which arises whether since 1855 the old road became a "new street." In 1874, as the line of new houses on the north side of the road were approaching completion, the district board duly resolved to pave a portion of the footway on that side of the street; and the appellant then pointed out to them that, inasmuch as the road (which formerly had been kept in repair by the county rates) had become a "new street" within the Metropolis Local Management Acts, the costs of the paving should be borne by the owners of the adjoining houses and land, and not by the ratepayers of Putney at large out of the general rates. The district board, however, would not entertain the appellant's suggestion, and hence the present issue, which is simply whether this road has become a "new street," and on the answer to be given to this question depends the liability of the appellant. I am of opinion that this is a "new street, and that the case is governed by *Pound v. The Plumstead Board of Works* (*ubi sup.*) which was not so strong a case as the present. Then, assuming it to be a "new street" another question arises whether the vestry has any option as to the persons from whom a rate is to be levied for the expense incurred in paving. I am of opinion that the terms of the 105th section of 18 & 19 Vict. c. 120, leave the vestry no discretion. The section may leave it as a matter within the discretion of the vestry whether a street shall be paved at all, but when once they have deemed it expedient that a street shall be paved the subsequent words of the section are imperative. The section says that in case the vestry shall deem it necessary or expedient to pave the street, "the owners of the houses forming such street shall, on demand, pay to such vestry the amount of the estimated expenses" of such paving. The words are as strong as legislative words can be; taken by themselves I think they are clearly imperative; and is there anything to show that they were not intended to be so? It is said that such a view would conflict with sect. 98 of the same Act. That section no doubt imposes on the vestry the duty of not neglecting the wants of a parish, and they are bound to see that the streets within their district are properly paved, &c. Nothing is said in that section about expenses, and therefore I think these expenses might have fallen on the general rate had it not been for the 105th section. But I fail to see any conflict between the two sections; the former section only imposes a general duty, the latter is directed specially to "new streets." I think, therefore, there is no necessary inconsistency between them. It seems to me, as appellant has alleged, that it is not unfair that those who get the benefit from the paving should pay for it. I forbear going into other sections of the Act which may throw light on the construction of the two sections to which I have alluded, because they could not alter the sections themselves, which, in my opinion, are capable of a reasonable construction. The one applies generally to the paving of streets in a district, the other directs how the expenses are to be provided in certain cases. That being so, it becomes unnecessary to consider whether the 159th section, which gives power to vestry to exempt from payment parts of a parish if not benefited by expenditure, is discretionary or not; but

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I will only remark that if the discretion was held not to exist in *Howell v. London Dock Company* (*ubi sup.*), *a fortiori*, it does not exist here. In my opinion the judgment should be for the appellant and the rate reduced.

QUAIN, J.—I am of the same opinion. Though there has been a long discussion, I think the case is a straightforward one enough, and dependent on the construction to be given to one or two sections. Now, first of all, is this a "new street"; and, secondly, if it be a "new street," have the vestry a right to levy a general rate, or are they bound to levy the expenses of paving, &c., upon the adjoining owners of houses and land? The cases of *Pound v. Plumstead Board of Works* (*ubi sup.*), and *Reg. v. Fulford* (*ubi sup.*), show that this has become a "new street" since 1855. That being so, the 105th section of 18 & 19 Vict. c. 20 says that when the vestry deems it expedient to pave such a street, or any part of it, the owners of the houses (and by a later Act, of land also) adjoining such street, must pay the expenses of the paving. Now, here the vestry did deem it expedient to pave the street, and the question arises whether, when the work is done, they should proceed under sect. 105 or under sect. 98. I am clearly of opinion that they are bound to proceed under the 105th section of 18 & 19 Vict. c. 20, the provisions of which are extended by 25 & 26 Vict. c. 102, s. 77. Where an Act of Parliament contains general words such as are to be found here, and also a special clause applicable to particular cases, when once a case is brought within the special clause it is taken out of the operation of the general words, otherwise the special clause would be useless. Therefore when once you have established this street to be a "new street" you must proceed under the 105th section. We are familiar with this class of legislation since the 67th section of the Public Health Act 1848 (11 & 12 Vict. c. 63) came into operation. This section distinguishes between paving and keeping in repair by providing that in case streets are not paved, &c., to the satisfaction of the local board, the board may by notice to the "respective owners or occupiers of the premises, fronting, &c., require them to pave, &c." and in case of default execute the works, and the section goes on, "the expenses incurred by them in so doing shall be paid by the owners in default, according to the frontage of their respective premises, and in such proportion as shall be settled by the surveyor." Under the Public Health Act expenses were regulated by the amount of frontage; that is not necessarily so here, but this being a "new street" the vestry must proceed under the 105th section, which is applicable to it. For these reasons I think the rate is wrong and should be reduced.

Judgment for appellant.

The appellant in person.

Solicitor for respondents, *W. Reeves, Putney.*

COMMON PLEAS DIVISION.

Reported by P. B. HUTCHINS and CYRIL DODD, Esqrs.,
Barristers-at-Law.

Thursday, Jan. 20, 1876.

WRIGHT v. DAVIES.

Ecclesiastical dilapidations—Exchange of benefices—Simoniack contract—Statute 34 & 35 Vict. c. 43.

The plaintiff and defendant, being incumbents of

two benefices, agreed, after the passing of the Ecclesiastical Dilapidations Act 1871, to effect an exchange of their benefices with each other, upon the terms that no payment should be made by either to the other of them for dilapidations.

At the time this agreement was made the defendant stated to the plaintiff that the repairs of the buildings of the benefice which he was thus giving in exchange to the plaintiff would be merely nominal, or equal in amount to those of the benefice which he was receiving from the plaintiff. This, though stated by him without any fraud on his part, was untrue, the amount of the repairs of the benefice he was giving in exchange being greatly in excess of those of the benefice he was receiving.

Held by the court (Lord Coleridge, C.J., Brett and Denman, JJ.), that the Ecclesiastical Dilapidations Act 1871 did not make such an agreement invalid.

Held also by the court (following Goldham v. Edwards, 25 L. T. Rep. O. S. 198; 16 C. B. 437; 24 L. J. 189 C. P.; 17 O. B. 141, Ex. Ch.), that such an agreement was not necessarily simoniacal.

This case came before the court upon demurrer to a plea and to a replication.

The pleadings were as follows:

R. Wright sues, &c., for that the defendant before the making of the order hereinafter mentioned was the incumbent of the benefice of Gisburn, in the county of York, in the diocese of Ripon, and being such incumbent vacated such benefice, and the same then and thereby became void, and the plaintiff then became and was and is his successor and new incumbent of such benefice, and still is the new or present incumbent of such benefice, upon and after the avoidance thereof by the defendant, and the defendant as such late incumbent became and was and is indebted to the plaintiff, as such new incumbent, in the sum of 247l. 19s. 6d., under and by virtue of an order of the Bishop of the said diocese of Ripon, bearing date the 28th Feb. 1874, duly made and signed by the said bishop in triplicate, in pursuance of the Ecclesiastical Dilapidations Act 1871, in and by which order the said bishop stated that the repairs of the buildings of the said benefice, for which the defendant the said late incumbent was and is liable, were those stated in the schedule to that order, and that the cost of such repairs for which the defendant as the said late incumbent was and is liable amounted to the said sum of 247l. 19s. 6d., and the plaintiff avers performance of all conditions precedent to constitute the said sum stated in the said order as the cost of the said repairs, a debt due from the defendant as the said late incumbent to the plaintiff as the said new incumbent, and to entitle the plaintiff to recover from the defendant the said sum stated in the said order, pursuant to the 36th section of the said Act, yet the defendant has not paid the same or any part thereof.

To this declaration the plea, to which the demurrer was, was as follows:

For a second plea the defendant says that whilst he was incumbent of the said benefice of Gisburn the plaintiff was vicar of the benefice of St. Mary's, in the county of Huntingdon, in the diocese of Ely, and the plaintiff and the defendant thereupon, with the consent of their respective patrons and diocesans, agreed to exchange their said respective livings in their then state and

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condition, and that no payment of any kind on either side should be made for dilapidations, and that the defendant should not be liable to pay the plaintiff for the repairs in the declaration mentioned, and the defendant says that the said exchange was made accordingly, and the defendant on his part has always been willing to carry out and has carried out the said agreement, and the plaintiff became the successor to the defendant as in the declaration mentioned, upon the terms that he the plaintiff should bear the costs of the repairs for which the said order was made, and that the defendant should not be liable to pay the plaintiff therefor, and after the making of the said agreement and after the said exchange, the said order was made, and the repairs mentioned in the said order were and are dilapidations within the meaning of the said agreement.

To this plea the replication demurred to was as follows:

On equitable grounds to the second plea the plaintiff says that upon and after the said avoidance and vacating by the plaintiff of the said benefice or living of St. Mary's, in the said diocese of Ely, the defendant thereupon became and was and is the successor and new incumbent of the said benefice of St. Mary's, and the plaintiff further says that the said Bishop of the said diocese of Ely duly made an order similar to that in the first count mentioned, in pursuance of the said Ecclesiastical Dilapidations Act 1871, in and by which said order the said bishop stated that the repairs of the buildings of the said benefice of St. Mary's, for which the plaintiff the said late incumbent of St. Mary's was and is liable were those stated in the schedule to that order, and that the cost of such repairs, for which the plaintiff as the said late incumbent of St. Mary's was and is liable, amounted to the sum of 32*l.* 10*s.*, and the plaintiff further says, that at the time of the making of the said alleged agreement and exchange in the second plea mentioned, the defendant represented and stated to the plaintiff that the repairs of the buildings of his the defendant's said benefice of Gisburn were merely nominal or equal in amount to the repairs of the plaintiff's said benefice of St. Mary's, and the plaintiff further says that the said agreement in the said second plea mentioned was made by the plaintiff on the faith and belief that such representation of the defendant was true and correct and not otherwise; whereas in fact and in truth the said repairs of the buildings of the defendant's said benefice of Gisburn were not nor are nominal, and were far more than equal in amount to and greatly exceeded in amount the said repairs of the plaintiff's benefice of St. Mary's, and amounted to the said sum of 247*l.* 19*s.* 6*d.*, as the defendant knew or ought to have known, and such statement and misrepresentation and such alleged agreement was and is an evasion of and in contravention of the said Act. And the plaintiff further says that he, on the faith of such statement and representation, and believing the same to be true, and not having any reason to believe otherwise, entered into the alleged agreement in the said second plea mentioned. And the plaintiff further says that the said respective patrons and diocesans had not nor had any of them any notice or knowledge of the said alleged agreement until long after the making of the said several orders, and that they in no way ratified, approved of, or confirmed the said

alleged agreement. And the plaintiff further says, that by reason of the premises and of the non-payment of the said sum or any part thereof, he has been wholly unable to pay, and has not paid, the said sum of 247*l.* 19*s.* 6*d.*, or any part thereof, to the said governors in the said Act mentioned, as in and by the said Act required.

Baylis, Q.C. (*C. Crompton* with him) for the plaintiff.—The law as to the effect of an exchange of livings between two incumbents, under an agreement that neither of them shall be liable to the other for dilapidations, as it stood before the passing of the Ecclesiastical Dilapidations Act 1871, is discussed and explained in the case of *Goldham v. Edwards* (25 L. T. Rep. O. S. 198; 16 C. B. 437; 24 L. J. 189, C. P.; 17 C. B. 141, Ex. Ch.) The plea in that case was almost, if not quite, identical with the plea here demurred to, and the court decided that the agreement in the plea was not necessarily a simoniacal agreement, and that the plea was good. There, however, there was not, as in the present case, a replication. It cannot since that case be contended in this court that the present plea is bad, unless there is some distinction between the law upon such agreements before the passing of the Ecclesiastical Dilapidations Act 1871 and the present law, and it is submitted that that statute does effect an important change in the law. The whole of that Act is framed with a view to protect the benefice, and to afford ample security for the keeping in repair of the buildings. Before the statute an incumbent, on an exchange of livings, could expend the money he received from the outgoing incumbent upon the buildings when and how he pleased, or he could appropriate the money, if he were so minded. Of course if he did appropriate the money, instead of executing the repairs required, he still remained theoretically liable during his incumbency to make good the repairs, and practically liable upon the termination of his incumbency to do so. He was not, in any sense, trustee of the money he might receive from the old incumbent for the benefit of the living. The statute changes this; the incumbent is now no longer acting on his own behalf—he is now the mere trustee for the living. He cannot do what he likes with what money he may get; he has to pay it over within a given time to the Governors of Queen Anne's Bounty, to a particular account. He cannot contract himself out of the Act. He may not, by any agreement of his with the old incumbent, lessen or destroy the chance of the money being raised to make good the dilapidations. The governors, as representing the living, have a right to have the personal security of the old incumbent. A contract may be illegal, if opposed to the plain policy of a statute, although the statute does not by express words forbid the contract: (*Steaines v. Wainwright*, 8 Scott, 280.) The replication shows that the agreement was the result of a misstatement, and that the exchange was an unfair and unreasonable one, the amounts of the two sets of dilapidations being widely different. This, taken with the plea, shows that the agreement was not merely such that it might possibly be simoniacal, which is all that the plea alone shows, but that it must be simoniacal. [DENMAN, J.—Where is the word "corruption," or anything to show that the bargain was corruptly made? It is not necessary to have the word "corruption," the facts set out show a simoniacal contract.

Gully (*Crump* with him) for the defendant.—A

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new incumbent, suing under the statute, does not sue as trustee; whether he is a trustee for the governors or for the living of moneys received from the old incumbent, as soon as he receives them, or not, he is not a trustee until he receives. The statute was not intended to and does not change the general ecclesiastical law as to the exchange of livings, it only provides a convenient method of assessing dilapidations, and a ready process for enforcing existing liabilities. The amount of the dilapidations was formerly, when ascertained, a debt for which the old incumbent, on an exchange, was liable to the new, but it was a debt which the new incumbent need not enforce unless he chose. Neither need a new incumbent now; nothing is changed, except that, instead of the action on the custom of England, an action founded on the bishop's order for an ascertained amount is substituted. The construction of sect. 40 is made plain by the other sections, it is that the new incumbent, whether he gets the money or not, must pay to the governors. The bishop, if the new incumbent does not pay, can sequester the living; therefore there is ample security for the repairs being done, even where such an agreement as the present has been entered into. As to the suggestion of simony, the case quoted of *Goldham v. Edwards* (*sup.*), shows that simony is not to be presumed, and the facts set out are perfectly consistent with an honest bargain. The replication charges no fraud, and alleges nothing beyond an honest mistake which would not afford a defence in a case such as the present.

Baylis, Q.C. replied.

LORD COLERIDGE, C.J.—This case comes before us upon demurrer. It is an action by the incoming incumbent of a benefice against the outgoing incumbent, the benefice becoming vacant owing to an exchange of benefices having taken place between the two incumbents. On the pleadings it appears that the amount sought to be recovered is the value of certain dilapidations. Under the law as it stood, before the passing of the Ecclesiastical Dilapidations Act 1871, the incoming incumbent would, in the absence of any arrangement between himself and the outgoing incumbent, have been entitled to recover from his predecessor the amount required to make good these dilapidations. The present action is brought since the passing of the Act of 1871, and is to be considered under the law as it now stands under that enactment. For the purpose of assessing dilapidations, under circumstances such as the present, a useful and convenient machinery has, by the Ecclesiastical Dilapidations Act 1871, been provided. The sum now is finally and conclusively ascertained, and all difficulties and delays incident to assessments under the former system have been abolished. The defendant in the present case says that the plaintiff has no right to recover dilapidations, which have been properly ascertained, from him, because an exchange of benefices was agreed to and carried out upon certain terms set out in his plea, part of those terms being that neither should charge the other with dilapidations. The question for our consideration is, whether such an agreement as that set out in the plea is good. Mr. Baylis properly admits that, since the case of *Goldham v. Edwards*, he cannot contend that, under the old law, a plea such as the present would not be good. In that case it was argued that a plea such as the present

showed an agreement that might be simoniacal. It was held that, though it might possibly be simoniacal, yet it was perfectly possible that such an agreement might be in no degree simoniacal, and that there was nothing in the plea to lead to one conclusion rather than the other, and that, consequently, the plea was insufficient. The present plea then, but for the statute, is a good one. Mr. Baylis's contention was, that though that was so, yet the agreement was so contrary to the statute as to be illegal. Now, I agree that there might be an agreement or a contract so entirely contrary to a statute and so contradictory to its provisions as by implication to be prohibited, although not in express words forbidden. I confess for myself that at first I was disposed to think that the object of the statute, or at any rate one of the main objects of it, being the protection of the benefice and the affording of security to the Governors of Queen Anne's Bounty, such an agreement as the present might be impliedly forbidden. On fuller consideration, however, I think that it is not. The objects of the statute may well be effected without our so holding. In substance the act is this: the bishop, through the surveyor, ascertains the amount required to make good the dilapidations, and then states the amount in an order. The statute provides that the sum so stated in the order shall be a debt due from the late incumbent, his executors or administrators, to the new incumbent, and shall be recoverable as such at law or in equity. It has been pointed out by Mr. Gully that an important alteration has been effected in the law by this enactment; first, as regards the remedy for the recovery of dilapidations; and, secondly, as regards the nature of the liability created by force of it. The present remedy is by an action to recover a debt, whereas formerly the remedy was by an action founded upon the custom of England. The statute further enacts by sect. 37 that "the new incumbent shall, as and when he shall recover the said sum or any part thereof, forthwith pay the amount recovered to the Governors" of Queen Anne's Bounty; "and if and whenever he shall recover any further part of the said sum, he shall in like manner forthwith pay to the governors the part so recovered." By sect. 39 it is enacted, that "the amount received by the governors from the new incumbent, together with the sum (if any) lent by them to him as aforesaid, shall be placed in their books to the credit of an account, to be entitled 'The Dilapidation Account of A. B., incumbent of _____,' and from the sum (if any) so lent by them they shall forthwith pay and discharge the costs and expenses of and incidental to the preparation and completion of the security." Sect. 40 enacts that "the new incumbent shall, within six calendar months (or within such extended period as is hereinafter mentioned) pay to the governors" (of the Bounty, that is) "to be carried to the credit of the said account, such sum (if any) as, together with the sums theretofore carried to the credit of the said account, will make up the sum stated in the order as the cost of the repairs." This is then a direct statutory provision, that if the new incumbent does not get the money from the old incumbent, he must himself within six months, or at most within twelve months, pay the sum stated as requisite in the order. Sect. 43 gives a remedy to the governors if the money is not paid to them by the new incum-

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bent in due course. These sections apparently are somewhat harsh, for it may happen that the new incumbent gets nothing whatever from the old incumbent, and has to find a sum greatly in excess of what he originally foresaw when he accepted the benefice; yet it must be recollected that, as the law stood before this Act, an incumbent was liable to repair the buildings of his benefice, whether he found them in repair or not, on entering upon it, and whether he obtained any sum from his predecessor or not. Sect. 40 appears to me to be the section on which the whole matter turns, the other sections do but strengthen the conclusion to be drawn from it. The living is at any rate to be secured from dilapidations; if the old incumbent does not pay, the new must find the money. It seems to me that the two may, as far as this statute is concerned, make as between themselves what bargain they please, because there is nothing expressly forbidding such a bargain, and the provisions of the statute prevent such a bargain from working to the injury of the living. It is not a bargain contrary to the policy of the Act. It has been argued that the plea and replication, taken together, show a simoniacal bargain, that is, that they disclose facts which amount to simony. It is not said that the conduct on either side was corrupt or dishonest, and the facts stated are consistent with honest mistake. No facts are stated to make it inequitable, no fraud is suggested on the pleadings now under consideration; on the contrary, all suggestion of fraud is carefully avoided. All that is said is that the defendant "knew or ought to have known" of the disparity, and that in pleading is equivalent only to "ought to have known."

BRETT, J.—Before the Ecclesiastical Dilapidations Act 1871, it was the duty of an incumbent of a benefice, or his representatives, to leave it, on his ceasing to be incumbent, in a proper state of repair. This duty could be enforced by the new incumbent by an action on the case. According to the case of *Goldham v. Edwards* (*sup.*), the two could make a bargain like the present as the law stood before the recent Act. The statute imposes no new duty on the retiring incumbent, no novel liability is created by it. Sect. 29 provides for the inspection of the buildings on a vacancy, and sect. 34 provides that the bishop shall make an order on the old incumbent stating the repairs for which the late incumbent or his representative is or are liable, and the cost of such repairs. This is made on the old incumbent, because his ancient liability remains, though the machinery for enforcing the liability is new. The amount now is an ascertained amount, and sect. 36 gives a new form of action, there being no longer any need of the former action on the case. That is all that is done, except that in favour of the old incumbent it is provided that no action for an unascertained amount shall be brought. The question raised now is, whether the statute has gone further, and prevented that which was before a defence for the old incumbent to an action for dilapidations from being so any longer. It has been argued that it does, and that the plaintiff and defendant cannot contract themselves out of the statute. That is an expression which must mean, if it has any meaning, that such an agreement as the present is either expressly or by implication prohibited and made illegal or unenforceable. Mr. Baylis says that the object of the statute is the protection of

the benefice. Now it is evident that the statute in question first provides a method of ascertaining the amount; and, secondly, protects the benefice. If such an agreement is good, the statute by no means leaves the living without protection. It first leaves the old incumbent liable where he was formerly liable; and, secondly, lets the new incumbent sue the old, where he was formerly liable, by an action, no longer on the case but in debt. It lets the new incumbent borrow money, and then provides that he must pay over to the governors what he gets. Sect. 40 protects the living by enacting that he must pay over what he gets, and that he must pay over the amount required even if he cannot recover it from the old incumbent. The bishop too may, if he does not pay over the amount, sequester the living in his hands. Sect. 60 again gives further protection to the living. The living is at all events protected. The agreement is not so far in contravention of the statute as to be illegal. The statute does not assume to interfere in any way with the law as to the exchange of livings. The replication discloses no facts which make out that this agreement is a simoniacal one, it does not show that it was corruptly made.

DENMAN, J.—I agree entirely with the view expressed by the rest of the court. The argument of Mr. Baylis turned mainly upon the point that a new incumbent had a right given to him for the benefit of the living, out of which he could not, by any agreement of his, contract himself. Sect. 36 gives him, as has been said, merely an option to sue. It would be going far to say that the Act means that this shall be a debt as to which he shall make no arrangement, and which he shall not release, and against which he shall allow no set-off, and for which he is absolutely bound to sue. The Act does not, in fact, say anything of the kind, and the scheme of the Act is contrary to such a contention.

Solicitors for plaintiff, *Shaw and Tremellen*; for defendant, *Norris, Allen, and Uarter*.

Wednesday, Jan. 26, 1876.

BAILEY AND ANOTHER v. JAMIESON AND OTHERS.

Highway—Stoppage of access—Loss of highway. Where a highway is stopped or diverted by order of quarter sessions, a road which branches from and rejoins the highway so stopped or diverted, and to which the public had no other means of access, ceases to be a highway, although not mentioned in the order.

THE second count of the declaration was for trespass to a close of the plaintiffs called Bothal Wood and destroying trees and underwood and breaking down fences.

The defendants pleaded among other pleas a public right of way over the close in question.

The trial took place before Pollock, B. at the Spring Assizes at Newcastle in 1875. The Duke of Portland, who was one of the plaintiffs, was the equitable tenant for life of the land in question, the legal estate in fee being vested in the other plaintiff Bailey as trustee. Before the year 1874 there had been a public footpath from Bothal to Sheepwash, in the county of Northumberland, passing over the Duke of Portland's land, which was coloured red on the plan used at the trial, and was referred to at the trial and on the argu-

ment as the Red Road. On 7th Jan. 1874 the Red Road was stopped up and diverted by an order of quarter sessions under the Highway Act of 1835 (5 & 6 Will. 4, c. 50) (a) a new way, which was shorter and more commodious, being substituted for it. The new way lay to the north of the Red Road. At a spot where the Red Road passed through Bothal Wood, near the bank of the River Wansbeck, an old path, referred to as the Green and Yellow Path, turned off to the south of the Red Road, and passed over land of the plaintiffs, and rejoined the Red Road further on. The Green and Yellow Path was not referred to in the order of Quarter Sessions of 7th Jan. 1874, by which the Red Road was stopped up; but the effect of stopping up the Red Road was to isolate the Green and Yellow Path at both ends, so that it no longer joined any way over which the public had a right to pass. The defendants claimed a public right of way over the Green and Yellow Path, and the trespasses complained of in the second count of the declaration, which were admitted at the trial, were committed in assertion of this alleged right. The verdict was for the plaintiffs, damages 40s.

A rule *nisi* was afterwards obtained pursuant to leave reserved to enter the verdict for the defendants on the second count on the ground that the way in the second count was a public way and had not been lawfully closed.

Herschell, Q.C. (G. Bruce and E. Bidley with him) showed cause.—The question is, what effect the order of quarter sessions stopping up the Red Road had upon the way over which the defendants claim a right of passing. The point is a new one, and no authority directly bearing on it can be found; but on principle, from the very nature of things, a road access to which by the public is closed at each end, cannot possibly be a highway. The effect of the order of quarter sessions therefore was to close by implication the path in question, and the defendants were not justified in passing along it, as it had ceased to be a public highway. [Lord COLERIDGE, C.J.—In Burn's Justice, vol. 2, p. 975, 3rd edition, a highway is defined as "a right of passage for the public in general without distinction."]

C. Crompton (Hamilton with him) in support of the rule.—No doubt the question is, what effect is to be given to the order stopping up the Red Road, but that order does not in any way refer to the path which the defendants allege to be a highway. "Once a highway always a

highway," is an undoubted rule of law, and the only exception to it is where the highway is stopped according to statutory powers. A highway cannot cease to be such by means of the indirect effect of an order relating to a different road. It is true that there is no authority to be found as to the effect of stopping up both ends of a highway, but it is clear that stopping up one end so as to make it a *cul de sac*, does not deprive it of its character of a highway:

Bateman v. Bluck, 18 Q.B. 870; 21 L. J. 406, Q.B.;
Gwyn v. Hardwick, 1 H. & N. 49; 25 L. J. 97, M.C.;
Souch v. The East London Railway Company, L. Rep.
16 Eq. 108; 42 L. J. 477, Ch.;
R. v. Waller, 31 L. T. Rep. N.S. 777;
R. v. Burney, 31 L. T. Rep. N.S. 828.

These cases are in favour of the defendants. If a highway can be stopped indirectly and by implication, it may in many cases cause hardship to individuals and injury to the public. He also referred to

R. v. The Marquis of Downshire, 4 A. & E. 698;
Daves v. Hawkins, 8 C. B. N. 3., 848; 29 L. J. 343, C.P.

Lord COLERIDGE, C.J.—In this case the effect of an act which was properly done has been to deprive the public of the means of access to that which had previously been a public way. The act I speak of as having been properly done, was the stopping up of the Red Road. The stopping of the Red Road was a legal act after the notices had been given; it was done by the proper authority, and was not appealed against, so we must take it that the stopping up was acquiesced in. It is said that the stopping up of the other road would be an unexpected consequence of the stopping of the Red Road. That may be so, but the question is whether this consequence has or has not followed. It must be taken that the Red Road opened into the other road, which was not in terms stopped, but, as the Green and Yellow Road began and ended in the Red Road, the question arises whether, if a road is in this way rendered impassable, it has lost the character of a highway, which it must be taken to have had. It is admitted that no authority directly in point can be found; there is no case which directly decides the question whether a track retains the character of a public highway when access to it by the public is prevented. We are therefore driven to principle in order to arrive at a decision, and the true principle seems to be this, that a highway is a way from one place to another, not necessarily from town to town, but from one inhabited place to another, along which all subjects of the Queen have a right of passage; this implies that it must lead from one place to another place. The cases to some extent assist us, but do not decide the point. It has been argued that a highway, one end of which has been lawfully obstructed, ceases to be a highway, and that contention was put forward in *Wood v. Veal* (5 B. & A. 454); and *R. v. The Marquis of Downshire* (4 A. & E. 698); but it is clear that to stop up one end of a road does not take away its character of a highway. Many roads must end in a *cul de sac* where they run down to the sea, but they are none the less highways on that account. No doubt a highway includes the idea of "passage," and it is defined consistently with this view by Blackstone (Commentaries, Book I., cap. 9, p. 358, and Book II. cap. 3, p. 35) and Hawkins (P. C. Book I. cap. 32), but a way up and back is a passage, and there is nothing inconsistent with

(a) By 5 & 6 Will. 4, c. 50, ss. 84, 85, when the inhabitants in vestry assembled deem it expedient that a highway should be stopped up, diverted, or turned, the chairman of the meeting shall, by an order in writing, direct the surveyor to apply to two justices to view it; and if it appear upon the view that the highway may be diverted or turned so as to make the same nearer or more commodious to the public, and if the owner of the land through which the new road is to pass consent in writing, or if it appear that a public highway is unnecessary, certain notices shall be published as by the Act directed, and a plan laid before the justices, who shall then make a certificate, which is to be lodged with the clerk of the peace and read in court at quarter sessions, and afterwards enrolled together with the proof plan and consent among the records of quarter sessions. The Act goes on to provide for an appeal against such order or certificate, and by sect. 91 if no appeal is made or if the appeal is dismissed the justices at quarter sessions shall make an order to divert or stop up the old highway.

C.P. Div.]

Ex parte THE RECTOR OF GAMSTON.

[CHAN. DIV.]

the nature of a highway in its not being a thoroughfare, and the end of a *cul de sac* is as good a terminus as the seashore. This view of the question to some extent assists us, but it does not decide the point; it only goes so far as to show that unless there is some notion of passage, and unless there are some natural termini, there would be no room for argument. There must be ends to the highway, and a right to walk along to the end, which is here entirely absent, for by the act of the proper authority, the public are prevented from getting in, and the path is isolated. It has therefore ceased to be a highway, and any person who attempts to justify his presence there by alleging that it is a highway fails. I agree with the general rule that if he is right you cannot make him a trespasser, because he cannot have got to the place without a trespass, but it is necessary to decide whether the road remains a highway, and for the reasons I have given, I am of opinion that it does not. No doubt other circumstances are conceivable under which it would be very inconvenient that a highway should be stopped up in this way, but the argument *ab inconvenienti*, is not logical, and although it may sometimes be a reasonable argument to use, I think it is not in this case sufficient to alter the logical conclusion at which I should otherwise arrive. There is no suggestion that by absence of proper notices any rights were taken away. It was an old highway, which was probably forgotten, and by operation of law access to it was stopped. The rule must be discharged.

DENMAN, J.—I am of the same opinion. The great difficulty arises from the doctrine "once a highway always a highway," and from the necessity of imposing some limitation upon that doctrine apart from statutory powers; but I think we are compelled to hold that this is a case where what was a highway in former times has ceased to be such by operation of law without coming within any statutory power. By means of legal acts which were done at each end of the road it ceases to be a place to which there is legal access, and, as it is left without legal access to it for all the Queen's subjects as such, no public highway remains. The cases which have been cited in support of the other view (*Bateman v. Bluck*, 18 Q. B. 870; 21 L. J. 406, Q. B., and *Souch v. The East-London Railway Company*, L. Rep. 16 Eq. 108; 42 L. J. 477, Ch.) show that where one end is stopped up the road may still continue to be a highway, but no case has decided that where there has been a legal stopping up of both ends the highway remains, and principle compels us to hold that it does not. We were pressed with the consideration of the injustice that might arise in certain cases, for instance if a long lane were stopped up in this way, which had furnished a convenient mode of access to a number of dwellings, but I think this ought not to weigh with us; it is unlikely that the question would arise, for persons would be sure to do enough in such a case to prevent the way from being stopped. In the present case there was only a short piece of what seems to have been a forgotten old path, and therefore the argument *ab inconvenienti* is not so applicable as it might otherwise have been. Now that the road is not passable by the public it is not a public highway.

LINDLEY, J.—I am of the same opinion. I understand Mr. Herschell to argue that there can

be no public highway without public access, and that seems reasonable, for it is a contradiction in terms to say that there is a public highway and yet that the public have no access to it. The difficulty as to persons having lands abutting on the road is not insuperable, for if there is any right of ownership that right remains, and the mere fact that they had other rights of getting there does not affect the question. I wish to guard against any supposition that a road could be stopped up by stopping up the roads leading to it without sufficient notices. *Rule discharged.*

Solicitors for plaintiffs, *Bailey, Shaw, and Co.*, for *Brumell and Brumell*, Morpeth.

Solicitor for defendants, *G. J. Brownlow*, for *Keenlyside and Forster*, Newcastle-upon-Tyne.

CHANCERY DIVISION.

(Before Vice-Chancellor BACON.)

Reported by F. GOULD and H. L. FRASER, Esqrs., Barristers-at-Law.

Saturday, Jan 22, 1876.

Ex parte The RECTOR OF GAMSTON.

Lands Clauses Act, sect. 69—Glebe lands—Permanent Improvements—Farm buildings—Investment of purchase money in defraying cost of—Surveyor's fees.

Where it will be a permanent and beneficial improvement the court will sanction the application of part of the purchase money of glebe lands, taken by a railway company, in defraying part of the cost of erecting farm buildings on the remainder.

PETITION.

In the year 1853 a portion of the glebe lands of Gamston Rectory, in the county of Nottingham, were taken by a railway company, and the purchase money was paid into court and invested in the purchase of 1412l. 5s. 5d. consols.

The glebe lands consisted of 261 acres, nearly the whole of which was arable, and there was no house or any farm buildings of any description on the lands.

In 1874 the rector built a substantial farmhouse with outbuildings on the glebe lands at a cost of about 1000l., whereby the rental of the lands was materially increased. About 880l. of the 1000l. had been advanced to him by the governors of Queen Anne's Bounty, and he now applied that the remaining 120l. might be raised and paid out of 1412l. 5s. 5d. Consols in court. The patron of the living and the bishop of the diocese had given their consent to the application. The 120l. was required for the purpose of paying the surveyor's and architect's fees.

Chapman Barber, in support of the petition, submitted that although in such cases the money was generally expended in the erection or repair of a rectory house, yet the court had sometimes permitted the money to be laid out in other permanent improvements. Here the rental of the farm was increased some 60l. per annum, and in *Ex parte the Rector of Shipton-under-Wychwood* (19 W. R. 549), Lord Hatherley had sanctioned the outlay of part of the purchase money in the erection of farm buildings.

The VICE-CHANCELLOR made the order.

Solicitor, *H. S. Nettleship*.

QUEEN'S BENCH DIVISION.

Reported by M. W. McKELLAR, J. M. LELY, and R. H. AMPLETT, Esqrs., Barristers-at-Law.

Monday, Jan. 24, 1876.

TARRY v. ASHTON.

Duty of occupier of house abutting on highway—Fall of part of lamp—Prior employment of negligent contractor to repair—Whether occupier excused by employment of contractor.

The duty of him who occupies a house abutting on the highway is to repair all known defects of the house and its appurtenances the non-repair of which may result in danger to the passers by; and that duty is not discharged by the employment of a contractor to repair such defects. If damage results from the negligence of a contractor so employed the householder is liable.

A. occupied a house abutting on a street. Projecting from the front wall, about 15ft. over the pavement, was a lamp, which A. had employed a contractor to repair, along with his other lamps. The contractor did his work badly. Another contractor, being afterwards employed by the defendant to examine the lamp, placed a ladder against the bracket which joined it to the wall. The weight of the ladder and the rotten state of the bracket caused the lamp to fall and injure T., a passer by in the street.

Held, that A. was responsible to T. for the injury so caused, and a rule to set aside a verdict entered for T. at the trial discharged.

Whether A. would have been liable if he had never known the decayed condition of the lamp, quere.

DECLARATION that the defendant was possessed of a house, and of a lamp projecting from and fastened to the same, and overhanging a certain public highway, and conducted himself so negligently in the management and keeping of the said lamp, and of an arm bracket and apparatus which supported the same, and of the pipes which conveyed the gas to the said lamp, and in suffering the same to be out of repair, and in certain work and repairs which were being done to the said lamp, and so wrongfully omitted to take precautions to prevent the said lamp from falling upon persons passing along the said highway, or to give them any warning in that behalf, that by reason of the premises the said lamp fell upon the plaintiff while she was lawfully passing along the said highway, and threw her down and greatly injured her.

A second count charged that the defendant suffered the lamp and bracket to be in a ruinous, weak, and insecure state and condition, and out of repair, so as to be dangerous to and likely to fall upon and injure persons passing along the highway, whereby the plaintiff was thrown down.

Pleas not guilty and not possessed.

Issue thereon.

The cause came on to be tried before Quain, J. and a common jury at the Guildhall Sittings after Hilary Term 1875, when the following facts appeared in evidence:

The plaintiff was a barmaid residing in Dulwich, and the defendant a licensed victualler who kept the Hampshire Hog Inn in the Strand. The plaintiff was walking along the Strand at about 3.30 p.m. on the 15th Nov. 1874. When opposite the defendant's house, one of the gas lamps hanging from the house over the pavement about 15ft., fell and injured her in its fall.

The immediate cause of the fall of the lamp (which weighed about 50lb.) was this: The gas being out of order, the defendant had engaged a gas-fitter named Weaver to put it to rights. The gas-fitter had placed a ladder against the bracket of the lamp, and was just mounting the ladder for the purpose of reaching the lamp and blowing the water out of the gas pipes, when the bracket gave way from the weight of the ladder, and the lamp at once fell. In the preceding August the defendant had contracted with a gasfitter named Chappell for the repair of all his lamps, including the one in question. Chappell had done certain repairs, for which the defendant had paid him.

In answer to questions put by the learned judge, the jury found that there was no negligence on the part of the defendant except by Chappell; that there was no negligence on the part of Weaver; that there was negligence on the part of Chappell, "the defendant's servant," (a) that the immediate cause of the fall of the lamp was the fall of the ladder, and that the lamp was out of order through general decay, but not to the knowledge of the defendant, and they assessed the damages at 40l. The learned judge then directed a verdict to be entered for the plaintiff to that amount, reserving leave to move on behalf of the defendant.

A rule having been obtained accordingly to set aside the above verdict and enter a verdict for the defendant or a nonsuit, on the ground that upon the ruling of the learned judge and the findings of the jury, he ought to have directed a non suit or a verdict for the defendant,

Collins and Poulter for the plaintiff, now showed cause.—The defendant is liable for the state of his premises in any event, and the plaintiff is entitled to recover from him for injuries caused to her by the fall of an ill-constructed lamp in a public thoroughfare.

Reg. v. Watson, 2 Ld. Raymond 856;

Quarman v. Burnett, 6 M. & W. 499, per Parke, B., at p. 510.

In *Reg. v. Watson* the defendant was indicted for that he was possessed of a house adjoining to a common bridge; that he ought to repair the house *ratione tenuræ*; but that he permitted it to be so much out of repairs that it was ready to fall upon the Queen's subjects passing over the bridge. It appeared that the defendant was tenant at will only, but judgment was given against him. "He ought," it was said "to repair the house, so that the public be not prejudiced by want of repairs." And in *Quarman v. Burnett* it was said by Parke, B., "The rule of law may be, that where a man is in possession of fixed property, he must take care that his property is so used or managed that other persons are not injured, and that whether his property be managed by his own immediate servants, or by contractors with them, or their servants. Such injuries are in the nature of nuisances." [BLACKBURN, J.—The jury have negatived personal knowledge and negligence in the present defendant.] It is submitted that the liability attaches, independent of any question of knowledge. The rule is thus put in Dicey on Parties, p. 453. "The employer," it is there said, "is liable when the contractor is entrusted with the performance of a duty incumbent upon the employer, and omits to perform it." [BLACKBURN, J.—We cannot take a

(a) Chappell was, and is treated in the judgment of the court as being, not a servant, but a contractor.

[Q.B. Div.]

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modern text book as an authority.] Two authorities bear out the proposition. They are

Pickard v. Smith, 10 C. B., N.S., 470;
Hole v. Sittingbourne Railway Company, 30 L. J. 86,
 Ex.; 6 H. & N. 488.

Even if this be not so, Chappell was a servant, and the defendant was liable for his acts. He would even have been liable criminally.

Reg. v. Stephens, L. Rep. 1 Q.B. 702; 14 L. T. Rep. N. S. 593.

[BLACKBURN, J.—Chappell was not a servant, but an independent tradesman.] They also cited

Barnes v. Ward, 9 C. B. 392; 19 L. J. 195, C. P.;
Fletcher v. Rylands, L. Rep. 3 H. of L. 330;
Hadley v. Taylor, L. Rep. 1 C. P. 53.

McIntyre, Q.C. and *Darling*, for the defendant, supported the rule.—There is no negligence here on the part of the defendant, and if there is, it was not the cause of the plaintiff's injuries.

[BLACKBURN, J.—Negligence is relative. The question is what was the defendant's duty?] In no case has a person in the position of the defendant been held liable where he had neither knowledge or means of knowledge. [BLACKBURN, J.—Is there any authority to show that a person having a duty cast upon him discharges it by employing somebody else to do it for him? Can the defendant get off because he employed a contractor who cheated him?] In *Nichols v. Mansland* (L. Rep. 10 Ex. 265), it was held that the defendant was not liable to an action for an escape of water caused by an agent beyond his control, as he had used all reasonable care to keep the water on his own land. [QUAIN, J. referred to *Francis v. Cockerell* (L. Rep. 5 Q. B. 184; 22 L. T. Rep. N. S. 203, aff. on appeal, L. Rep. 5 Q. B. 501; 39 L. J. 291, Q. B.; 23 L. T. Rep. N. S. 466), in which case it was held that the person who had employed a contractor to erect a stand upon a race course was responsible for injuries occasioned by the defective construction of the stand.] The duty of the defendant cannot be put higher than that of a bailee of a chattel. In *Searle v. Laverick* (L. Rep. 9 Q. B. 122; 43 L. J. 43, Q. B.; 30 L. T. Rep. N. S. 89) it was held that a livery stable keeper was not liable for injury caused to carriages placed in his keeping by the fall of the building, in a case where the careless conduct of the builder was the real cause of the accident. How can the defendant be under a greater liability than the livery stable keeper?

BLACKBURN, J.—When we get at the exact facts of this case, to which I desire to confine myself, I have no doubt as to the law. The defendant occupied a building which abutted on the highway, and a lamp projected from that building over the highway. If the lamp had been always kept in a proper state, it would have been harmless to the passers by, but by being in an improper state, it became dangerous. Now there is no doubt that knowingly to maintain such a thing in an improper state would be a nuisance to the highway. Thus much was decided in *R. v. Watson* (1 Ld. Raym. 856.) I do not decide how far the occupier would be liable in a case where the danger to the public arose from a latent defect in his house or the appurtenances of it. Take the case, for instance, of a wrong doer digging out coals, and making the house unsafe by undermining it; in that case I by no means say that the householder would be liable in any event. But I do say this, that the householder would be

responsible as soon as he knew of such a defect. I will go further, and say that a householder having that on his premises which is liable to fall into decay, and which he knows will ultimately fall into decay, has a duty cast upon him to investigate and repair. Whether he would be liable if the defect were latent, and he consequently failed to discover it, is a point of considerable doubt, which, as I said before, I do not decide. It is enough for the present case to say that if the defect be discovered, the householder is bound to repair. Now in August the plaintiff appears to have become aware, applying his common sense to the matter, that these lamps were going out of repair. Acting very properly, he proceeded to have them mended, and employed a contractor—for Chappell was not a servant—to do the work for him. It does not appear that he was careless in his selection of Chappell as contractor, but that does not affect the question. It comes to this: The defendant having a lamp, and it being his duty to investigate the state of it, employs Chappell to do that duty for him. Because Chappell failed in his duty to the defendant, the defendant's duty to investigate is not therefore discharged. Consequently the defendant is liable, and this rule must be discharged.

LUSH, J.—I am of the same opinion. The question is what is the duty of a person in the position of the defendant? Is it his duty to maintain his premises in good repair, or only to employ a competent person in the work of maintaining them? I think the mere statement of the case suggests its answer. A person who keeps a lamp of this kind puts the public in peril. He cannot get rid of his duty to put the public out of peril by employing another person to take the necessary steps for doing so.

QUAIN, J.—I am of the same opinion. The question is what was the duty of the defendant? He chooses to hang out a lamp from his house over the public street. I think that *R. v. Watson* (*ubi sup.*) shows that it was his duty to repair the lamp and keep it in repair. It is plain that one of the public has received injury from the lamp being out of repair. This being so, can the defendant shift the responsibility from himself by showing that he had employed a contractor to do the repairs? I think not. None of the cases which have been cited bear out such a proposition. For these reasons I agree with the rest of the court that this rule ought to be discharged.

Rule discharged.

Solicitor for the plaintiff, L. W. Gregory.

Solicitor for the defendant, E. Froggart.

Saturday, Jan. 15, 1876.

REG. v. JUSTICES OF LANCASHIRE.

Appeal to quarter sessions against poor rate—Practice of adjourned sessions—Notice of appeal—Jurisdiction of Sessions—Statutes 17 Geo. 2, c. 38, s. 4; 12 & 13 Vict. c. 45, s. 1; 27 & 28 Vict. c. 39, s. 1.

B., being dissatisfied with the decision of an assessment committee given on 16th June, resolved to appeal to the Kirkdale Sessions of the County of Lancashire.

Fourteen days' notice of appeal is required to be given to the overseers, and twenty-one days to the assessment committee. The next quarter

sessions for the county of Lancaster were held on the 28th June, and by adjournment at Kirkdale on 13th July. B., duly served his notice of appeal for the Michaelmas Quarter Sessions, which commenced at Lancaster on 18th Oct., and were held at Kirkdale by adjournment on 2nd Nov. The justices having refused to hear the appeal on the ground that B. should have given the requisite notices for the sessions held at Kirkdale on the 13th July.

Held, that the justices were wrong inasmuch as time for giving notice of appeal must be calculated in reference to the first day of the commencement of the sessions at Lancaster, and not to the first day of the adjournment thereof at Kirkdale.

Reg. v. Justices of Lancashire (30 L. T. Rep. 149) followed.

THIS was a rule calling on the justices of Lancashire to show cause why a writ of *mandamus* should not be issued commanding them to hear an appeal brought by one James Blackledge against certain poor rates levied against him.

The material facts are as follows:—The appeal was against a poor rate assessment on the appellant's corn mill at Bootle, near Liverpool, within the West Derby Hundred of the county of Lancaster, and was intended to be heard at the Quarter Sessions for the county of Lancaster, which were held for the Liverpool district on 2nd Nov. 1875, at Kirkdale. In the county of Lancaster there are four places where the sessions are held, viz., at Lancaster, where they commence, and also at Preston, Salford, and Kirkdale, by adjournment one from the other. The appellant was before the Assessment Committee on the 16th June 1875, and accordingly on that day became aware that the committee declined to reduce his rate to the extent he required. He then determined to appeal to the Court of Quarter Sessions for the county of Lancaster. Under 17th Geo. 2, c. 38, s. 4, persons aggrieved by any poor rate may appeal upon giving reasonable notice to the next general or quarter sessions of the peace for the county. By 12 & 13 Vict. c. 45, s. 1, fourteen clear days' notice of appeal at least shall be given to the overseers; and by 27 & 28 Vict. c. 39, s. 1, twenty-one days' notice of appeal must be given to the Assessment Committee. The Quarter Sessions for the county of Lancashire, next after the 16th day of June, commenced at Lancaster on the 28th day of June, that is to say, within twelve days from the time the Assessment Committee had refused relief. Accordingly notice of appeal was prepared and served on behalf of James Blackledge in due time for the next ensuing sessions for the said county, which commenced at Lancaster on the 18th Oct., and by adjournment at Kirkdale on 2nd Nov.

It appeared from the affidavit of one of the deputy clerks of the peace, that the Court of Quarter Sessions for the county of Lancaster is held at Lancaster, from thence by adjournment to Preston, and from thence by further adjournment to Manchester, and from thence by final adjournment to Kirkdale. These sessions commence at Lancaster on the Monday, at Preston on Wednesday, at Manchester the following Monday, and at Kirkdale on the Tuesday in the following week, being in the third week after the first day of the session at Lancaster. For practical convenience all business arising within the hundred of West Derby is transacted at the session held by final

adjournment at Kirkdale. It had been the practice during the last ten years whenever any questions have arisen at the Kirkdale Sessions affecting the time at which notices of appeal against poor rates should have been given, or whether or not they have been given in due time, to calculate such time from the first day of the said session at Kirkdale, and not from the first day of such session at Lancaster; and it was unusual to enter an appeal against an assessment of property situate within the said West Derby hundred of the said county to the sessions for any other division of the said county than those of the Kirkdale division.

The rule *nisi* was granted on 16th Dec. 1875.

Herschell, Q.C. and Segar showed cause.—The other side will rely on *R. v. Justices of Lancashire* (30 L. T. Rep. 149; 27 L. J. 161, M. C.; 4 B. & S. 956), but that case has been practically overruled by *R. v. Justices of Sussex* (11 L. T. Rep. N.S. 740; 34 L. J. 69, M. C.). At all events that was a case of a highway appeal, and turned on the point whether a ten days' notice of appeal was a condition precedent to the appeal being heard. The Kirkdale Sessions have been held at fixed dates for the last thirty or forty years, for the convenience of dispatch of business. [FIELD, J.—In *R. v. Justices of Lancashire* (*ubi sup.*), Lord Campbell says, "We cannot take notice of the arrangements made in the county of Lancaster for the convenient administration of justice at the quarter sessions; and we can give no more effect to the notice than if the sessions had continued from the beginning, and until all the business of the county had been finished."] *R. v. Justices of Sussex*, in the Exchequer Chamber (*ubi sup.*) really decides the question in dispute. Erle, C.J., in the course of an elaborate judgment, says: "When for practical convenience the county is divided into distinct divisions, and in each division a distinct court is held, so that all the questions locally arising within each division by practice belong to that division, and all the process for that division is returnable at the court for that division, and the panels of the jury are made out for that division, and the rules of practice made by the court of each division for the conduct of business in it assume that the day when the court for that division begins its sittings is the first day of the sessions for that division, we see good reason for holding that the conduct of an appeal suit, which has been properly commenced and which belongs to one of those divisions, should be governed by the rules of practice for that division." These remarks are distinctly applicable to the Kirkdale Sessions. [MELLOR, J.—They formed no part of the original decision. FIELD, J.—The court, after overruling *R. v. Justices of Suffolk* (4 A. & E. 319; 5 L. J. 3, M.C.), expressly say, "it is not intended to make any alteration in the rule that the next sessions after service of an order of removal, having jurisdiction over an appeal against it, must be ascertained by reference to the date of the original sessions for the county, and not of any adjournment thereof as laid down in *R. v. Justices of Sussex* (7 T. Rep. 107)."]

Edwards Q.C. and Potter, in support of the rule.—These sessions are treated by Cross and Leeman in their *Practice of Quarter Sessions*, 2nd edit. p. 119, as adjourned sessions. *R. v. Justices of Lancashire* (*ubi sup.*) is on all fours with the present case, and was not referred to in the judgment of

NISI PRIUS.] REG. v. GERRANS—THE APOTHECARIES' COMPANY v. NOTTINGHAM. [NISI PRIUS.]

R. v. Justices of Sussex, No. 2 (*ubi sup.*) or intended to be overruled.

COCKBURN, C.J.—The older case of *R. v. Justices of Sussex (ubi sup.)* followed by *R. v. Justices of Lancashire (ubi sup.)*, is directly in point. If these two cases were overruled either expressly or virtually by the later case of *R. v. Justices of Sussex (ubi sup.)*, we should be bound to follow it. But the judgment of the court expressly shows they were not intended to be overruled.

MELLOR, J.—I am of the same opinion. In the later case of *R. v. Justices of Sussex (ubi sup.)* there is no desire on the part of the learned judge who delivered the judgment of the court to interfere with the judgment of *R. v. Justices of Lancashire (ubi sup.)*, indeed quite the contrary.

FIELD, J.—I am of the same opinion.

Rule absolute.

Solicitors for the appellant, *Vizard and Co.*, agents for *Teebay and Lynch*, Liverpool.

Solicitors for the respondents, *T. W. Golding*, agent for *Holden and Cleaver*, Liverpool.

NISI PRIUS.

SITTINGS AT WESTMINSTER.

Reported by *SHERARD B. J. BURNABY, Esq., Barrister-at-Law.*

Thursday, Jan. 27, 1876.

(Before BRAMWELL, B.)

THE APOTHECARIES' COMPANY v. NOTTINGHAM.

Apothecaries' Act (55 Geo. 3, c. 194), s. 20—Action for penalty.

Customers went to the shop of the defendant, a chemist, and asked him what was good for their ailments, and the defendant, who was not a certificated apothecary, was accustomed to suggest medicine, make it up, and sell it to them.

Held, that, in so doing, the defendant was acting and practising as an apothecary, and was liable to a penalty under 55 Geo. 3, c. 194, s. 20.

ACTION for a penalty under 55 Geo. 3, c. 194, s. 20, "An Act for better Regulating the Practice of Apothecaries." (a)

The claim alleged that the defendant carried on the practice of an apothecary in Shadwell, and charged that he "advised, attended, furnished, and supplied medicines for reward to himself to divers persons between the 15th Aug. 1875, and the date of the issuing of the writ." The claim was for 20*l.*, the forfeiture under the above section of the Act. On this issue was joined.

Glyn for the plaintiff.

Rose for the defendant.

It was proved that the defendant, who was a certificated chemist but not an apothecary, had been in partnership with a duly qualified medical practitioner, but it was also shown that this medical man was not always on the spot. It also appeared in evidence that the defendant had on various occasions been applied to for advice and medicine, both of which he gave to the applicants, but did so as an ordinary shop-keeper from behind the counter. It did not appear

(a) If any person shall "act or practise as an apothecary" in any part of England or Wales without having obtained a certificate for so doing, every person so offending shall for every such offence forfeit and pay the sum of 20*l.*

that he ever went from his shop to attend on patients, and he was proved, in cases of serious illness, to have always referred the patient to the doctor with whom he was in partnership. At the close of the plaintiff's case

Rose submitted that the plaintiff should be nonsuited, and that the defendant had merely acted as most chemists of the present day are in the habit of acting, and that in dispensing his drugs over the counter, even though he gave advice therewith in trivial cases, he did nothing whatever to bring himself under the penalties of the Act.

Glyn replied.

The learned judge thought the case must go to the jury, whereupon the defendant was called and examined, and admitted that he had prescribed medicines over the counter on various occasions as aforesaid.

BRAMWELL, B., in summing up, said: You have to find a true verdict on the evidence, whether you like the Act or not. Perhaps you may think that a person has a right to practise as he likes, whether qualified or not; or, on the other hand, you may think that, whereas the poorer classes have no opportunity of judging of or ascertaining the qualifications of the persons to whom they resort for medical advice, the Legislature should require such persons to possess proper skill and knowledge, and to obtain a certificate thereof. No doubt some people like to go to unqualified practitioners so as to get advice cheap; but there is the law, and we have to observe it. If you think this man has "acted or practised as an apothecary," then you must find your verdict for the plaintiff. Indeed, I feel some little difficulty in putting the case to you, for on the defendant's own admission he says he prescribed, and that, if a person brought a child to him suffering from, say diarrhoea, and asked what was good for it, he gave the medicine; if, however, the case was serious, he sent the doctor. Surely that is acting and practising as an apothecary within the meaning of the Act. [His Lordship then adverted to the evidence.] Possibly, if on some one or two occasions a customer had gone to the shop and asked for medicine, and the defendant had said it was good for his complaint, that advising might be too trivial to be worth taking notice of by suing under this Act, but here the defendant admits that he dispensed and at the same time advised medicine habitually.

Verdict for plaintiff.

Solicitors for plaintiff, *Green and Pridham*.

Solicitors for defendant, *Smith and Howard*.

HAMPSHIRE SPRING ASSIZES.—WINCHESTER.

Reported by *T. W. SAUNDERS, Esq., Barrister-at-Law.*

Thursday, March 2, 1876.

(Before DENMAN, J.)

REG. v. RICHARD GERRANS.

Deposition of witness absent through illness—Sending same before grand jury.

When a witness is unable to attend a trial through illness, his deposition may be presented to the grand jury without any preliminary proof that the witness is ill and that such deposition was regularly taken. In such case the grand jury should be told that the court permits them to look

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at the deposition, and to act upon it if they think proper.

Loveland, on the part of the prosecution, applied that the deposition of one of the witnesses in this case might be sent up to the grand jury upon the presentation to them of the bill of indictment against the prisoner, such witness being unable to attend in consequence of illness, and he stated that he was then ready to prove such illness, and that the depositions were duly taken in conformity with sect. 17 of the 11 & 12 Vict. c. 42.

DENMAN, J.—I do not think you need do so.

Loveland.—I believe it is usual to give this proof before sending up the deposition.

DENMAN, J.—I think it is unnecessary. The grand jury are entitled to look at and to act upon the deposition.

Loveland.—The grand jury may not think of looking at the deposition, and so may ignore the bill.

DENMAN, J.—They should be told that the court permits them to look at the deposition, and to act upon it, if they think proper.

The deposition was thereupon taken before the grand jury, and they returned a true bill.

CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, Nov. 13, 1875.

(Before Lord COLERIDGE, C.J., BRAMWELL, B., MELLOR, and GROVE, JJ., and POLLOCK, B.)

REG. v. WELCH.

Malicious injury—Reckless act causing death of a mare—24 & 25 Vict. c. 97, s. 40.

The prisoner by a reckless and cruel act caused the death of a mare. The jury found that he did not intend to kill maim or wound the mare, but that he knew that what he did would or might kill maim or wound the mare, and that he nevertheless did the act recklessly and not caring whether the mare was injured or not.

Held that there was sufficient malice to support a conviction.

CASE reserved for the opinion of this court by Lindley, J.

The prisoner in this case was indicted under 24 & 25 Vict. c. 97, s. 40, for unlawfully and maliciously killing, maiming, or wounding a mare.

The indictment contained three counts viz.:

First, for killing; secondly, maiming; thirdly, wounding.

The prisoner was tried before me at the Old Bailey on the 23rd Sept. 1875.

The evidence showed that the mare in question died by reason of injuries caused by the prisoner. These injuries consisted of a hole in the base of the bladder and three holes in the large intestines. They were caused by the prisoner inserting the handle of a stable fork into the vagina of the mare and pushing the handle two feet and more into the mare's body and working the fork backwards and forwards in that position. Whilst this was being done the mare put her ears back and stamped her feet and it was proved that these were signs of pain.

There was no evidence to show that the prisoner was actuated by any ill-will towards the owner of the mare, nor by any spite towards the mare

herself, nor in fact, by any motive or desire except the gratification of his own depraved tastes.

It was objected by Counsel for the prisoner that there was no case for the jury as there was no malice.

I overruled the objection, and, having *Reg. v. Pembilton* (L. Rep., 2 Cr. Cas. Res. 119; 12 Cox C. C. 607) before me, directed the jury to find the prisoner "guilty," if they were of opinion that either of the two following questions ought to be answered in the affirmative, viz.:

1. Did the prisoner, in fact, intend to kill, maim, or wound the mare, or if he did not, then,

2. Did he know that what he was doing would or might kill, maim, or wound the mare, and did he, nevertheless, do what he did recklessly and not caring whether the mare was injured or not?

The jury answered the first question in the negative and the second in the affirmative and the prisoner was found guilty accordingly.

Sentence was postponed and the prisoner was left in custody.

The question for the court is, whether the conviction ought to be quashed or not.

NATHANIEL LINDLEY.

No counsel appeared for the prisoner.

Besley, for the prosecution.—The conviction was right. In *Reg. v. Pembilton* the prisoner was indicted for maliciously committing damage to property, viz. breaking a plate glass window, but the jury found that he did not intend to break the window. Here the jury have found that the prisoner did the act recklessly not caring whether the mare was injured or not. [He was then stopped by the court.]

LORD COLERIDGE, C.J.—The act was reckless and cruel, and we are of opinion that there was malice sufficient to sustain the conviction. The conviction will therefore be affirmed.

BRAMWELL, B.—*Reg. v. Pembilton* is clearly distinguishable from this case. There the damage to the property injured was not intended and was not the natural consequence of the act done which was throwing a stone at a person whom it missed.

The other judges concurred.

Conviction affirmed.

REG. v. COOPER.

Evidence—False pretences—Fraudulent intent.

Prisoner was indicted in one count for falsely pretending to M. that D. carried on business at H. &c.; and there were other counts for similar false pretences to other persons; and a general count for, with intent to defraud the Queen's subjects, inserting in a newspaper an advertisement containing similar false pretences. It was proved that the prisoner had inserted the advertisement, and that the pretences were false and fraudulent. Six envelopes, each directed according to the advertisement, and containing twelve postage stamps were found upon the prisoner, and 281 other letters similarly directed were produced from the post office in a sealed bag which had been stopped by the post office authorities. None of the 281 had ever been in the prisoner's possession or custody, nor were the writers of them called as witnesses.

Held that the 281 letters were admissible in evidence upon this indictment.

CASE reserved for the opinion of this court by the

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REG. v. COOPER.

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Chairman of the Northampton Court of Quarter Sessions.

The prisoner George Cooper was tried on an indictment for obtaining and attempting to obtain certain moneys from the persons in the said indictment mentioned, by false pretence.

The following is an abstract of the indictment.

First count.—Falsely pretending to Maria Mitchell that certain persons called Davis Brothers were carrying on business at Hardingstone, and were acquainted with a method whereby 2s. 6d. per hour could be earned by beginners of either sex, by preparing carte de visite papers at their own homes at eightpence per dozen, and were able to give permanent employment to all who should learn the method by their instruction, whereby the defendant obtained twelve stamps.

Second count.—Similar false pretences to John Clarke, whereby the defendant obtained certain stamps.

Third count.—Similar false pretences to Ellen Cameron, whereby the defendant attempted to obtain one shilling.

Fourth count.—Similar false pretences to Elizabeth Hickson, whereby the defendant attempted to obtain one shilling.

Fifth count.—That the defendant with intent to defraud the Queen's subjects inserted in the *Daily Telegraph* a fraudulent advertisement in the words therein mentioned containing the false statements in the first count mentioned, whereby he obtained sums of money and stamps from the Queen's subjects.

The advertisement was as follows: "Two and sixpence per hour easily earned by beginners (either sex) by preparing carte de visite papers at their own homes, at eightpence per dozen, employment permanent. Trial paper and instructions, one shilling. Davis Brothers, Hardingstone, Northampton."

On the trial it was proved that the prisoner inserted the said advertisement, that there was no such firm as Davis Brothers at Hardingstone, and that the prisoner was not in a position to give permanent employment.

Six envelopes, each directed as above, containing answers to the advertisement and twelve postage stamps were found in the possession of the prisoner on his being apprehended. 281 other letters were produced by the chief clerk of the post office at Northampton in a sealed bag.

These letters had also been addressed to the prisoner under the title of Davis Brothers, Hardingstone, in reply to the said advertisement, and had been received at the office in like manner as those mentioned in the former paragraph, but having been stopped by the post office authorities before the said letters had been delivered, none of the 281 letters had ever been in the prisoner's possession or custody, nor was any proof adduced that they were written by the persons from whom they purported to come, but each letter had been opened at the post office before production at the trial and each contained twelve stamps.

The counsel for the prosecution proposed to put the whole of such letters in evidence against the prisoner.

The counsel for the prisoner objected that the said letters not having been found in the possession of the prisoner, and as their contents were unknown to him and there was no proof of their

authenticity, they could not be adduced in evidence against the said prisoner.

The court admitted the said letters. Two were read, and all the others taken as read. It was proved that when they were opened by the post office clerk, each envelope contained twelve postage stamps, as when admitted in evidence. The letters except the said two were not, in fact, read, but were taken as having been regularly put in, and were commented upon by the Counsel for the prosecution.

The jury found the prisoner guilty and the court sentenced him to nine months' imprisonment with hard labour in the House of Correction at Northampton, but reserved for the consideration of the Court for the Consideration of Crown Cases Reserved, the question whether the Court of Quarter Sessions ought to have admitted the said letters as evidence against the said prisoner.

If the court should be of opinion that the Court of Quarter Sessions ought to have rejected the said letters as evidence, then the conviction to be quashed, if not to be affirmed.

Execution of the judgment was respited until the determination of the question reserved, and the prisoner was released on recognisance himself in one hundred pounds and two sureties in fifty pounds, conditional for the prisoner's appearing and rendering himself at the January sessions.

H. M. STOCKDALE,

Chairman of the said Court of Quarter Sessions.

Jacques, for the prisoner.—The 281 letters detained at the post office were not evidence against the prisoner. It was not shown that the prisoner had done anything which caused those letters to be written. The writers of them were not called and the letters were not evidence of the facts stated therein: (*Reg. v. Plumer*, Russ. & Ry. 264.) The prisoner had never received them nor does it appear that he had done anything to obtain possession of them. [Lord COLERIDGE, C.J.—Did not the prisoner by the advertisement make the postmaster his agent for receiving the letters: (*Reg. v. Jones*, 1 Den. C. C. 551; 4 Cox C. C. 198).] In *Reg. v. Huet* (2 Leach C. C. 956) it was held that a letter purporting to come from the prisoner's brother, and left by the postman pursuant to its direction, at the prisoner's lodgings after he was apprehended and during his confinement, but never actually in his custody, could not be read in evidence against him on his trial. If the prisoner had been indicted on each or any one of the letters, the sender must have been called for the prosecution.

Merewether, for the prosecution.—The letters on being read showed that they were written in answer to the advertisement. Under the circumstances it may be taken that the postmaster here received the letters for the prisoner; for the insertion of the advertisement, the finding of some letters upon the prisoner, and the receipt of the 281 at the post office may all be connected together: (*Reg. v. Welman*, Dears. C. C. 188; 22 L. J. 118, M. C.). [Grove, J.—It seems difficult to say that the receipt of the postmaster was the prisoner's receipt, when the postmaster withheld the letters, and prevented the prisoner from obtaining them.] At all events they were admissible to show the intent to defraud: (*Reg. v. Francis*, 12 Cox C. C. 612; L. Rep. 2 C. C. R. 128.) [BRAMWELL, B.—That case would be an authority in your favour if

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the evidence had been that of other similar advertisements inserted by the prisoner, but I do not see how it applies here.]

Jacques was heard in reply.

LORD COLERIDGE, C.J.—The majority of the court are of opinion that the 281 letters were admissible in evidence under the circumstances of this case. *Conviction affirmed.*

Solicitor for the prosecution, *A. J. Jeffreys*, Northampton.

Solicitor for the prisoner, *Becke*, Northampton.

Saturday, Jan. 29, 1876.

(Before LORD COLERIDGE, C.J., MELLOR, J., LUSH, J., GROVE, J. and AMPHLETT, B.)

REG. v. CRESWELL.

Bigamy—Validity of first marriage—Ceremony performed in a private house.

While the parish church was under repair, divine service had been several times performed by a clerk in holy orders in a chamber at a private hall, and the marriage of the prisoner with his wife was solemnized there. There was no evidence that the chamber at the hall was licensed for the performance of divine service or for marriages.

Held that there was evidence from which the court and jury might properly infer that it was properly licensed.

CASE stated for the opinion of this court by the Lord Chief Baron.

The prisoner was tried at Chelmsford at the last Summer Assizes for bigamy and convicted.

It was proved that he married one Sarah Hill in 1868, that she was still alive, and that he married the prosecutrix in Oct. 1874 at St. Mary's, Islington.

It was, however, objected for the prisoner that that the first marriage was void on the ground that it was solemnized not in a church, but in a chamber at South Weald Hall in Essex, which was situate some yards from the parish church, and that the marriage took place while the church was under repair.

The Statutes 6 Will. 4, c. 85, and 4 Geo. 4, c. 76, ss. 21 and 22, were quoted.

I reserved the point, and the question for the opinion of the court is whether upon the above facts this was a valid marriage. If not the conviction must be set aside, otherwise affirmed.

FITZ ROY KELLY.

Jan. 22.—The case came on for argument this day, but was referred back to Kelly, C.B. for some further facts to be stated. The following were the additional facts stated: "Divine service had been several times performed in the building in question from which it is for the court to consider whether the presumption may be raised which would give validity to the marriage."

Jan. 29.—No Counsel appeared to argue for the prisoner.

C. E. Jones, for the prosecution.

LORD COLERIDGE, C.J.—It appears to the court that the additional facts stated by the Lord Chief Baron settle the case. We are of opinion that the marriage service having been performed in a place where divine service was several times performed, the rule "*Omnia præsumuntur rite acta*" applies, and that we must assume that the place was properly

licensed, and that the clergyman performing the service was not guilty of the grave offence of marrying persons in an unlicensed place. The facts of the marriage and other church services being performed there by a clergyman are abundant evidence from which the court and a jury might assume that the place was properly licensed for the celebration of marriages.

MELLOR, J.—I am of the same opinion for the reasons stated by my Lord Chief Justice.

LUSH, J.—I am also of the same opinion. The fact of the marriage service having been performed by a person acting in a public capacity is *prima facie* evidence as to the person's legal capacity to perform the service. So the fact of its having been performed in a place by a person acting in such capacity is also *prima facie* evidence that the place was properly licensed for marriages. The presumption covers both the person and the place. Here the ceremony having been performed by a clergyman in a place where the church service was performed on several occasions, brings the case within the rule "*Omnia præsumuntur rite acta*."

GROVE, J. and AMPHLETT, B. concurred.

Conviction affirmed.

Supreme Court of Judicature.

COURT OF APPEAL.

CHANCERY DIVISION.

(Before the MASTER OF THE ROLLS.)

Reported by G. WELBY KING and J. E. THOMPSON, Esqrs., Barristers-at-Law.

Dec. 1, 2, 3, 1875.

BAGSHAW v. BUXTON LOCAL BOARD OF HEALTH.

Highway—Inclosure—Obstruction—Local Board of Health—Towns Improvement Clauses Act 1847 (10 & 11 Vict. c. 34), s. 70.

The plaintiffs filed a bill to restrain the local board of health from removing a wall and railings enclosing a piece of land in front of a house, which piece of land was alleged by the local board to form part of the highway:

Held, upon the evidence, that the piece of land did form part of the highway.

Held, also, that the defendants had a right to remove the wall and railings as an obstruction under sect. 70 of the Towns Improvement Clauses Act 1847.

Held, also, that if that section did not apply, the court, having decided that the wall and railings were obstructions, would not restrain the defendants from removing them.

THIS was a bill to restrain the Buxton Local Board of Health from removing an alleged obstruction to the highway.

In the year 1853, William Parker Shipton purchased a plot of land in Buxton, and in the course of that year erected a house now called No. 7, Terrace-road.

In or about the year 1858, William Parker Shipton enclosed a narrow piece of ground in front of this house, with a low wall and iron railings, which he planted with shrubs, thus forming a front garden to the house. Shipton subse-

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quently sold the house and premises to the plaintiff, John William Potter, who let the same to the plaintiff, Samuel Bagshawe, as yearly tenant. The defendants, the Buxton Local Board of Health were incorporated in 1859 under the provisions of the Local Government Act 1858, and they alleged that this inclosed garden formed part of the highway within the district of the local board, and on the 11th Dec. 1873, they served the plaintiff, Samuel Bagshawe, with a notice under the 70th section of the Towns Improvements Clauses Act 1847 (10 & 11 Vict. c. 34), which is incorporated with the Local Government Act 1858, requiring the wall, railings, and shrubs to be removed as an obstruction to the safe and convenient passage along the street called Terrace-road, and stating that in default he would be liable to a penalty, and that the board might proceed to remove the obstruction. The plaintiffs then filed this bill.

Roeburgh, Q.C. and *E. C. Willis* for the plaintiffs, contended that, even if the land enclosed formed part of the highway, the defendants, who had only the same powers as surveyors of highways under the Highways Act, had no power to remove the wall, railings, and shrubs, and they referred to

Bateman v. Bluck, 21 L.J. 406, Q.B.

Southgate, Q.C. and *Hastings, Q.C.* for the defendants referred to

Turner v. Ringwood Highway Board, L. Rep., 9 Eq. 418.

Sir G. JESSEL.—There are some questions which I think I must dispose of before I hear and decide upon the substantial question of fact in dispute; and for the purpose of deciding these questions, I assume, for the present, that the defendants can prove to my satisfaction that the piece of garden in question is a part of a public highway which is vested in them as the local board under the Town Improvement Acts; and when I say "vested," I mean vested *sub modo*, as far as a highway can be—not giving them necessarily a right to the soil. On that assumption, I am of opinion that the bill to restrain them from moving the wall or taking away the shrubs and soil of the garden cannot be maintained. It must be remembered that this suit came to a hearing after the Judicature Acts had come into operation, and I have now to decide the question of title between the parties. The great object of the new Acts was to prevent unnecessary and useless litigation, and the case must now be heard by a judge who is competent to decide every question, instead of sending the parties to have their rights decided before some other judge at the cost of very great expense and delay. The plaintiffs say, "Assuming that we are wrongfully encroaching on the highway, and assuming also that the defendants, who are the guardians of the highway, are right in saying that we have so encroached, yet they have no right under the terms of their Act of Parliament, or at common law, to abate the nuisance, and if they abate the nuisance, they render themselves liable to an action for trespass" and so forth. They further say that, under the circumstances, this court, which at the same time decides that he is wrong in encroaching on the public highway, is bound, though it decides the question finally and for ever, to say that it will restrain the defendants from abating that nuisance. If I were to come to such a conclusion as that, it would certainly be

very extraordinary. Now I will first of all consider the question as it stands on the powers given to the defendants by their Acts. The only material section to consider is the 70th section of the Towns Improvement Clauses Act 1847, but as that section refers to the 69th section, it is necessary to read it first. The 69th section is this—"The commission may give notice to the occupier of any house or building to remove or alter any porch, shed, or projecting window, step, cellar, cellar door or window, sign, sign-post, sign-iron, show-board, window-shutter, wall, gate, or fence, or any other obstruction or projection erected or placed after the passing of the special Act, against or in front of any house or building within the limits of the special Act, and which is an obstruction to the safe and convenient passage along any street." Now that section is limited to an obstruction erected in front of a house or building. I must not forget that it is not a general power, but a power limited to that extent. The question of construction is, whether the words in section 70, "any such obstructions or projections" include the wall of a garden. I find the word "wall" in the 69th section, and I have no doubt that a wall falls within section 70. The obstruction, if it is an obstruction, is none the less so because the land is used as a garden. A garden wall is a wall, and the shrubs which are planted in the garden will come under the words "any other obstructions." I have no doubt that the wall and shrubs have obstructed, and that they are obstructions. Accordingly, the only question is, whether they are obstructions "to the safe and convenient passage along any street." I assume for this purpose, that if this was a public and convenient highway, it was a street within the meaning of this Act. The words "along a street," mean along the whole of the street; and if you take and inclose a portion of the street itself, how can it be said that that is not an obstruction to the safe and convenient passage along the street? It appears to me that I should be cutting down this Act of Parliament, and making it almost meaningless if I so held, and I am therefore of opinion that the defendants are entitled, under the section in question, to remove this, being, as it is, an obstruction in front of the house. The next point I have to consider is this, whether, assuming that this section does not apply, I ought to restrain the defendant by injunction. That raises also a question, as to which I believe there is no decision, namely, who has the right to abate an obstruction of a public highway? It is clear, on the authorities, that any individual who is specially injured by the obstruction, has by common law, a right to remove that which illegally causes a special injury to him. But a private individual has no right to remove an obstruction which causes no special injury to him, but which is simply an obstruction to the road as regards the public in general as distinguished from the individual. But has no person a right at common law to remove an obstruction which is an obstruction to all her Majesty's subjects? I have no doubt that at one time either the crown or the conservators of the road, must, by their agents, have had such a right. Of course, the ordinary proceeding was by indictment for the crime of obstructing the highway. The indictment did not remove or get rid of the obstruction. How then was it to be got rid of? According to the modern

practice, the judge suspends the conviction if the obstruction is removed by the offender; and in some cases, where there is summary jurisdiction, there is a special power to order the removal of the obstruction. Still, it seems to me, the result of an indictment is to decide that somebody or other had the right to prostrate the obstruction, and the question is, who has that right? Surely the person acting on behalf of the public must have the right to prostrate on reasonable notice. The reason which prevented the individual acting on behalf of the public does not seem to me to exist, when there is a body or a person who is entitled to represent the public in this way, although no special statutory power may be given for this purpose. It appears to me only reasonable that when the right is decided (and I am limiting my observations to that case), that body or person should have the power to prostrate. If that is so, and if I am now to decide the right as it would be decided in the case of an indictment, it would be very absurd that, having decided the right, and having decided that this obstruction ought to be prostrated, I should restrain the public body, who are the guardians of the road, from prostrating it. It appears to me that, even assuming that the public body had no right to prostrate without a decision as to the right, yet, when the court decides that, it would be multiplying itself at the same time to award an injunction to prevent the public body doing that which the court says it ought to do, viz., to get rid of the obstruction. Therefore, if I were of opinion that by the statute no such power was given to the defendants, and that at common law they had no such power as representing the crown or the public, I should yet come to the conclusion that when the court had decided that the plaintiff's erection was an obstruction and a wrongful thing amounting to a nuisance, it would be wrong, at his suit, to restrain the public body from abating the nuisance. The only point to be decided is the question of right to the piece of land in question, and on that I must now hear the evidence. The burden of proof of course lies on the defendants to show that the local board is right in asserting that this piece of land is a portion of the public highway.

[His Lordship having heard the evidence, decided that the piece of land was a part of the public highway, and dismissed the bill with costs.]

Solicitors: *Le Riche and Son*; *F. Venn and Son*.

(Before Vice-Chancellor HALL.)

Reported by *B. MARRACK, HENRY C. DEANE, and J. E. THOMPSON, Esqrs., Barristers-at-Law.*

Jan. 24 and 25, 1876.

THORLEY v. GLOSSOP.

Lessor and Lessee—Breach of covenant by lessee owing to neglect of public duty by lessor—Ejectment—Remedy of lessee at law and in equity.

The defendants, in Dec. 1873, demised to the plaintiff certain premises to be used for refreshment rooms for twenty-one years. The plaintiff put up a stove for the purposes of his business, which made the party wall so hot as to endanger the adjoining premises. On receiving notice from defendant's solicitors to abate the nuisance they substituted another stove in August 1874, but the

evil continued. In Oct. 1874 the defendants commenced an action of ejectment against the plaintiff for breach of covenant. The plaintiff then had the premises examined, and found that in several respects the provisions of the Metropolitan Building Act (18 & 19 Vict. c. 122) had been violated. The plaintiff by his bill sought to have the lease cancelled, the action of ejectment stayed, and damages awarded. The defendants did not insist on the lease or seek damages for past breaches of covenant.

Held, that as the bill was filed before the Judicature Acts came into operation, and was really for damages and not for the rescission of a contract, as the defendants did not seek to enforce the contract, it could not be sustained. The plaintiff's remedy was at law and not in equity.

THIS was a bill to obtain the cancelling of a lease and to restrain the defendants from continuing an action of ejectment which they had commenced against the plaintiff. The defendants are the owners of various shops and houses in Oxford-street, including No. 417, which was the subject of the present suit, and which they had recently pulled down and rebuilt. By an indenture of 31st Dec. 1873, between the defendants of the one part and the plaintiff of the other, the premises No. 417, Oxford-street, were demised to the plaintiff for twenty-one years at the rate of 345*l.* per annum. The plaintiff covenanted to pay the usual rates and to keep the premises and the roofs and party and other walls in good repair, and not to cut or alter the walls, timbers, or partitions without the defendants' consent; and also not to carry on any other business than that of a cigar merchant and keeper of billiards and refreshment rooms, and not to do any act which might create a nuisance to the defendants, their tenants, or the neighbourhood.

The plaintiff took possession in Nov. 1873, and proceeded to fit up the premises for the purposes of his business, and expended about 3000*l.* for that object, and after so fitting them up he let the premises to his brother, Josiah Watson Thorley. Amongst other fittings was a cooking stove, furnished by Mr. Benham, of Wigmore-street, made expressly to suit the position and character of the premises. But owing to the improper manner in which the building was constructed, the ordinary use of the stove made the wall of the premises and of the adjoining house so hot as to cause danger of fire, and to make the adjoining premises, a picture dealer's, unfit for use. The plaintiff accordingly received notice from the defendants' solicitors to abate the nuisance; but on the plaintiff's representation that the nuisance was owing to the faulty construction of the party walls, they consulted their surveyor, who reported that the walls were of the usual thickness, but that the stove was of an unusual character. The plaintiff spent much money and labour in attempting to remedy the evil, but to no purpose, and in August 1874 he substituted another stove, which he was assured could not cause a like nuisance. But the evil was undiminished, and the picture dealer, Mr. Hooper, next door, stated that two leading insurance companies declined to insure his pictures.

On the 10th Oct. 1874, the defendants commenced an action of ejectment against the plaintiff, on the ground of breach of the covenant in the lease not to cause nuisance to the neighbour-

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hood. The plaintiff had the premises carefully examined, and found that in several important particulars, the thickness of walls, the lining of flues and other things, the provisions of the Metropolitan Building Act had been flagrantly violated. The defects were such as could not be remedied except by the complete demolition of the premises. The state of the house was, as the plaintiff alleged, fraudulently concealed from him, and his brother has been obliged to shut up the premises. The plaintiff had no defence at law to the action of ejectment, but the breach of the covenant was wholly owing to the misconduct of the defendants.

The plaintiff accordingly prayed that the indenture of the 31st Dec. 1873 might be delivered up to be cancelled, that the defendants might be restrained from further prosecuting the action of ejectment, and that damages might be awarded.

It did not appear that the defendants wished to hold the plaintiff to his lease or to recover damages for past breaches of covenant.

Day, Q.C., W. Pearson, Q.C., and Simmonds, for the plaintiff.—There has been a gross breach of public duty by the defendants of which the plaintiff was ignorant, and owing to which a nuisance has been occasioned within the meaning of the covenant. The doctrine of equity in such cases is laid down in *Tildesley v. Clarkson* (30 Beav. 419; 6 L. T. Rep. N. S. 98). The person who neglects a public duty is liable to the person who suffers therefrom: (*Couch v. Steel*, 3 E. & B. 402); and that liability for damages is not taken away even though a penalty be imposed for non-performance of the duty:

Atkinson v. Newcastle Waterworks Company, L. Rep. 6 Ex. 404;

Blamires v. Lancashire and Yorkshire Railway Company, L. Rep. 8 Ex. 283;

Pickering v. James, L. Rep. 8 C. P. 489.

We cannot get our contract set aside at law; our right to get damages does not affect our rights here. At law it would be no answer to an action of ejectment that the house was defectively built. There has been a breach and no waiver. The injury has been caused by the defendants' violation of the Building Act. We are entitled to our civil remedy, which, as it cannot be at law, must be in equity.

Dickinson, Q.C. and Sturges, for the defendants, were not called upon.

The VICE-CHANCELLOR.—I do not think that this bill can be sustained. As the bill was filed before the Judicature Acts came into operation, the case is regulated by the law applicable to these cases at the time of the filing of the bill. That being so, the plaintiff's case is this: He was induced to take a house suited for him, in which there were certain defects of structure known to the defendants and concealed from the plaintiff. At the time of bill filed, the defendants had taken proceedings, under the covenant in the lease, to re-enter on a breach of covenant, which is not disputed. The plaintiff having discovered these defects, abandoned the premises and ceased to carry on the business. He wanted to get rid of the place. Otherwise his remedy would have been to retain possession, and bring his action for having been induced to take the premises. Under these circumstances, when the bill was filed, an action was pending for the recovery of the premises by the defendants, to which the plaintiff

admits that he had no defence. His desire is to get rid of the premises, which the defendants were willing and desired to take back. It is not suggested that the defendants sought to recover damages in respect of past breaches of covenant. The case thus becomes a suit to recover damages for having been induced to take the premises, whether on account of the non-performance of a public duty or an implied warranty. He has his remedy on both grounds, as is shown by the cases cited: it is not shown that the remedy is an imperfect one. Instead of taking his remedy at law, proceedings at which would have been differently conducted from proceedings in this court, he comes here. He claims a right to come here because it is a case of rescission of contract. There would have been something to say for this if it had been sought to hold him to his contract; but all that he can now be entitled to is damages. The action would have gone on a different system at law. There would have been the evidence in chief and cross-examination of witnesses before a jury. Looking to the spirit and principle of the new procedure, this is a case for a jury. Unless it was considered that this was a case peculiarly belonging to this division of the High Court, or such as a judge could try by himself, it would be difficult to satisfy me in such circumstances that I should say, "This is a case for a judge without a jury." I assume that a judge might so say. It seems to me inconvenient and undesirable to withdraw from the better tribunal, or which the defendant has a reasonable right to say is the better tribunal, and which he prefers, a case like the present. It is not a case in which this court should entertain jurisdiction. If I am wrong I should still be disposed not to let this case go on to be tried here, inasmuch as if it goes to the Court of Appeal that court will have the advantage of hearing the witnesses for itself. The bill must be dismissed with costs.

Solicitors, *Cronin and Rivolta; Young, Jones, Roberts, and Hale*.

QUEEN'S BENCH DIVISION.

Reported by M. W. McKELLAR, J. M. LELY, and R. H. AMPLETT, Esqrs., Barristers-at-Law.

Saturday, Dec. 18, 1875.

REG. v. NEW WINDSOR.

County rate for other purposes—Liability of borough—Boundary Act 1832 (2 & 3 Will. 4, c. 64)—Municipal Corporations Act 1835 (5 & 6 Will. 4, c. 78) sects. 7 and 117.

The borough of New Windsor before the passing of the Boundary Act 1832 was not liable to the rates for the county of Berks. By that Act, a part of Clewer, then liable to the county rates, was added to the borough for parliamentary purposes, and by the 7th section of the Municipal Corporations Act 1835, the municipal was made coextensive with the parliamentary borough. By sect. 117 "the county rate for other purposes" is to be shared by every borough in the county in which is a separate court of quarter sessions, and which before the passing of the Boundary Act was chargeable with or liable to contribute in whole or in part to the county rate.

Held, that the borough of New Windsor was liable to contribute to such rate.

THIS was a rule obtained on the 18th Nov. last, by *Dowdeswell*, Q. C., on behalf of the Treasurer of the county of Berks, calling upon two justices of the peace in and for the said county of Berks, and the treasurer of the borough of New Windsor in the said county of Berks, to show cause why a writ of *mandamus* should not issue directed to the said justices, commanding them forthwith to proceed to hear and determine the matter of a certain information or complaint preferred by John Lamplow Roberts, treasurer of the said county of Berks, against Adolphus Frederick Millns, the aforesaid treasurer of the borough of New Windsor on the 29th June last.

The following facts were stated upon affidavit by the clerk of the peace for the county of Berks:

Before the passing of the Boundaries Act 1832, one part of the parish of Clewer in Berks was within the then existing borough of Windsor, and exempt from the county rate, and on the passing of the Act a further portion of the parish which up to that time had been chargeable with and liable to county rate was added to the borough of New Windsor, and the amount levied on the parish for general county rate was thereupon reduced.

In 1840 the new assessment for county rate being in the course of preparation by the justices of the county with the assistance of Mr. Coates, a valuer, a return was obtained from the overseers of Clewer, pursuant to sect. 2 of 51 Geo. 3, c. 51, which was duly verified on oath by one of the parish officers of Clewer, before the justices at petty sessions, held at Windsor, which contains as follows:

PARISH OF CLEWER.

	Quantity of land.	Gross estimated value.	Rateable value to the Poor Rate.
	a. r. p.	£ s. d.	£ s. d.
1. Without the borough of Windsor, liable to all county rates.....	1184 3 24	5588 10 0	4437 0 0
2. Within the said borough, subject only to county rates made for certain purposes under 6 & 7 Will. 4, c. 76, s. 117.	76 2 30	3517 10 0	2538 10 0
3. Within the said borough not subject to any county rate.....	16 1 28	3369 10 0	2201 10 0

In the assessment then settled, the portion of Clewer which was liable to general county rate described in the overseer's return as containing 1184 acres 3 roods 24 poles was assessed at 4617*l.*, and the rateable value of the portion described in the overseer's return as containing 76 acres 2 roods 30 poles was settled at 2866*l.*

From that time until 1867 the treasurer of the county kept an account of the expenditure for "other purposes," as directed by the Municipal Corporations Act, and not more than twice in every year sent a copy of the same, and made a claim upon the council of the borough of New Windsor for a proportion of such expenses, in respect of the said portion of the parish of Clewer added to the borough as before stated.

In 1867 a fresh basis or standard for county rate was prepared, pursuant to the provisions of 15 & 16 Vict. c. 81, and the portion of Clewer without the borough was raised to 9923*l.*, and the portion within the borough, in respect of which the county claimed for the expenditure for other purposes, was then ascertained by the county treasurer to be 1118*l.*, and a proportionate claim was made on the borough of New Windsor.

The claims so made from the passing of the Boundary Act up to Michaelmas 1870 were duly paid to the county treasurer by the Windsor treasurer on behalf of the council of the said borough, but the claims for 1871, 1872, and 1873 have not been paid, and payment of the same has been refused and resisted by the Town Clerk of the said borough acting on behalf of the council, and also by the treasurer of the borough upon the grounds hereinafter appearing.

On the 19th June 1875, the Berks clerk of the peace duly caused a summons to be taken out against the treasurer of the borough of New Windsor, Adolphus Frederick Millns, of New Windsor aforesaid, upon the complaint of John Lamplow Roberts, of Wokingham, solicitor, the treasurer of the county of Berks, summoning him to appear before two justices of the county of Berks, at Reading, on the 29th June, to show cause why a warrant should not be issued ordering the said borough treasurer to pay to the treasurer of the said county over and above the first mentioned order or orders certain additional sums amounting to 31*l.* 16*s.* 1*d.*, as provided by the statute 15 & 16 Vict. c. 81.

On the 29th June last, the said summons came on to be heard at Reading, before John Blight Monck, Esq., of Coley-park, Reading, and Alexander Wm. Cobham, Esq., of Leighton-park, Reading, two of Her Majesty's justices of the peace in and for the said county of Berks.

It was then admitted on the part of the treasurer of New Windsor, that a copy of an account of all sums received in aid of or on account of the county rate, and of the sums of money expended out of the county rate for other purposes than the costs arising out of the prosecution, maintenance, and punishment, conveyance, and transport of all offenders committed for trial at assizes in such county from the boroughs in which separate courts for the quarter sessions of the peace are holden, had been sent to the council of the borough of New Windsor, on the 15th March 1875, and had been duly received by the council.

It was also admitted that the treasurer of the county of Berks had made an order on the council of the borough of New Windsor, for the payment of a proper and proportionate sum, if the borough of New Windsor was properly subject to pay any contribution in respect of the said portion of the parish of Clewer, and that such order had been duly issued and received more than one month before the making of the complaint by the said treasurer of the county.

It was further admitted and agreed that the borough of New Windsor possesses a court of quarter sessions and charter, containing *non-intromittant* clauses, and that prior to the passing of the Boundary Act, no part of the borough as the borough then existed was chargeable with or liable to contribute in whole or in part to the county rate. These admissions were made for the purposes of convenience, and evidence tendered to support them was by agreement dispensed with.

It was contended on the part of the county treasurer that the borough of New Windsor, as now bounded, contains a part which, prior to the passing of the Boundary Act, was liable to contribute to county rate, to wit, a portion of Clewer parish. That there is no enactment to relieve such portion of the parish from its liability to contribute to the "other purposes account," and

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that the said borough took it from the county with that liability, and that the said borough falls expressly within the words of the section, and is now a borough which, before the passing of the Boundary Act, was liable to contribute in part (i.e., as to part of its area) to the county rate. It was stated that before the passing of the Boundary Act there was no borough which was liable to contribute (as to the whole of its area) to part only of the county rate.

It was contended on the part of the borough treasurer that inasmuch as the borough of New Windsor has a separate court of quarter sessions, and had the same prior to the passing of 5 & 6 Will. 4, c. 76; and inasmuch as the borough, as it then existed, was not, before the passing of the Boundary Act, liable to the county rate, it could not be called upon for any contribution to the county rate or the other purposes account, in consequence of the said parish of Clewer being added to the borough by the Boundary Act, and by sect. 117 of the Municipal Corporation Act. It was further contended that the 15 & 16 Vict. c. 81, s. 38, did not give jurisdiction to the said justices to make an order and cause to be sent to the treasurer of the borough a warrant ordering him to pay such sums to the county treasurer. And it was also urged by the town clerk of New Windsor, who represented the borough treasurer, that the remedy, if any, for the county was by a writ of *mandamus*, and that the justices, if they issued a warrant of distress, would be liable to an action of trespass.

The said justices, after hearing the argument of the counsel for the county treasurer, stated that they did not feel satisfied that they had jurisdiction to cause a warrant to be issued ordering the borough treasurer to pay the sum or any sums in respect of the other purposes account: and they further stated that to enable the county treasurer to raise the question by moving for an order or *mandamus*, or otherwise, they would, as suggested on behalf of the borough treasurer, refuse to make a determination of the said matter then before them, and did then refuse to act, and declined to make any order.

The town clerk of the borough of New Windsor stated upon affidavit, in answer to the rule, that a portion of the parish of Clewer was by the Boundary Act of 2 & 3 Will. 4, c. 64, added to the parliamentary borough of New Windsor, and afterwards by the 7th section of 5 & 6 Will. 4, c. 76, the boundaries of the municipal borough were made coextensive and identical with the then existing parliamentary borough. Prior to the passing of the Boundary Act the municipal borough consisted of the whole of the parish of New Windsor, and a small portion of the parish of Clewer, and such borough was never liable in whole or in part to contribute, and never contributed towards the county rate. He further said that he was advised and verily believed that that portion of the parish of Clewer which was added to the municipal borough by the Boundary Act as before stated was not liable to be and ought not to have been assessed to the county rate as stated in the affidavit of the clerk of the peace for the county of Berks. And he further said that the portion of the parish of Clewer so added to the said municipal borough as aforesaid is assessed to all the borough and general district rates levied and raised in the said borough. The

payments by the treasurer of the borough to the treasurer of the county on the other purposes account were always made under a misapprehension of the borough's liability, and without any order of the council.

H. Matthews, Q.C., showed cause against the rule.—The proceedings before the justices against the treasurer of the borough of Windsor were instituted under sect. 38 of 15 & 16 Vict. c. 81, which begins by reciting part of the Municipal Corporations Act 1835 (5 & 6 Will. 4, c. 76). It is enacted by the 117th section of that Act of 1835, "That the treasurer of every county in England and Wales shall keep an account of all sums of money received in aid or on account of the county rate, and of the sum of money expended out of the county rate for other purposes than the costs arising out of the prosecution, maintenance and punishment, conveyance and transport of offenders committed for trial in such county, and in the case of boroughs having a separate court of quarter sessions of the peace other than out of coroners' inquests, and shall, not more than twice in every year, send a copy of the said account to the council of every borough situate within such county in which a separate court of quarter sessions of the peace shall be holden, and which, before the passing of the said Act (the Boundary Act 1832) was chargeable with, or liable to contribute in whole or in part to the county rate of such county, and shall make an order on the council of every such borough for the payment of such proportion of such sum as would have been chargeable, after deducting all sums of money received in aid of the county rate as aforesaid, if this Act had not passed, upon such borough as the same shall be bounded, according to the provisions of this Act, and the council of such borough shall forthwith order the same, with all reasonable charges of making and sending the said account to be paid to the treasurer of such county out of the borough fund." There is no dispute about a separate court of quarter sessions being held in this borough, but the question is whether before the Boundary Act 1832, the borough was chargeable with or liable to contribute in whole or in part to the county rate. It is admitted that the borough, as it was constituted before that Act, was not chargeable at all with the county rate, and it is admitted that the portion of the county added to the borough by that Act was before that chargeable with the county rate. These are exactly the circumstances as stated in the note to Chitty's Statutes, p. 1016, of the case *Reg. v. Inhabitants of New Sarum* (7 Q. B. 941). It there appears that such a borough cannot be called upon for contribution to the county rate. [BLACKBURN, J.—But that note is not borne out by the case itself, which merely decides that the borough was not liable under the circumstances to repair a county bridge, which had been added to the borough.] There is, however, this note to the argument at p. 948—"Patteson, J. here referred to Rawlinson's edition of the Municipal Corporations Act, p. 207, note (1) to sect. 117, where it is said:—A question has been raised under these words, whether a borough (in the first section of schedule A to this Act), which has a separate court of quarter sessions, and which was not, before the passing of the Boundary Act, liable to the county rate, can be called upon for any contribution to the county rate, in consequence of a portion of the adjoining

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county being added to the borough by the Boundary Act, and by sect. 7 (*sup.*), it seems clear that it cannot, upon the express words of the above section. For though the part added may have previously contributed to the county rate, the question is whether the borough, previously to the Boundary Act, did. There is no provision in this section for a separate rate being made on the part added only, and no new burden can be thrown on the inhabitants living within the old limits." Sect. 7 of the Municipal Corporations Act 1835, provides that the boundaries of certain parliamentary boroughs as described in the Boundary Act 1832 (2 & 3 Will. 4, c. 64), shall be the boundaries of certain municipal boroughs mentioned in the Schedule, amongst which appears this borough of New Windsor. The county rates were assessed under 12 Geo. 2, c. 29, until the passing of 15 & 16 Vict. c. 81.

Dowdeswell, Q.C. (with him *Greene*), for the treasurer of the county of Berks, supported the rule.—The boroughs referred to in the 117th section of the Act of 1835 are those of which the area or site was chargeable before 1832, in whole or in part, to the county rate. With this interpretation the section would include the borough of New Windsor. That there have been places liable to be rated both for a borough and the county in which it lies at the same time, appears from *Bates v. Winstanley* (4 M. & S. 429), where it was held that a charter granting jurisdiction to borough justices over a district not within the borough, without words of exclusive jurisdiction, does not exclude the county justices from rating the district to a county rate. [FIELD, J.—*Reg. v. Mayor, &c. of Birmingham* (7 Q. B. 116), is an authority more nearly in point. It appears from *Reg. v. Boucher* (3 Q. B. 641), that the borough of Birmingham was incorporated by Royal Charter in 1836, but it was held in the other case that the borough, though it had a grant of a separate court of quarter sessions, was liable as part of the county of Warwick for its proportion of the purchase money of a county gaol under the 117th section].

COCKBURN, C.J.—I think the rule must be made absolute. It is difficult to suppose that the Legislature should have intended to exempt from contribution to these other purposes the places which were added to boroughs for the purposes only of quarter sessions and municipal privileges, and it does not seem to have been desirable to deprive the counties of these contributions; expediency, therefore, and principle both point in the same direction, and although there may be some doubt whether the language of the 117th section is sufficient of itself to embrace a borough which never as a borough was liable in whole or in part to the county rate of its county, yet the Birmingham cases referred to by my brother Field seem to be a sufficient authority to overcome all such doubts, and our judgment must, therefore, be in favour of the claim by the county for a contribution by the borough. The rule will be absolute.

BLACKBURN, J.—I also think the rule must be absolute. It turns on the 117th section of the Municipal Act of 1835, which depends upon the previous law concerning county rates. At that time they were subject to the provisions of 12 Geo. 2, c. 29, which consolidated earlier Acts, and in the same way as before made the county

rates payable by every town, parish, or place within the respective limits of the commissions of the justices at general or quarter sessions. The boroughs in each county which enjoyed charters with non-intromittant clauses were not subject to these county rates, but the exemption does not seem to have been due to any want of consideration in the way of benefit from the rates, but only from the fact that the justices of each county at quarter sessions had no commissions giving them jurisdiction to assess or levy rates in such boroughs. We may take it therefore that at the time of the passing of the municipal Act, every place in each county was liable to county rates, unless the county justices had no jurisdiction over it. Then by that Act provision is made concerning the payment of county rates by the three kinds of boroughs. The first kind, the old boroughs with quarter sessions and non-intromittant clauses, are to pay all their own rates, by sect. 92, and as before to be exempt from county rates; by sects. 111 and 112, no borough justices being at liberty by sect. 101, to act with respect to any rate in the nature of a county rate. Sect. 113 exempts assize expenses from this exemption, but the counties have no other claim upon the ancient boroughs of this kind. The other two kinds of boroughs are dealt with in a few words by sect. 117, which directs the treasurer of each county to keep an account of moneys received and expended for other purposes than the costs of offenders committed for trial in such county, and to send a copy of the said account to the council of every borough situate within such county, in which a separate court of quarter sessions of the peace shall be holden, and which, before 1832, was chargeable with or liable to contribute in whole or in part to the county rate of such county, and such borough is to pay its contribution. No borough is to be exempt under this section unless it has a separate court of quarter sessions, and also unless no part of it was liable to county rates before 1832. The expression "in whole or in part" cannot refer to the county rates, for it does not appear from any of the statutes, nor as a matter of fact, that any borough was liable to part of a rate; it can only refer to the area of the borough, so that all boroughs with courts of quarter sessions, to which some part was added from the counties in which they were situated by the Boundary Act, are still liable to contribute to the county rates for other purposes in respect of the additions made to them at that time. This is a provision of perfect justice and fairness, for it could not have been intended to deprive the counties without compensation of contribution which they had enjoyed before the Municipal Act was passed. It is clear to my mind that the intention of the Legislature, as evinced by the words of the statute, was to make such boroughs as this contribute to the county rates, and I am confirmed in that opinion by the case of *Reg. v. Birmingham*, which seems to be exactly in point. The rule, therefore, will be made absolute.

FIELD, J.—I am of the same opinion, and I have nothing to add.

Rule absolute.

Solicitors for the prosecutor, the Treasurer of Berks, *Newman, Stretton, and Hilliard for Morland and Son*, Abingdon.

Solicitor for the defendants, the borough of New Windsor, *J. Lott for Darvill, Darvill, and Last*, Windsor.

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BIRKENHEAD IMPROVEMENT COMMISSIONERS v. SANSOM.

[Q.B. Div.]

Saturday, Jan. 22, 1876.

BIRKENHEAD IMPROVEMENT COMMISSIONERS v.
SANSOM.

Public highway—Used by public—1 Vict. c. 33, s. 18. By a Birkenhead Local Act of 1838, commissioners are required to cause all such parts of the streets, ways, or places, within the said township, not being public or common highways which are now in the estimation of the commissioners fully built upon, but not sufficiently paved or put in good condition, and all such streets, ways, or places as are now making or may hereafter be made within the said township, although not fully built upon, to be made, paved, and cleansed, as to the commissioners shall seem necessary; the expenses to be paid by the frontagers.

Defendant occupied a house in a street formed about seventeen years ago, and ever since used by the public.

Held, that defendant was liable to contribute to the making and severing of this street lately resolved upon by the commissioners.

APPEAL from the County Court of Cheshire, holden at Birkenhead, by W. Wynne Ffoulkes, Esq., judge thereof.

The following is a copy of the plaint and particulars of demand:

Town of Birkenhead Local Improvement Acts.
Town Surveyor's Office, 35, Hamilton-square,
17th July 1874.

To Mr. Jno. Sansom,
35, Milton-road, Tranmere.

To the commissioners acting in execution of the several Acts of Parliament, made and passed for improving the township of Birkenhead and Claughton-cum-Grange, Dr. (Please require a printed cheque receipt countersigned by the treasurer.)

For your proportion of the expenses of making and completing the surface of that part of King-street which lies immediately opposite to and adjoining your property in the said street, being a frontage of 191ft., Nos. 24, 26, 28, and 30, on the north side of street.

Particulars.

	£	s.	d.
General works	47	2	0
Proportion of sett crossing	3	3	6
	50	5	6

I hereby certify the above apportionment to be correct.
THOS. C. THORBURN,
Town Surveyor.

Above, I beg to hand you the amount due from you to the Birkenhead Improvement Commissioners for work done as above, as ascertained and settled by the surveyor to the said commissioners; which sum I do hereby demand and require you to pay to me at the treasurer's office, Birkenhead, within fourteen days from this date.

Notice. If not paid within fourteen days from the above date, interest at the rate of 5l. per cent. per annum will be charged from the date of the delivery of the bill.

17th July 1874.

The plaintiffs are constituted commissioners for the improvement of the township of Birkenhead under and by virtue of several Acts of Parliament, of which the several sections relied on by the plaintiffs are hereinafter set out.

By sect. 18 of 1 Vict. c. xxxiii., it is enacted that it shall be lawful for the said commissioners, and they are hereby required to cause all such parts of the streets, ways, roads, and passages or places within the said township, not being public or common highways, which are now in the estimation of the said commissioners fully built upon, but not sufficiently soughed, cleansed, paved, or

otherwise put in good order and condition, and all such streets, ways, roads, passages, or places, as are now making, or may hereafter be made within the said township, or any part or parts thereof, although not fully built upon, to be made, soughed, paved, flagged, repaired, and cleansed with such soughs, gutters, sinks, common or main sewers, drains or water-courses, and with such materials and in such manner as to the said commissioners shall seem meet and necessary, and the charges and expenses attending the same shall be reimbursed to the said commissioners by the occupiers or persons in the actual possession, or by the immediate owners of the houses, building ground, or land within or on the respective sides of the said streets, ways, roads, passages, or places, so to be soughed, paved, flagged, repaired, and cleansed as aforesaid, or wherein such soughs, gutters, sinks, or common or main sewers, drains, or watercourses, shall be made, repaired and amended, scoured and cleansed as aforesaid, each such occupier or person in possession or owner paying a proportionable share thereof, such share to be ascertained by the said commissioners or their surveyor; and if any such occupier or person in possession or owner shall at any time refuse or neglect to pay such proportion of the said charges and expenses so to be ascertained as aforesaid, the same shall be levied by distress and sale of the goods and chattels of such occupier or persons in possession or owner, in like manner as the rates hereinafter directed and required to be raised and levied are authorised to be recovered, or shall and may be sued for and recovered, together with full costs of suit in any of Her Majesty's Courts of Record at Westminster.

By sect. 17 of the last mentioned Act it is enacted, "And be it further enacted, that where any streets, ways, roads, passages, or places already laid out or hereafter to be laid out within the said township, not being public or common highways, shall be well and sufficiently made, soughed, paved, flagged, or otherwise constructed, repaired, and put into good order, repair, and condition, in such manner and with such public drains therein as shall be satisfactory to the said commissioners, then and in such case, but not before, it shall be lawful for the said commissioners, upon the application of the owner or owners of the soil of such streets, ways, roads, passages, or places, or of the greater part in value of such owners, or of the person or persons liable to repair the same, or of the greater part in value of such persons, to declare such streets, ways, roads, passages, or places, to be public or common highways; and from and after such declaration made, the same and every of them shall be deemed and taken to be public and common highways to all intents and purposes, and thenceforth repaired and kept in repair by the said commissioners."

The defendant is the owner of some house property on one side of King-street aforesaid, which street is within the township of Birkenhead, and within the jurisdiction of the commissioners.

About seventeen years ago a Mr. Ball formed and constructed the said street, and at that time threw it open to the use of the public, and it has ever since been open to and without interruption used by the public.

In 1873 the commissioners resolved to make and sewer King-street in a proper and sufficient manner, and to apportion the cost thereof upon

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MILE END OLD TOWN VESTRY v. WHITECHAPEL GUARDIANS.

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the several owners of the houses, buildings, and lands fronting to or on the sides of the said street. Notice of the intention of the commissioners to do the work was given to the defendant.

A contract was entered into for doing the work, and the works having been completed in due course, the cost was apportioned by the surveyor to the commissioners in the various frontages, the defendant being one of them.

On a demand made for payment the defendant refused to pay, and this action was brought for 50*l.*, the plaintiff having abandoned the excess of 5*s.* 6*d.*

There was no proof that any application under the 1st Vict. c. 33, s. 17, had ever been made to the commissioners to declare, or that the commissioners had ever declared the street to be a public or common highway, and it was thereupon contended by the attorney for the plaintiffs that it was a street for the soughing, paving, flagging, and repairing of which the owners were personally liable under the 18th sect. of 1 Vict. c. 33.

The attorney for the defendant contended that the street, having been dedicated to the use of the public by Ball seventeen years ago, it became a common or public highway and therefore the plaintiffs had no power under sect. 18 of 1 Vict. c. 33, to do the work which they had done upon it, and to charge any portion of the expenses attending the same upon the defendant.

The County Court judge told the jury, and it was admitted by the defendant, that King-street had not been adopted as a public highway in the manner prescribed by 5 & 6 Will. 4, c. 50, s. 23 (The Highway Act), nor had an application been made to the Birkenhead commissioners by the owners to declare, nor had the commissioners declared such street to be a public highway in accordance with 1 Vict., c. 33, s. 17.

The said County Court judge left it to the jury to say whether when King-street was laid out Mr. Ball intended to dedicate it, though even for a single day, to the use of the public, and whether it had been used by the public ever since.

The jury answered the question in the affirmative, and the said County Court judge directed a verdict to be entered for the defendant.

The question for the opinion of the court of Queen's Bench is whether the said County Court judge was right in so directing the jury.

If he was right the verdict for the defendant is to stand.

If he was wrong the verdict is to be set aside and entered for the plaintiffs.

Gully, for appellants, the plaintiffs.—The question is whether the defendant, as a frontager, is liable for the pavement of King-street. There has been seventeen years user of the street by the public, but it was never declared a public or common highway by the commissioners under sect. 17 of the Act of 1833, nor is it a highway repaired by the inhabitants under sect. 23 of the Highway Act. It must, therefore, come within the description in sect. 18 of such streets or places "as are now making, or may hereafter be made within the said township." [He was stopped by the court].

Leofric Temple, Q. C., *contra*.—The words "not being public or common highways" which appear in the first clause of the 18th section apply to the subsequent parts of it, and must be read as describing such streets or places as may hereafter

be made. In that case King-street clearly would not come within the provision of the 18th section.

BLACKBURN, J.—I think the County Court judge was right in everything except his construction of this 18th section. I think the words point clearly enough; first, to completely built streets, not then public or common highways; and secondly, to all such streets as were then making, or might thereafter be made, whether public or common highways, or not. This street has been made since the Act was passed, and therefore the paving is to be done by the frontagers. It is hard, no doubt, after the street has been made seventeen years, but there can be no doubt as to the meaning of the section.

FIELD, J.—I am of the same opinion.

Judgment for the appellants, the plaintiffs.

Solicitors for plaintiffs: Gregory, Rowcliffes, and Co., for T. M. Downham, Birkenhead.

Tuesday, Feb. 8, 1876.

MILE END OLD TOWN VESTRY v. WHITECHAPEL GUARDIANS.

Apportionment of paving expenses—One side of street—18 & 19 Vict. c. 120, s. 105—25 & 26 Vict. c. 102, s. 77.

The plaintiffs, acting under the Metropolis Management Acts, resolved that a portion (to wit), the eastern side of a certain new street should be paved throughout the whole length for a uniform breadth of 12ft., measured from the eastern boundary; and that the owners of the houses forming the eastern side should pay the estimated expenses. In an action against the defendants for contribution to these expenses, their workhouse being part of the eastern side of the street, it was stated in defence that there were houses and land on the western side; and it was replied that those houses and land did not bound or abut on any part of the street to be paved.

Held, upon demurrer to the reply, that the plaintiffs had no power to charge only the owners of one side of the street; and that the action could not be maintained.

THIS was a demurrer to the plaintiff's reply.

The statement of claim alleged that:

1. The plaintiffs under and by virtue of the statutes in that behalf made, on or about the 9th Dec. 1874, deemed it necessary and expedient that a portion (to wit) the eastern side of a certain new street within the said hamlet, and which was not paved to the satisfaction of the plaintiffs, should be so paved; and thereupon duly and according to the said statutes, resolved that the same be paved by them, the plaintiffs, throughout the whole length thereof for a uniform breadth of 12ft., measured from the eastern boundary thereof; and that the owners of the houses forming the eastern side of such street should be required to pay to the plaintiffs the estimated amount of the expenses of the said works, such amount to be determined by the surveyor of the plaintiffs, and when so determined to be apportioned among such owners; and the owners of the houses and the owners of the land to contribute to such estimated expenses in the same proportion, and the payment of such estimated expenses by such owners to be required, and, if necessary, enforced

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before the commencement, during the progress, or on the completion of the said works.

2. On or about 22nd Dec. 1874, the surveyor of the plaintiffs estimated the expenses of the said works at 243*l.* 17*s.* 9*d.*

3. On or about 23rd Dec. 1874, the plaintiffs apportioned the said estimated expenses amongst the owners of the houses and land bounding or abutting on the eastern side of the said street, as follows:—

"On the premises known as the warehouse belonging to the defendants (including the frontage of the private road belonging to them), 209*l.* 7*s.* 7*d.* On the house 626, Mile End-road, and the yard adjoining thereto, 34*l.* 10*s.* 2*d.*"

4. The plaintiffs afterwards caused the said work to be done, and the actual expenses thereof amounted to 210*l.* 11*s.* 4*d.*

5. The defendants at the times aforesaid were, and still are, the owners of the said workhouse and premises, being buildings and land abutting upon and bounding the eastern side of the said new street, and benefited by the said works, and the amount to be contributed by them towards the said expenses in respect thereof, was and is 181*l.* 0*s.* 3*d.*

6. The plaintiffs on or about the 8th June 1875, demanded of defendants payment of the said 181*l.* 0*s.* 3*d.*

7. All conditions have been fulfilled, and all times have elapsed necessary to entitle the plaintiffs to have the defendants pay the said 181*l.* 3*d.*

8. The defendants have not paid it.

The statement of defence alleged that:

1. At the time of the resolutions in the statement of claim mentioned and of the doing of the said work, there were and still are, on the western side of the said street, houses and land bounding and abutting thereon, the owners of which were and are by law liable to contribute to the expenses of the said work.

2. The plaintiffs have not apportioned the expenses of the said work, among the owners of the houses and land bounding and abutting on the said street, paved by the plaintiffs, as in the statement of claim mentioned, but have by the said resolutions, attempted illegally to throw upon the owners of houses and land bounding and abutting on the eastern side of the said street, the whole of the expenses of the said work.

The reply alleged that:

1. The plaintiffs deemed it necessary and expedient that part only of the said street should be paved, viz., the eastern side thereof, and did not deem it necessary or expedient that the western side of the said street should be paved, and did not deem it necessary or expedient to pave, and did not pave any part of the western side of the said street.

2. The houses and land bounding and abutting on the western side of the said street, and mentioned in the statement of the defence, did not nor did any or either of them or any part thereof bound or abut on any part of the said street which the plaintiffs deemed it necessary and expedient to pave, and which they paved as mentioned in the said statement of claim.

This reply was demurred to on the ground that the plaintiffs had no power by law to charge the owners with the expenses of paving one side of a street only.

Finlay (with him *Day*, Q. C.) argued for the

defendant.—The Metropolis Management Acts do not authorise this claim for contribution. By sect. 105 of 18 & 19 Vict. c. 120, "in case the owners of the houses forming the greater part of any new street laid out or made, or hereafter to be laid out or made, which is not paved to the satisfaction of the vestry or district board of the parish or district in which such street is situate, be desirous of having the same paved, as hereinafter mentioned, or if such vestry or board deem it necessary or expedient that the same should be so paved, then and in either of such cases such vestry or board shall well and sufficiently pave the same, either throughout the whole breadth of the carriage way and footpaths thereof, or any part of such breadth, and from time to time keep such pavement in good and sufficient repair; and the owners of the houses forming such street shall on demand pay to such vestry or board the amount of the estimated expenses of providing and laying such pavement (such amount to be determined by the surveyor for the time being of the vestry or board." This section was amended by sect. 77 of 25 & 26 Vict. c. 102, "Where any vestry or district board shall under the powers given by the 105th section of the firstly recited Act" (just referred to) "have paved or be about to pave any new street, the owners of the land bounding or abutting on such street shall be liable to contribute to the expenses or estimated expenses of paving the same as well as the owners of houses therein, provided that it shall be lawful for the vestry or district board to charge the owners of land in a less proportion than the owners of house property, should they deem it just and expedient so to do; and any such costs or expenses, including the cost of paving at the points of intersection of streets, and all other incidental costs and charges, shall be apportioned by the vestry or board, and shall be recoverable either before the work shall be commenced, or during its progress, or after its completion; and it shall be lawful for the vestry or district board at their discretion to accept payment of the amount apportioned or charged in respect of each house or premises by instalments spread over a period not exceeding twenty years, and any such amount shall be recoverable from the present or any future owner of the premises, either by action at law or in a summary manner before a justice of the peace, at the option of the vestry or board." Sect. 112 adopts and extends the interpretation to the word "street," contained in sect. 250 of the Act of 1855, and enacts that "the expression 'new street' shall apply to and include all streets hereafter to be formed or laid out, and a part of any such street, and also all streets, the maintenance of the paving and roadway whereof had not, previously to the passing of this Act, been taken into charge and assumed by the commissioners, trustees, surveyors, or other authorities having control of the pavements or highways in the parish or place in which such streets are situate, and a part of any such street, and also all streets partly formed or laid out." There is no power in either of these statutes to charge the owners of one side of a street only: here there are houses on both sides. [BLACKBURN, J.—If there were no houses there would be owners of land who might be charged.] Certainly. The apportionment can only be made in pursuance of the statutes on the owners of houses and land forming such street.

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Bazalgette (with him *Philbrick*, Q.C.) for the plaintiffs.—If a part only of the breadth of a street be paved, which may be clearly done by vestries under these Acts, it is only fair that those owners should pay who have the advantage of it. The reply states that the houses, the owners of which were not charged with this expense, did not bound or abut on any paved part of the street. The only case which can be cited as an authority against this exercise of the vestry's discretion in apportioning expenses of paving is distinguishable from the present. That case is *Whitchurch v. Fullam Board of Works* (L. Rep. 1 Q. B. 233), where the defendants passed the usual resolution to repair a road, but the surveyor divided the road into four sections, and apportioned the cost of repairing each section amongst the owners of property in each section respectively. It was held that there ought to have been but one apportionment on all the owners along the entire road; and that the separate apportionments were invalid, and could not be enforced. This, however, was on the ground that the whole road was ordered to be repaired, and the owners are by statute equally responsible along the whole piece to be repaired. *Blackburn*, J., said in his judgment, "If they (the District Board) had come to the conclusion that the first section only of this road should be paved at this time, they might, in all probability, have made an order to that effect." In that case they could not have apportioned the expenses upon the whole length of the road.

The defendants were not heard in reply.

BLACKBURN, J.—I agree with the plaintiffs that the case referred to has no bearing on the question we have to decide; but it is perfectly clear to my mind that, though the vestry have power to pave so much of the breadth of a street as they may think fit, yet they must apportion the amount of the estimated expenses amongst the owners of the houses forming such street, and the owners of the land bounding and abutting on such street. There is no power in either statute to charge only the houses and lands bounding the part paved; and if there be hardship sometimes in this mode of apportionment, the hardship in any other would probably be greater. I think the defendants have established their demurrer, and the action cannot be maintained.

LUSH and *FIELD JJ.* concurred.

Judgment for defendants.

Solicitor for plaintiffs, *Müller Jutsam*.

Solicitors for defendants, *Turner and Sons*.

Monday, Jan. 17, 1876.

REG. v. RAFFLES.

Licensed premises—Addition to house—Question of fact.

A licensed person added to his premises a sixth of his frontage and a new entrance. He was then summoned for selling intoxicating liquors on unlicensed premises. A magistrate dismissed the summons and refused to state a case.

Held, upon a rule for a mandamus directing a case to be stated, that under the circumstances the magistrate was right and was justified in his refusal.

THIS was a rule nisi for a mandamus to the stipendiary magistrate for Liverpool, directing

him to state a case for the opinion of the court under 20 & 21 Vict. c. 43.

A licence to sell intoxicating liquors was held by one *Steadman*, who resided at No. 1, *Blundell-street*, and his house had a frontage of 72ft. in that street. During his licence, in consequence of changes and local improvements, a vacant space or strip of land was left 12ft. wide along the side of his house, which was then a corner house. He purchased this piece of land, and began to extend his building so as to include it, and when taken in he thereby acquired an addition of 12ft. frontage in *Blundell-street*, and also a new entrance in the cross street called *Jamaica-street*. He was then summoned for selling liquors in a place which was unlicensed, the ground being that he had no right to add this new building to his existing premises, and that the licence did not cover the new part.

The magistrate held that though enlarged it was still substantially the same house and dismissed the summons. On being asked to state a case for the opinion of the Court of Queen's Bench he refused on the ground that it was a question of fact only which was for him to decide. This rule was obtained on behalf of the person who took out the summons in consequence of the magistrate's refusal.

Poland and *Brenner* showed cause against the rule.—It was entirely a question for the magistrate. A licensed person is not prevented from enlarging his premises; the only difficulty that could arise is when his licence is to be renewed, whether the premises were substantially the same, and that is a question of fact. If they were substantially the same he would ask for a renewal, if they were substantially different he would ask for a new licence.

Pope, Q.C. and *Little* supported the rule.—The licence extended only to the premises as they existed when the licence was granted, and the licence was restricted to that area. It is against the policy of the Act to extend such a right.

COCKBURN, C. J.—I think the rule ought to be discharged. The question whether the premises are the same or not is a question of fact for the magistrates; and though I do not mean to say that supposing the magistrates were clearly wrong—as for example where a man had a small house licensed, and he added on the whole of a street, and the magistrates said the premises still remained the same—this court would not review that decision. Still, unless in a case like that, where the magistrates are clearly wrong, we should not interfere. But in a case like the present, I think the magistrate was right. The licensed premises here were added to in a small proportion, so that it might be considered a mere accretion. When we look at the purpose of the Legislature we see it was to secure premises of sufficient value as a test of the character of the tenant. When a licence is granted for particular premises, it includes all that comes fairly within the denomination of improvements. Here for all practical purposes the premises remained the same.

MELLOR, J.—I am of the same opinion. The Act provides for the means of preventing drunkenness, and as one of the means it assumes that the larger the house the less likelihood of its encouraging drunkenness. The question whether it remains the same house though additions have been made is for the justices within reasonable limits. If

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REG. v. MYERS AND OTHERS—BRIGDEN (app.) v. HEIGHES (resp.).

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they decided something outrageous we might interfere. But when the alterations and additions do not destroy the identity as in this case, I see no ground for interference. It is a question of degree, and we must abide by the magistrate's decision.

FIELD, J.—I am of the same opinion.

Rule discharged with costs.

Solicitor for prosecutor, J. A. Redhead, for Richardson, Jones, and Billson, Liverpool.

Solicitor for defendant, Gregory, Rowcliffes and Rawle, for Bremner and Son, Liverpool.

Friday, Dec. 17, 1875.

REG. v. MYERS AND OTHERS (Justices of Edmonton).

Interested justices—Interest in litigation a sufficient ground of disqualification—30 & 31 Vict. c. 115.

Any substantial interest, such as being a litigant in a matter before the court, will disqualify a justice of the peace from acting, and if a justice so disqualified merely sits upon the bench, the order or conviction by his fellow justices will be quashed, although the disqualified justice may not have signed such order or conviction.

Legal proceedings had been taken by one local board against another in consequence of the discharge of sewage into the river Lea by H., who had contracted with one of the boards to take the sewage of its district for manuring his farm. H. having been summoned before justices for pollution of the river, the proceedings between the boards were suspended, by the mutual consent of their chairmen, until the result of the summons against H. could be seen. H. was ordered to pay a sum of money by a Bench upon which both such chairmen sat:

Held, that the order upon H. was bad.

This was a rule calling upon Mr. Myers and other justices of the peace for the borough of Edmonton to show cause why a certain order of the said justices should not be brought up on a *certiorari* and quashed, on the ground that the said justices, or some of them, were disqualified from acting as being interested parties.

It appeared that a Mr. Harrison occupied a farm in the parish of Edmonton, and that such farm abutted on the river Lea. Mr. Harrison had contracted with the Enfield Local Board to take the sewage of Enfield in order to manure his farm therewith, but not being able to take all the sewage upon his land had discharged a part of it into the river Lea. This led to proceedings being taken by the Edmonton Local Board against the Enfield Local Board, but such proceedings were suspended by the mutual consent of the chairmen of the two boards, for the following reason. Mr. Harrison had been summoned before the Edmonton justices, under the Lea Conservancy Act, for the offence of polluting the river, and it was deemed by the two chairmen to be a waste of money to proceed with the litigation between their boards until the result of the summons against Mr. Harrison should be seen. The result of that summons was that the Edmonton justices made an order—the order complained of—that Mr. Harrison should pay 10s. a day so long as he should continue to discharge sewage into the river. Of the justices who made this order one was Mr. Myers, the chairman of the Edmonton Local Board, and another, Mr. Nash, the chairman of the Enfield Local Board, but neither of them signed the order which was complained of.

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Bealey, for the justices, now showed cause, and argued that the interest of the justices, if any, was not such as ought to make their proceedings bad. The recent statute, 30 & 31 Vict. c. 115, has removed the disqualification. This statute provides that "a justice of the peace shall not be incapable of acting on the trial of an offence arising under an act to be put in execution" by any local authority by reason only of "his being as one of several ratepayers, or one of any other class of persons liable in common with the others to contribute to or be benefited by any fund to the amount of which the penalty payable in respect of such offence is directed to be carried, or of which it will form part, or to contribute to any rate or expenses in diminution of which such penalty will go." [BLACKBURN, J.—That statute merely deals with a pecuniary interest, and leaves untouched an interest arising from the promoting of litigation.] Even if that be so, the mere possibility of bias is not enough to disqualify: (*Reg. v. Rand*, L. Rep. 1 Q. B. 230; 35 L. J. 157, M. C.) The following cases were also referred to:

Reg. v. Cheltenham Commissioners, 1 Q. B. 467;

Reg. v. Hertfordshire Justices, 6 Q. B. 753;

Wakefield Board of Health v. West Riding and Grimsby Railway Company, 35 L. J. 69, M. C.: 6 B. & S. 794; 18 L. T. Rep. N. S. 590.

Biron, in support of the rule, was not called upon.

BLACKBURN, J.—This rule must be made absolute. There is no doubt that Mr. Myers actually sat on the bench as justice, and was not present merely as a spectator. If he ought not to have acted, it was enough that he sat on the bench, although he may not have actually signed the conviction. Then comes the question: was he interested? Now in many cases it has been held that a pecuniary interest, however small, will disqualify a justice from acting. And in so far as the pecuniary interest arises from liability to a rate, the disqualification is removed by the Act 30 & 31 Vict. c. 115. But here we have no case of pecuniary interest. The alleged interest arises from Mr. Myers having been substantially a litigant under the circumstances detailed in Mr. Harrison's affidavit. I think that these facts show that Mr. Myers was substantially a litigant in a matter in which it was his interest, for the object of that litigation, that Mr. Harrison should be convicted. In *Reg. v. Rand* (*ubi sup.*) there was no pecuniary interest, and therefore the court was not bound to interfere, but the court in express terms declared that they must not be understood to say that they would not interfere in a case where there was a real bias, other than pecuniary. I think that the present is such a case. I think that, using the old phrase, Mr. Myers was sitting as judge in a matter where he was party, and that therefore the judgment in which he took part must be set aside.

QUAIN and ARCHIBALD, JJ. concurred.

Rule absolute, with costs against Mr. Myers.

Solicitors for Mr. Harrison, J. Wood and Co.

Solicitors for the justices, Pead.

Saturday, Jan. 15, 1876.

BRIGDEN (app.) v. HEIGHES (resp.).

Licensing Act 1874, ss. 3 and 9—Closing premises—Adjoining shops for grocery and drapery—Premises open for the sale of liquor.

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BRIDGEN (app.) v. HIGHERS (resp.).

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A licensed person for the sale of intoxicating liquors, not to be consumed on the premises, was also a grocer and draper. The liquors were kept and sold in the shop for groceries, which communicated with the drapery shop in the day time. He was convicted under sect. 9 of the Licensing Act 1874 of keeping his premises open for the sale of liquors during prohibited hours, although the drapery shop was the only part to which the public had access at the time, the grocery shop being entirely shut up.

Held that he was wrongly convicted; and that the penalty is imposed only in a case where the licensed person keeps his premises open for the purpose of selling liquors during prohibited hours. This was a case stated by two justices of Surrey under 20 & 21 Vict. c. 43, at the request of the appellant, whom the justices had convicted under 37 & 38 Vict. c. 49, s. 9.

James Bridgen, of Cobham, in the county of Surrey, grocer, draper, and licensed dealer in wines and spirits, the defendant and appellant, appeared before two of Her Majesty's justices of the peace for the county of Surrey, sitting in petty session at Kingston-upon-Thames, in the said county, on Thursday, 24th June 1875, to answer an information laid against him by the respondent, who was the prosecutor, for that he, the above-named defendant, on the 12th June 1875, in the parish of Cobham, in the said county, being then and there a person duly licensed to sell intoxicating liquors by retail not to be consumed on the premises, did have his said premises open for the sale of intoxicating liquors at a time at which the said premises were directed by law to be closed, viz., after the hour of 10 o'clock at night.

At the hearing it was proved or admitted that the defendant lives in a house at the corner of East-street and Church-street, Cobham, and he has two shops, viz., a grocer's shop and a draper's shop which form part of his house, and both shops can be entered from the house at the back, besides the customers' entrance; and it was also admitted or proved that he carries on the several trades or business of a grocer and draper on his premises situate at Cobham aforesaid, and that he has a licence for the sale on such premises of wines and spirits not to be consumed on such premises.

The grocery business is carried on in a shop having an entrance for customers in Church-street. The drapery business is carried on in a shop having an entrance for customers in East-street. During the day there are means of egress and regress from the grocer's shop into the draper's shop, through openings leading from one shop to the other, but after 10 o'clock at night shutters or partitions are put up and all means of communication between the two shops, except through the house of defendant as before mentioned, is prevented.

As a rule the customers for grocery goods enter the grocer's shop from Church-street, and customers for drapery goods enter the draper's shop from East-street, but occasionally customers requiring both grocery and drapery goods pass from one shop to the other by means of the said internal communication until the grocery shop is closed at ten o'clock in the evening.

In the grocer's shop, where the wines and spirits are exposed for sale, notices are affixed that no wines or liquors will be supplied after ten o'clock p.m.

On the day named in the information, viz., the 12th June, the prosecutor, at 10.30 p.m., entered the defendant's drapery shop, which was then open for the sale of drapery goods, and informed the defendant that he would be summoned for having his premises open during prohibited hours, as he was bound to close the whole of his premises by ten o'clock p.m.

It was proved that before ten o'clock that night the grocer's shop had been shut and was in darkness, and that the openings between it and the draper's shop had been closed. No wines or spirits are sold or kept in the drapery shop, the same being kept in the grocery shop only. The defendant's sons serve the customers in the grocer's shop, and his daughters and assistants serve the customers in the drapery shop; but the defendant himself assists occasionally in serving customers in both shops.

Under these circumstances it was contended on behalf of the defendant that it had not been proved that the defendant had committed any offence against the 3rd section of 37 & 38 Vict. c. 49 under which the information had been laid, inasmuch as no wines or spirits were kept exposed for sale in the draper's shop, and that no evidence had been given to show that his premises, viz., the grocer's shop, had been kept open for the sale of wines or spirits during prohibited hours. The justices were of opinion, first, that the two shops, being part of the same premises and always open and accessible to one another through the back of the house, must be taken as one; and secondly, that a wooden partition open in the day time and closed at night was not a sufficient division to constitute the grocer's shop and draper's shop separate premises, and so exempt the defendant from the provisions of the 3rd section of 37 & 38 Vict. c. 49 with regard to the draper's shop; and they convicted the defendant of keeping his premises open for the sale of intoxicating liquors during prohibited hours and fined him the sum of 1s. and costs.

Manisty, Q.C. (with him Pearce) argued for the appellant.—The sections of the Licensing Act 1874 (37 & 38 Vict. c. 49), which relate to this matter, are the 3rd and the 9th. The 3rd is the first of the sections under the heading "Hours of Closing," and it provides that "All premises in which intoxicating liquors are sold by retail shall be closed as follows, that is to say:" The 1st and 2nd sub-sections relate to premises within the metropolitan district, or within towns and populous places. "(3.) If situate elsewhere than in the metropolitan district or the metropolitan police district, or such towns or populous places as aforesaid," . . . "(c) On the nights of all other days [than Sunday] from ten o'clock until six o'clock on the following morning." By sect. 9, "Any person who, during the time at which premises for the sale of intoxicating liquors are directed to be closed by or in pursuance of this Act, sells or exposes for sale in such premises any intoxicating liquor, or opens or keeps open such premises for the sale of intoxicating liquors, or allows any intoxicating liquors, although purchased before the hours of closing, to be consumed in such premises—shall for the first offence be liable to a penalty not exceeding 10*l.* and for any subsequent offence to a penalty not exceeding 20*l.*" There is nothing in the Act which can be interpreted to impose a penalty for not shutting up

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licensed premises. The penalty is only for selling or exposing for sale, or keeping open for sale, or allowing the consumption of liquors after closing hours. This was a *bonâ fide* proceeding on the appellant's part, and he committed no offence.

Pugh, contra.—The justices have found that the premises were open for the sale of intoxicating liquors. [MELLOR, J.—Not at all; they merely find the facts and interpret the law to forbid them.] If there can be a doubt about it, the case should be remitted, in order that the justices may state more definitely the purpose for which the premises were open. [MELLOR, J.—It sufficiently appears that the only purpose was the sale of the drapery goods.] If these facts do not constitute a breach of the statute, it will be easy to evade the law. A publican might keep his tap closed and allow his customers to drink in adjoining premises. [FIELD, J.—That would clearly be subject to a penalty. MELLOR, J.—The mere connection of the premises cannot be sufficient. Even if the door were open, there must be either an actual drinking going on or something like an invitation to customers.] It must be remembered that here there could be no consumption on the premises, and any person buying drapery might easily ask for and carry away a bottle from the adjoining room. The sects. 3 and 9 ought to be read together, and the word "premises" must include every part occupied by the licensed person under the same roof.

Manisty, Q.C., was not heard in reply.

MELLOR, J.—I am of opinion that the justices have construed the statute erroneously, for though the 3rd section of the Act speaks of closing the premises, the offences are set out in the 9th section. I think the premises in which the liquor was sold were closed in this case. There may be a danger, and the justices assume that where one part of the premises is open the other parts may be easily got at, and if the justices had found as a fact that the appellant's shutting up of the grocery shop was a sham and merely colourable, I think it would be within the Act. But the justices do not find that that part of the premises in which the liquors are usually sold was really kept open for sale of liquor, though formally closed. They must find that in order to convict. The 3rd section, unless taken with the 9th section, amounts to nothing, for the conviction can only be under the 9th section. The justices do not say there was any evidence that liquor was sold on the premises after ten o'clock. They think the partition was not a sufficient separation, still they must have some evidence that the shutters are a sham. It is easy to see that a man may very reasonably have a separate part of his premises for selling liquors, and I see nothing in the Act to prevent this; and if it is capable, as in this case, of being shut up, and has sufficient indications that the business of selling liquors is *bonâ fide* concluded, I think the mere fact of another part of the premises, which is under the same roof but used for a different business, being left open, is immaterial. The object was to prevent the sale of liquor, and that was the reason why the door was to be closed, but the door may be opened for other purposes not connected with the sale of liquor. I therefore think the justices were wrong.

FIELD, J.—I am of the same opinion. I think the mere fact of the drapery business being carried on under the same roof was immaterial.

Judgment for appellant.

Solicitor for appellant, *F. Buckland*.
Solicitors for respondent, *Bell, Crowder, and Greenfield*.

COMMON PLEAS DIVISION.

Reported by P. B. HUTCHINS and CYRIL DODD, Esqs.,
Barristers-at-Law.

Thursday, Feb. 3, 1876.

MASPER AND WIFE v. BROWN.

Assault—Same cause of action—24 & 25 Vict. c. 100, sect. 45—Husband and wife—Bar to subsequent proceedings.

By 24 & 25 Vict. c. 100, sect. 45, it is enacted that "If any person, against whom any such complaint as in either of the last three preceding sections mentioned shall have been preferred by or on behalf of the party aggrieved, shall have obtained such certificate, or having been convicted shall have paid the full amount adjudged to be paid, or shall have suffered the imprisonment or imprisonment with hard labour awarded, in every such case he shall be released from all further or other proceedings, civil or criminal, for the same cause." A complaint within the said three sections, namely, of an assault upon the wife of the plaintiff, had, before the commencement of the present action, been preferred on behalf of the wife against the defendant, and he had been convicted, and had paid the whole amount imposed upon him by the justices before whom the complaint was heard.

Held, that such conviction and payment constituted a bar to an action brought by the husband for the consequential damages sustained by him in consequence of the assault upon his wife.

The words "same cause" in the section mean the same offence or assault, and not merely the same cause of action.

This was an action for damages. The first count of the declaration contained a claim by a husband and wife for damages for an assault committed by the defendant upon the wife; the second count contained a claim by the husband alone for the loss occasioned to him by the assault on his wife, viz., medical expenses, loss of his wife's comfort and services, &c. The plea, which so far as it was pleaded to the second count was demurred to, was substantially as follows:

That the trespass was an assault for which the defendant had been fined under 24 & 25 Vict. c. 100, and that he had paid the amount adjudged to be paid by him.

R. Henn Collins appeared in support of the demurrer.—The subject matter of the proceedings before the justices was the assault on the wife, which was the cause of action declared on in the first count, and not the loss to the husband, which was all that was sought to be recovered in the second count. The causes of action in the two counts are altogether different, the one claiming compensation for personal injuries, the other to be recouped money loss occasioned by the assault and by the personal injuries. The husband's ground of action is distinct from the wife's. The statute is one in restriction of common law rights, and must be construed strictly. The words of sect. 45 of 24 & 25 Vict. c. 100, are: "If any person against whom any such complaint as in either of the last three preceding sections mentioned shall have been preferred by or on behalf of the party

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aggrieved, shall have obtained such certificate, or having been convicted, shall have paid the whole amount adjudged to be paid, or shall have suffered the imprisonment, or imprisonment with hard labour, awarded, in every such case, he shall be released from all further or other proceedings, civil or criminal, for the same cause." The conviction, therefore, and the payment of the fine imposed, is a bar to any proceeding only for the "same cause." In *Hyde v. Scissor* (Cro. Jac. 538), it is plain that the court regarded the claim for personal injury caused by the assault and the husband's claim for his own personal loss by being deprived of his wife, &c., as distinct causes of action. The case of *Brockbank v. The Whitehaven Junction Railway* (7 H. & N. 834; 31 L. J. 349, Ex.), too, shows that the claims constitute distinct causes of action.

No one appeared on behalf of the defendant.

LORD COLERIDGE, C.J.—The 45th section of the Act 24 & 25 Vict. c. 100, enacts that where a person has been convicted of certain offences and has paid the whole amount adjudged to be paid "he shall be released from all further proceedings civil or criminal, for the same cause," and the question is whether this action by the husband for the damages occasioned him by the assault on the wife is a proceeding for the same cause as that in respect of which the defendant was convicted and paid what it was adjudged that he should pay. In my opinion it is. The word "cause" means "assault" in the section, and this, which is the interpretation which follows from the plain and untechnical reading of the section in question, is fortified by a consideration of the language of sect. 1 of 16 & 17 Vict. c. 30, which is an Act *in pari materia*. It is an Act for the punishment of aggravated assaults upon women and children. The 1st section is as follows: "When any person shall be charged before two justices of the peace . . . with an assault upon any female whatever . . . it shall be lawful for the said justices or stipendiary magistrate, if the assault is of such an aggravated nature that it cannot in their or his opinion be sufficiently punished under the provisions of the statute 9 Geo. 4, c. 31, to proceed to hear and determine in a summary way, and if they shall find the same to be proved, to convict the person accused; and every offender so convicted shall be liable to . . . and such conviction shall be a bar to all future proceedings, civil or criminal, for, or in respect of the same assault. . . ." If, then, the defendant had been proceeded against under this last mentioned statute and convicted, it is quite clear that he would have been free from any such liability as that sought to be imposed upon him, so that, if the plaintiff's contention is right, a man who is convicted of an unaggravated assault upon a married woman is liable to be sued by her husband, whilst one who is convicted of an aggravated assault is not. This would indeed be an unfortunate result, but I think the words of this section as to aggravated assaults throw much light upon the proper mode of construing the section now before us. For these reasons, then, I am of opinion that the plea is good and affords a bar to the action.

DENMAN, J.—I am of the same opinion. If the words of the section in question had been for the same cause of action, instead of, as they are, "for the same cause," I should have had some difficulty in dealing with the case. It seems as

though the statute 9 Geo. 4, c. 31, on which the case of *Vaughton v. Bradshaw* (9 C. B., N. S., 103; 3 L. T. Rep. N. S. 373; 30 L. J. 93, C. P.), was decided, was the foundation for the section which is now before us. At any rate it is clear that similar provisions are to be found in other statutes, and that there is nothing startling or unusual in the interpretation which we feel is to be put upon the section before us. The words "all further or other proceedings civil or criminal for the same cause" mean for the same matter, or thing, for the same act, or offence.

LINDLEY, J.—The only difficulty that I had in the case was this, the person is to be released from all further proceedings. Proceedings by whom does this mean? Is it merely from proceedings by the person assaulted, or from proceedings by any person? I think it means the latter, and, therefore, I agree that the judgment must be for the defendant.

Solicitors for the plaintiff, *Chester, Urquhart and Co.*, for *Richardson*, Manchester.

DIVISIONAL COURT FOR APPEALS FROM INFERIOR COURTS.

Reported by M. W. McKELLAR, and R. H. AMPLETT,
Esqrs., Barristers-at-Law.

Saturday, Jan. 29, 1876.

(Before the FULL COURT.)

HOLLAND v. NORTHWICH HIGHWAY BOARD.

Anything done in pursuance of statute—Omission to repair—Action within three months—5 & 6 Will. 4, c. 50, s. 109—25 & 26 Vict. c. 61, ss. 11 & 17.

Plaintiff, late in the evening, was crossing a bridge, from which the handrail had fallen into the brook below. He stretched out his hand to hold it, believing it to be in its usual place, fell over the bridge, and sustained injuries for which he sued the defendants in the County Court. Notice that the rail was unsafe had previously been given to the defendants, and it was repaired by them a few days after. The County Court judge nonsuited plaintiff on the ground that the action was not brought within three months, according to the Highway Act 1835, s. 109.

Held, that this omission to repair was something done in pursuance or under the authority of that Act, and that the County Court Judge was right.

APPEAL from a judgment of the County Court of Cheshire holden at Congleton and Sandbach.

The defendants are constituted a board for the Hundred of Northwich under the provisions of the statute 25 & 26 Vict. c. 61.

The plaintiff's particulars of demand were as follows:

This action is brought to recover the sum of 50*l.* as damages for that you, the defendants, on or about the 8th April last, neglected your duty in not properly repairing and keeping in proper and substantial repair a certain public highway in the township of Bechtou, in the parish of Sandbach, in the said county, and within your district, but allowed the same to become out of repair; to wit, the bridge over Dean Hill Brook, in the said township of Bechtou aforesaid, and in not maintaining a handrail across and by the side of the said bridge as had been previously provided, by reason whereof the said bridge became dangerous to passengers, and the plaintiff fell in the said Dean Hill Brook, over which the

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said bridge is carried, and was seriously injured, and the plaintiff claims 50l.

Dated this 7th Oct. 1875.

THOMAS COOPER,
Town Hall-passage, Congleton,
Plaintiff's Attorney.

To the defendants.

A notice of action, of which the following is a copy, was proved to have been duly served on day of date:

To the Highway Board for the District of the Hundred of Northwich, in the City of Chester; to Mr. David Harding, their clerk, and Mr. Edward Massey, their surveyor:

You having, on or about the 8th April last, neglected your duty in not properly repairing and keeping in repair a certain highway in the township of Betehton, in the parish of Sandbach, in the said county, and within your district, but allowed the same to become out of repair, to wit, the bridge over Dean Hill Brook, in the said township of Betehton aforesaid, and in not maintaining a handrail across and by the side of the said bridge, as had been previously provided, by reason whereof the said bridge became dangerous to passengers, and William Pointon Holland, of Bongwood, in the said township, farmer, fell in the Dean Hill Brook, over which the said bridge is carried, and was seriously injured. I do, therefore, as the attorney of and for the said William Pointon Holland, in this behalf, and according to the form of the statute in such case made and provided, hereby give you notice that I shall at or soon after the expiration of one calendar month from the time of your being served with this notice, cause a summons to be issued out of Her Majesty's County Court of Cheshire, holden at Congleton and Sandbach, against you, or some or one of you, at the suit of the said William Pointon Holland, for the said neglect of duty, and shall proceed against you thereupon according to law.

Dated this 19th August 1875.

Yours, &c., THOMAS COOPER,
Town Hall Passage, Congleton,
Attorney for the said W. P. Holland.

The plaint was entered on the 7th Oct. last, and the summons was issued on the same day. The action was tried before Joseph St. John Yates, Esq., Judge of the said court, and a jury, on the 26th Oct. last.

It was in evidence for the plaintiff:

1. That the bridge over the Dean Hill Brook, in the particulars mentioned, was a public footbridge, with a handrail for the protection of passengers, and that it was repairable by the defendants as part of the public highway, under the provisions of 25 & 26 Vict. c. 61.

2. That at some time before the date of the accident hereinafter described, the topmost bar of the said handrail, which had become rotten and unsafe from natural decay, fell away from the post to which it had been fastened, and dropped into the brook.

3. That late in the evening of the 8th April last (it being very dark), the plaintiff, who was crossing the said bridge, and did not know that the bar or rail was missing, stretched out his hand to take hold of it, and in so doing lost his balance and fell into the brook, whereby he sustained the injuries in respect of which the action was brought.

4. That on the 25th March next before the day of the accident the surveyor employed by the defendants to take charge of the district was told that the said handrail was rotten and unsafe.

5. That within a few days after the accident the defendants repaired it.

The defendants did not deny that the accident had happened in the manner stated, and they called no witnesses. But their solicitor contended that the action was not maintainable:

1. Because it had not been commenced within the time limited by 5 & 6 Will. 4, c. 50.

2. That the defendants, who were subject to the same responsibilities only as a surveyor appointed under that Act, were not liable in an action founded upon neglect to repair.

The counsel for the plaintiff replied:

1. That the 5 & 6 Will. 4, c. 50, had no application.

2. That in having failed to repair the handrail after notice of its rotten and dangerous condition, the defendants were guilty of wilful negligence amounting to misfeasance.

The County Court judge held, first, that the 5 & 6 Will. 4, c. 50, and 25 & 26 Vict. c. 61, must be read together, and that the action was too late; secondly, that upon the evidence the action could not be maintained. But to save the expense of a second trial, the said judge consented to take the opinion of the jury upon the following questions:

1. Had the defendants, through their surveyor, on the 25th March 1875 next before the accident notice that the rail of the bridge which afterwards fell into the brook was rotten or unsafe?

2. Did they neglect to repair it within a reasonable time after such notice?

The jury answered both questions in the affirmative, and assessed the damages contingently at 25l.

The said judge directed the verdict to be entered for the defendants, and the plaintiff gave notice of appeal.

The questions for the opinion of the court are:

1. Whether the action was brought in time?

2. Whether upon the evidence it was maintainable?

If the court should answer both questions in the affirmative, the verdict for the defendants was to be set aside, and a verdict entered for the plaintiff with damages 25l.

Otherwise the verdict for the defendants to stand.

Dunn argued for the plaintiff, the appellant.—

The words of the limitation to this action, as the defendants contend, are "That no action or suit shall be commenced against any person for anything done in pursuance of or under the authority of this Act until twenty-one days' notice has been given thereof in writing to the justice, surveyor, or person against whom such action is intended to be brought, nor after sufficient satisfaction, or tender of satisfaction, has been made to the party aggrieved, nor after three calendar months next after the fact committed for which such action or suit shall be so brought" (5 & 6 Will. 4, c. 50, s. 109). Amongst the consequences of formation of a highway district (25 & 26 Vict. c. 61, s. 11), "All such powers, rights, duties, liabilities, capacities and incapacities (except the power of making, assessing, and levying highway rates) as are vested in or attached to, or would but for this Act have become vested in or attached to, any surveyor or surveyors of any parish forming part of the district, shall vest in and attach to the highway board." The question arises whether what was proved in this case was "anything done in pursuance of or under the authority of" these Acts. If it was not so, there was no three months' limitation, and on the first point the plaintiff was right. The first case on the subject seems to be *Umphelby v. McLean* (1 B. & Ald. 42), which was decided on the words of 43 Geo. 3, c. 92, s. 70,

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that no writ or process shall be sued out for anything done in pursuance of that Act, till after a month's notice. The action was for an excessive distress for arrears of taxes, and it was held that the defendants were not entitled to notice. The same point was raised but not decided in *Partridge v. Elkington* (L. Rep. 6 Q.B. 82). Mere acts of omission are not things done in pursuance of or under the authority of a statute. There are two cases which at first sight do not seem to agree with this distinction, but it must be remembered that they were both decided upon sect. 139 of the Public Health Act 1848 (11 & 12 Vict. c. 63), the words of which are that no writ shall be sued out against a local board "for anything done, or intended to be done, under the provisions of this Act," until the expiration of a month after notice in writing. In *Wilson v. Mayor of Halifax* (L. Rep. 3 Ex. 114) the defendants left a goit unfenced, into which the plaintiff's husband fell, and was killed. In *Jolliffe v. Wallasey Local Board* (L. Rep. 9 C. P. 62) the defendants were guilty of negligence in not placing a buoy of sufficient size and dimensions over an anchor which caused the plaintiff's damage, to resist the current of the tides, and to indicate the position of the anchor below. These were both held to be acts intended to be done under the provisions of the Public Health Act, and the defendants were therefore entitled to notice of action: but it was not said that acts of omission of that kind would come within such words as those used in this Highway Act.

Before proceeding to the second question reserved by the case the Court called upon the other side to argue on the first question.

Coxon for the defendants.—The two last cases cited are sufficient authority that this action should have been brought within three months after the fact committed, according to the Highway Act 1835, s. 109. By the 17th section of the subsequent Highway Act 1862, "The highway board shall maintain in good repair the highways within their district, and shall, subject to the provisions of this Act, as respects the highways in each parish within their district, perform the same duties, have the same powers, and be liable to the same legal proceedings as the surveyor of such parish would have performed, had, and been liable to, if this Act had not passed."

Dunn in reply.—The object of the statute was here obtained, for a month's written notice was given before action.

CLARKE, B.—We need not hear any arguments on the second question reserved by the County Court judge, for we are satisfied that he was right on the first. We consider that the case of *Wilson v. Mayor of Halifax* in the year 1868 is an authority we are not entitled to set aside, and it would be inconvenient to decide this matter so as to throw the law which has been so long established into confusion. The only question for us is whether that authority is in point so as to be applicable to this case. It was decided upon the words "for anything done or intended to be done under the provisions of this Act;" the words upon which this case depends being "for anything done in pursuance of or under the authority of this Act." The distinction suggested is that the latter words do not cover acts of omission which are necessarily included in the former. I cannot myself, however, see any distinction between them. This is a very useful legislation for

the protection of public bodies by compelling actions to be brought within reasonable time, and by giving them an opportunity for tendering amends. We are not anxious to limit its effect, and we feel that *Wilson v. Mayor of Halifax* is in point. The judgment will, therefore, be affirmed.

GROVE, J.—I am of the same opinion. There are two objects in thus protecting public bodies: one that there may be no delay, the other that the defendants may tender amends before action brought. These reasons apply equally to acts of omission or commission, and I do not see why they should be distinguished. Moreover, the cases of *Wilson v. Mayor of Halifax* and *Jolliffe v. Wallasey Local Board* are, to my mind, fully in point. The words there are "anything done or intended to be done;" but nothing has been said or cited to make the decision distinguishable from what it should be upon the words in the Highway Act. In both the cases mentioned the acts done were acts of omission; I think this statute applies equally, whatever be the nature of the thing done, and we are also bound by these authorities.

FIELD, J.—I am of the same opinion. The question shortly is whether the omission to repair this railing can be properly said to be anything done in pursuance of or under the authority of these Highway Acts. I fully concur in the desirability of not limiting the effect of these statutory protections of public bodies. In *Wilson v. Mayor of Halifax* there was an omission like this, but the Exchequer held that the result was the same as if the defendants had actively done something in pursuance of the Act. We are bound by that decision, and I do not desire to dissent from it. There would be great confusion if we distinguished the present case from that.

Judgment for respondents, with costs.

Solicitors for plaintiff, the appellant, J. Burton, for T. Cooper, Congleton.

Solicitors for defendants, the respondents, C. R. and H. Cuff.

Jan. 29 and Feb. 3, 1876.

MORANT (app.) v. TAYLOR (resp.)

Order for payment of money or otherwise—Demolition of building—11 & 12 Vict. c. 43, ss. 1, 11, 17, 32 & 33 Vict. c. 51, s. 22.

By the Leeds Improvement Act 1869, sect. 22, in case any building be made or begun without, or not in accordance with, the consent of the corporation, a justice may, upon complaint and summons, make an order in writing on the owner, occupier, or builder summoned, directing the demolition of the building.

Held, upon a case stated, that this was an "order for the payment of money or otherwise," within the application of 11 & 12 Vict. c. 43 (Jervis's Act), and that the complaint must, under the 11th section, be made within six calendar months from the time when the matter of such complaint arose.

AFTER the hearing and determination by W. Bruce, Esq., stipendiary magistrate for the Borough of Leeds, of a complaint made on the 22nd Oct. 1875, by Alfred William Morant, engineer and surveyor of the borough of Leeds acting as agent for and on behalf of the mayor, aldermen, and burgesses of the borough of Leeds, the said magistrate having dismissed the said

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complaint, the said Alfred William Morant being dissatisfied with the said determination as being erroneous in point of law, did, within three days after the said hearing and determination, apply to the said magistrate in writing to state and sign a case setting forth the facts and grounds of such determination for the opinion thereon of the Queen's Bench division of Her Majesty's High Court of Justice, and in pursuance thereof the said magistrate stated and signed the following case.

On the 22nd Oct. 1875, the said Alfred William Morant, the engineer and surveyor of the borough of Leeds, acting as agent for and on behalf of the mayor, aldermen, and burgesses, made a complaint against the said Henry Taylor of his having made a building contrary to a certain requirement by the corporation of the borough, and thereby infringed the provisions of sect. 22 of the Leeds Improvement Act 1869.

Sect. 22 of "The Leeds Improvement Act 1869," is in the following terms:—

In case any building be made or begun without, or not in accordance with, the consent of the corporation, where their consent is by this or any of the recited Acts required, or contrary to any requirement by the corporation, made in accordance with the provisions of such Acts, the corporation may make complaint thereof before a justice, who shall thereupon issue a summons requiring the owner or occupier of the premises, or the builder or person engaged on the work, to appear at a place and time stated in the summons, to answer the complaint; and if at the time and place appointed in the summons, and whether the persons summoned appear or not, the complaint be proved to the satisfaction of the justice before whom it is heard, the justice shall make an order in writing on the person summoned directing the demolition, within such time as the justice deems reasonable, of the house, building, erection, or addition, or so much thereof as is made otherwise than in accordance with the consent or contrary to the requirement of the corporation, and also directing payment of the costs up to and including the costs of the order.

The said Henry Taylor was the owner of three houses, which were built contrary to a requirement by the corporation, duly made in accordance with the provisions (of the Acts referred to) in sect. 22 of "The Leeds Improvement Act 1869."

The said houses were completed more than six months before the 22nd Oct. 1875, the day on which the said Alfred William Morant made his complaint; and having been so completed, remained in the same state down to and including the day of the said complaint.

The said magistrate dismissed the complaint on the ground that such complaint came within 11 & 12 Vict. c. 43, s. 1., and therefore under sect. 11 of that statute, ought to have been laid within six calendar months of the day when the building of the said houses was completed.

The question upon which the opinion of the Court was desired was whether the said magistrate was right in dismissing the complaint upon the ground above stated. If he was right his order was to stand; if he was wrong, then he respectfully desired that the case might be remitted to him in order that he might further hear and determine the matter of the complaint.

Maule, Q.C., with him *Tennant*, argued for the appellant, the engineer of the corporation.—By the 1st section of Jervis's Act 1848 (11 & 12 Vict. c. 43), the proceedings before justices, as provided by that Act, are to be applied to all cases where an information shall be laid of any offence or act for which the person committing it is liable by law to

a summary conviction for the same, "and also in all cases where a complaint shall be made to any such justice or justices upon which he or they have, or shall have, authority by law to make any order for the payment of money or otherwise." The latter cases are described by the same words in sect. 8: "That in all cases of complaints upon which a justice or justices of the peace may make an order for the payment of money or otherwise, it shall not be necessary that such complaint shall be in writing." Then by sect. 11: "That in all cases where no time is already, or shall hereafter be specially limited for making any such complaint, or laying any such information in the Act or Acts of Parliament relating to each particular case, such complaint shall be made, and such information shall be laid, within six calendar months from the time when the matter of such complaint or information respectively arose." Sect. 17 directs that the forms of convictions and orders contained in the schedule shall be used when no other form is given in the Statute authorising a summary remedy. There are only three forms of order (K 1) (K 2) (K 3)—the first two for payment of money; the last is headed "Order for any other matter where the disobeying of it is punishable with imprisonment." Such an order as this, therefore, is not contemplated by the Act at all. The Court of Queen's Bench held, in *Reg. v. Hannay* (44 L. J. 27, M. C.), that the adjudication of two justices under sect. 22 of the Lands Clauses Act is not an order for the payment of money or otherwise within Jervis's Act; and the judges expressed doubts whether *Re Edmundson* (17 Q. B. 67), was right in deciding that a settlement of the amount of compensation under sect. 24 of the same Act was subject to the six months' limitation. *The Vestry of Bermondsey v. Johnson* (L. Rep. 8 C. P. 441) was decided upon a clause of limitation of the Metropolis Amendment Act 1862, sect. 107, which enacts "that no person shall be liable for the payment of any penalty or forfeiture under" that Act, "unless the complaint respecting such offence have been made before such justice within six months next after the commission or discovery of such offence." The summons charged the defendant with unlawfully erecting a certain building beyond the general line of buildings in the street, contrary to sect. 75 of that Act. The court held that the limitation did not apply to an order for the demolition of such a building, but only to the payment of any penalty or forfeiture. [FIELD, J.—Sect. 11 of Jervis's Act was not referred to, and perhaps it would not be applicable where an express limitation is given by the statute.] The Judges of the Common Pleas treated the assumption of Malins, V.C., in *Brutton v. St. George, Hanover-square* (L. Rep. 13 Eq. 339) as a mere dictum not necessary for his decision. The issue of a warrant of distress for recovery of unpaid rates has been held not to be an order within Jervis's Act: (*Sweetman v. Guest*, L. Rep. 3 Q. B. 262).

Forbes for respondent. — The case of *Reg. v. Hannay* is beside this case, because it was no order at all. [CLEASBY, B.—So it has struck me.] In the *Vestry of Bermondsey v. Johnson* there was no counsel for the respondent, and attention was not called to this 11th section of Jervis's Act. Unless the limitation of that section applies to this order, there can be none whatever to an order

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of demolition under this local Act. It would be a breach of a public statute, and no prescription could save the owner of a building made without or not in accordance with the consent of the Leeds corporation. With the interpretation contended for by the other side, no force whatever can be given to the words "or otherwise." They are not merely *et cetera*, which would refer to matters only of the same kind as those previously expressed, but they have no limit, and include all orders, other than those for payment, which justices can make. It is admitted that if the local Act provided imprisonment in default of obedience to this order of demolition, it would be included under (K. 3) as an order within Jervis's Act; but that admission destroys the argument of *ejusdem generis* upon which the appellant has relied. The words of the latter part of section 17 do not limit the application of the Act to those orders for which forms are given in the schedule.

Maule, Q.C. in reply.—It is no argument that hardship would be the result of the opposite contention.

CLARKE, B.—We are all of opinion that the magistrate was right in dismissing this summons, on the ground that the complaint was not made within the time required by the 11th section of Jervis's Act. Sect. 22 of the Leeds Improvement Act 1869, provides that, in certain cases, if any building be made or begun without consent, the corporation may make complaint thereof, and upon a summons a justice may make an order in writing on the person summoned, directing the demolition of the building. The question for us is whether an order made in pursuance of this section would be an order within the application of 11 & 12 Vict. c. 43, so that the complaint, upon which to base it, must be made within six months from the time when the matter of such complaint arose, as provided by the 11th section of that Act. I have been greatly impressed with the decision of Malins, V.C., in *Brutton v. St. George, Hanover-square* (L. Rep. 13 Eq. 339), with respect to a similar order of demolition. There the words describing the orders to which the limitation was applicable are not so extensive as the words in Jervis's Act: "No person shall be liable for the payment of any penalty or forfeiture under the recited Acts or this Act, or any bye-law made by virtue thereof, for any offence made cognisable before a justice, unless the complaint respecting such offence shall have been made before such justice within six months next after the commission or discovery of such offence." The Vice-Chancellor does not seem to have doubted that the order for demolition came within that provision, and if he was right, such an order would be clearly subject to Jervis's Act. It is better, however, to decide upon the terms of the statute with regard to the subject matter before us. The 1st section relates to convictions, and also to all cases where a complaint shall be made upon which the justice has or shall have authority by law to make any order for the payment of money or otherwise. Now it is said that this means only an order *ejusdem generis* with one for payment of money, and cannot apply to an order like this for the demolition of a building. But that is not so. The words themselves do not imply such limitation, and it appears from the 17th section that the Act contemplated other orders than for payment only. That section distinguishes between the forms of convictions and

orders, and amongst others adopts a form in the schedule (K. 3) which is not an order for payment of money. Nothing could be more reasonable than to require a complaint to be made within six months where so extensive a power is given to a justice, and I am satisfied that Jervis's Act was intended to apply to all such orders as that which the magistrate here refused to make. His judgment will be affirmed.

GROVE, J.—I am of the same opinion. Certainly, on first looking at the words alone, without considering the rest of the Act, I was inclined to interpret the expression "any order for the payment of money or otherwise" by the rule of construction known as *ejusdem generis*. But looking at the scope of the whole statute I do not see any difficulty in holding that an order for the demolition of a building should come within that description. The preamble mentions summary convictions and orders, and makes no exception. The 17th section gives forms, as contained in the schedule, for different kinds of convictions and orders, and contemplates no kind of order to which it does not relate. So sect. 18 gives justices power to allow costs in all cases of summary convictions or of orders. Further, the schedule actually contains a form of order for any other matter than payment of money; and although that particular form is applicable only when the disobeying of the order is punishable with imprisonment, yet it is sufficient to show that orders under that Act are not limited to orders for the payment of money. I think the magistrate was right.

FIELD, J.—I also am of opinion that the magistrate was right. The question before us is whether a complaint under sect. 22 of the Leeds Improvement Act, is to be made in six months as required by sect. 11 of Jervis's Act. It must be so if the order applied for is, in the words of the 1st section, an order for the payment of money or otherwise. Upon this arises the contention whether the rule of construction *ejusdem generis* is to prevail in interpreting the words "or otherwise." I think not, and not only for the reasons which have been given, but I rely also much upon the argument *a convenienti*. It is highly desirable that there should be some limit to the time in which such an order is possible, and unless the 11th section of Jervis's Act applies no limitation of any kind exists.

Judgment for respondent with costs.

In answer to an application by the appellant, leave to appeal was granted on the ground of the general importance of the question; notice to be given to the respondent within a week.

Solicitors for appellant, *Simpson and Co.*, for *O. A. Curwood*, Town Clerk, Leeds.

Solicitors for respondent *Ridsdale, Craddock, and Ridsdale*.

Saturday, Feb. 12, 1876.

BEVAN (app.) v. HOPKINSON (resp.)

Poaching—Ground used for keeping rabbits—9 Geo. 4, c. 69, s. 1—24 & 25 Vict. c. 96, s. 27.

Appellant was caught with rabbits at night in a field forming part of a farm over which the respondent had the right of sporting.

The justices found as a fact that this field was not a warren or ground used for the breeding or keep-

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ing of hares or rabbits, within the 17th section of the Larceny Act 1856, and convicted the appellant of night poaching under 9 Geo. 4, c. 69, s. 1.

Held, upon a case stated, that it was a question of fact whether a place was within this description; and that upon this finding the conviction was right.

THIS was a case stated by two justices of the peace in and for the county of Brecon, under the statute 20 & 21 Vict. c. 43, on the application in writing by the appellant, who was dissatisfied with the said justices' determination, upon the question of law which arose before them as hereinafter stated on the 11th Dec. 1875, at Brecon, in the said county.

Upon the hearing of a certain information preferred by the respondent against the appellant under sect. 1 of the Act 9 Geo. 4, c. 69, it was charged that he, the said appellant on the 29th Sept. 1875, about the hour of three in the morning of the same day, at the parish of St. David Upper, in the said county of Brecon, unlawfully did take five rabbits in a certain close of land in the occupation of John Lloyd, Esq., there situate; the said justices convicted the said appellant of the said offence, and adjudged him for his said offence to be imprisoned in the common gaol at Brecon, in the said county of Brecon, and there kept to hard labour for the period of three calendar months; and at the expiration of such period to find sureties by recognizances, himself in the sum of 10*l.* and two sureties in the sum of 5*l.* each, or one surety in the sum of 10*l.*, conditioned that he, the said appellant, should not so offend again for the space of one year next following; and they further adjudged that the said appellant, in case he should not find such sureties as aforesaid, should be further imprisoned in the said common gaol, and there kept to hard labour for the space of six calendar months, unless such sureties should be sooner found.

The following facts were either proved before the said justices or admitted by both parties.

The respondent, Charles Hopkinson, a keeper in the employ of Major Thomas Conway Lloyd, of Dinas, while watching, in company with another man, about three o'clock in the morning of the 29th Sept. 1875, heard the squeal of rabbits, and upon going in the direction from whence the sound came, he discovered Wm. Bevan, the appellant (and another person named Thomas Davies, who was convicted on the 2nd Oct. last) coming towards them with a dog, some nets, a sack, and a bundle of five rabbits, and a bludgeon each, there being also seven other rabbits lying dead in the direction the appellant and his companion were going.

The field whence the squealing of the rabbits proceeded, and where the appellant was found, is not a warren or ground used for the breeding or keeping of hares or rabbits, but is part of a farm on the Dinas estate, over which Major Lloyd has the right of sporting.

The respondent, on coming up to the appellant and his companion, called upon them to surrender, which they declined to do, and threatened to knock the respondents' brains out if they approached them.

The appellant and his companion then retreated, and the respondent and his fellow watcher followed them and succeeded in capturing the appellant's

companion; but the appellant, after a desperate struggle with the respondent, effected his escape, leaving his nets, the rabbits, and bludgeon behind him.

The appellant absconded, and a warrant was issued for his apprehension, and he afterwards surrendered himself on the 10th Dec.

On the hearing of the case no previous conviction was proved or alleged against the appellant.

On the part of the appellant it was contended that the statute of 9 Geo. 4, c. 69, s. 1 was repealed by 24 & 25 Vict. c. 96, s. 17; and that, therefore, he could not be summarily convicted, but that he should be committed for trial at the sessions.

On the part of the respondent it was contended that 24 & 25 Vict. c. 96, s. 17, was confined to offences committed in warrens or grounds used for the breeding of hares or rabbits, and that, therefore, it did not repeal 9 Geo. 4, c. 69, s. 1, which referred to offences committed on any land other than warrens, &c.

The said justices, however, being of opinion that the 24 & 25 Vict. c. 96, s. 17, referred to warrens or ground used expressly for the breeding of hares or rabbits, and that it did not repeal 9 Geo. 4, c. 69, s. 1, but merely limited its application so far as warrens or ground used expressly for the breeding of hares or rabbits are concerned, gave their determination against the appellant in the manner before stated.

The question of law upon which this case is stated for the opinion of the court therefore is whether 9 Geo. 4, c. 69, s. 1, is repealed by 24 & 25 Vict. c. 96, s. 17, as far as land not being a warren or ground used for the purpose of breeding hares or rabbits is concerned.

J. Paterson argued for the appellant.—By the 1st section of 9 Geo. 4, c. 69, it is enacted that "if any person shall, after the passing of this Act, by night, unlawfully take or destroy any game or rabbits in any land, whether open or inclosed, or shall, by night, unlawfully enter or be in any land, whether open or enclosed, with any gun, net, engine, or other instrument, for the purpose of taking or destroying game, such offender shall, upon conviction thereof, before two justices of the peace, be committed for the first offence to the common gaol or house of correction, for any period not exceeding three calendar months, there to be kept to hard labour, and at the expiration of such period shall find sureties by recognisance, or in Scotland by bond of caution, himself in 10*l.*, and two sureties in 5*l.* each, or one surety in 10*l.*, for his not so offending again for the space of one year next following." This provision must be impliedly repealed if the enactment contained in the Larceny Act 1851 (24 & 25 Vict. c. 96), sect. 17 of which covers the same offences. "Whosoever shall unlawfully and wilfully, between the expiration of the first hour after sunset, and the beginning of the last hour before sunrise, take or kill any hare or rabbit in any warren or ground lawfully used for the breeding or keeping of hares or rabbits, whether the same be inclosed or not, shall be guilty of a misdemeanor." It cannot be said that this field was not ground lawfully used for the breeding or keeping of hares or rabbits; the justices have decided that this section of the Larceny Act applies only to warrens on ground used expressly for the breeding of hares or rabbits; but the word "expressly" does not occur in the section, and warrens do not exist for hares. If the

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word "ground" has any signification, it must be the same as "land" mentioned in the earlier Act, that is wherever rabbits or hares can be found. [CLEASBY, B.—The word "ground" must mean something *ejusdem generis* with "warrens," as for instance, places where hares are preserved. The fact of this provision being contained in a Larceny Act confirms the view that the section can relate only to a species of property.] A field may surely be included in "any warren or ground lawfully used for the breeding or keeping of hares or rabbits, whether the same be enclosed or not."

Mellor, Q.C., appeared for the respondent, but was not heard.

CLEASBY, B.—I have very little doubt that this man must have been acquitted, if he had been indicted under sect. 17 of the Larceny Act. It must, however, be a question of fact in each case how far the ground upon which poachers are caught is used for breeding or keeping hares or rabbits. Here the justices have found conclusively as a fact that this field is not a warren or ground used for this purpose; and that being so, no question of law arises. Whether an open field like this was intended by the Legislature to be included in this section we need not consider, but it is a fair inference from the enactment forming part of a larceny Act that it relates only to what is *sub modo* property. This may be some justification for the finding of fact that this place was not a warren or ground treated of by the 17th section. The appeal must be dismissed.

GROVE, J.—I am of the same opinion. The statement in the case is conclusive, but if it had not been for the express finding of fact against the appellant, I should have found great difficulty in determining that a field, in a farm on which there are rabbits and hares, is not ground used for breeding or keeping rabbits.

FIELD, J.—I am of the same opinion.

Judgment for respondent.

Solicitors for appellant, Heath and Parker; for W. Games, Brecon.

Solicitor for respondent, Field, Roscoe, and Co.

Saturday, Feb. 12, 1876.

GREGSON v. WATSON.

Employers and Workmen Act 1875 (38 & 39 Vict. c. 90) s. 4—Weekly hiring—Forfeiture on the ground of absence—Claim for wages due.

Plaintiff, a factory winder, was paid every Saturday for the number of sets she had wound off during the week ending on the preceding Wednesday; one of the rules of the defendants' factory, in which she worked, was that fourteen days' notice in writing was required previous to leaving their employment, such notice to be given on a Thursday; and all persons leaving without notice would forfeit the whole of the wages to which they would otherwise have been entitled, and also render themselves liable to be proceeded against according to law.

The plaintiff earned 3s. 7d. on the first two days of one week of her employment, was absent with leave on the Saturday, did not return, and wholly left the defendant's service, without leave or notice, on Monday. In an action for 3s. 7d. earned, the County Court judge held that the plaintiff's was a weekly hiring, and that, although the defendant's

damage by reason of plaintiff's absence was only 3s., the plaintiff could not recover anything under sect. 11 of the Employers and Workmen Act 1875. Held, upon appeal that, notwithstanding the fortnight's notice required, the facts justified the finding that the service was weekly; that the plaintiff had no claim for wages or other sum due for work done; and that the County Court Judge was right.

APPEAL from the County Court of Lancashire, holden at Blackburn by W. A. Hulton, Esq., judge thereof;

This was an action brought by the plaintiff against the defendants to recover certain wages alleged to be due to the plaintiff under the following circumstances.

The defendants are the owners of a cotton factory at Oswaldtwistle, and the plaintiff, who was a woman subject to the provisions of the Factory Acts, 1833 to 1874, was employed by and worked for the defendants in the said factory as a winder.

The wages of winders in the said factory generally are regulated by the number of sets, that is to say, of cans of twist which each winder has wound off during the week, beginning on the Thursday morning in the one week and ending on the Wednesday night in the succeeding week. Each set has an ascertained weight, and is of a known value, and the weight is booked by the warehouseman both in the "tally" book of the winder, and in the books of the employer on the delivery of each set. The amount of wages is then ascertained on the Wednesday night in each week, and is paid on the Saturday following.

The plaintiff worked under certain rules, and they formed part of the contract of hiring and service, and employment between the plaintiff and defendant.

On Wednesday, the 10th Nov. last, the plaintiff's wages were duly ascertained, and were paid to her on the Saturday following.

On Thursday the 11th Nov. the plaintiff began another week of her service and employment. She worked as usual during that day, and during Friday, the 12th Nov., and it was admitted that the value of the work done by her on those days amounted to the sum of 3s. 7d.

On Saturday the 13th Nov. she was absent from her work, but the plaintiff had obtained from the defendants leave of absence for that day. On Monday, the 15th Nov. the plaintiff did not return to her employment, and wholly left the service of the defendants, and on Tuesday, the 16th, the defendants obtained the service of another winder in the stead and place of the plaintiff.

The plaintiff demanded payment of her wages, and it was admitted that the sum of 3s. 7d. was the value of the work done by the plaintiff on the 11th and 12th Nov., but the defendants refused to pay, and this action has been brought to recover it.

It was contended on behalf of the plaintiff that the case came within the meaning of the statute 38 & 39 Vict. c. 90 (The Employers and Workmen Act, 1875) s. 11, by which it is enacted that, "In the case of a child, young person, or woman, subject to the provisions of the Factory Acts, 1833 to 1874, any forfeiture on the ground of absence or leaving work, shall not be deducted from or set off against a claim for wages or other sum due for work done before such absence or leaving work, except to the amount of the damage (if any) which

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the employer may have sustained by reason of such absence or leaving work."

It was contended on behalf of the plaintiff that it was the intention of the Legislature to prevent the wages of women and children from being forfeited; and that the said Act was intended to supersede any rules that might be made by a master.

The said County Court judge dissented from that argument, and he found, under the circumstances and facts above stated,—

That the engagement and hiring of the plaintiff was a weekly hiring and engagement, beginning on the Thursday morning in each week, and ending on the Wednesday night in the succeeding week.

That, by the default of the plaintiff, the hiring of the plaintiff on the 11th Nov. last was never completed, and that any sum of money for the value of the work done by her on the 11th and 12th days of Nov., was not payable to the plaintiff by reason of her leaving her said employment on Monday the 15th Nov., and not completing her said term of service.

That the said enactment did not apply to the present case, as the defendants claimed neither a deduction nor a set off against a claim for wages or other sum due for work done, as no sum was shown to have been due to the plaintiff; and that the forfeiture spoken of in the statute was for a temporary absence or leaving work, and did not apply to a total rescission of contract by leaving the same before the term of service was completed.

The said County Court Judge, therefore, directed the verdict to be entered for the defendants.

But at the request of the plaintiff, and thinking it reasonable and proper that the same should be allowed, he gave permission to the plaintiff to appeal against his said decision.

And he assessed the damages which the employers, the defendants, aforesaid, had sustained by reason of the plaintiff's absence and leaving work as aforesaid, that is to say, from the Monday morning until the Tuesday following, when the defendants obtained the assistance of another winder in the stead of the plaintiff, at the sum of 3s.

Notice of appeal was given on the grounds following:

1. That the plaintiff, being paid by piece work, her wages accrued on the completion of each set, and at the time she left, 3s. 7d. was due to her.
2. That the engagement by piecework did not constitute a weekly hiring.
3. That the operation of the statute rendered any agreement between women and their masters inoperative, the effect of statute 38 & 39 Vict. c. 90, s. 11, being to prevent masters making deductions for wages earned by women and children.

The rules before mentioned are as follows:

Rules to be observed by all persons employed in this mill.

First, fourteen days' notice in writing is required from every person working in this establishment previous to leaving our employ (such notice to be given on a Thursday), and fourteen days' notice will be given by us to all persons before discharging them (except as stated herein, after); and all persons leaving our employment without serving the above notice will forfeit the whole of the wages to which they would otherwise have been entitled,

and also render themselves liable to be proceeded against according to law.

Secondly, any person before absenting himself or herself from work (with the intention of returning) must obtain the consent of the overlooker for that purpose, and any person who may be prevented from attending his or her work through sickness must immediately give notice thereof to his or her overlooker; otherwise all wages due shall be forfeited and irrecoverable, and such person shall be liable to dismissal without notice.

Thirdly, any person guilty of neglect, damaging, or spoiling work, disorderly conduct, indecent or improper behaviour, shall be liable to be discharged without notice.

Fourthly, any person neglecting to clean the machinery on which he or she is employed, or refusing to clean the same when requested by the overlooker, shall be liable to be discharged without notice.

Fifthly, a fair abatement shall be made for bad or inferior workmanship, as also for the value of any materials entrusted to any person, which shall not be properly accounted for.

Sixthly, nothing herein contained shall affect our legal rights as employers.

The opinion of the court is therefore requested, Whether in point of law the judgment for the defendants is correct. If so the judgment is to stand.

If not, and the verdict ought to have been for the plaintiff, the judgment for the defendants to be set aside, and a verdict to be entered for the sum of 7d.

J. Edwards, Q.C. (with him R. S. Wright) argued for plaintiff, the appellant. The County Court Judge has reserved for the consideration of this court all the points upon which he has given a decision. [FIELD, J.—We cannot review his findings of fact, one of which is that the plaintiff's was a weekly hiring.] A fortnight's notice is inconsistent with such a hiring, and the only possible contract under the defendant's rules is for piecework. In *Rea v. Great Yarmouth* (5 M. & S. 114) a hiring at weekly wages, either party to be at liberty to part at a month's notice, was held to be a yearly hiring; although the case stated that the pauper let himself by the week. But even assuming the service to be by the week, this is just such a case as the Legislature intended to provide for by this 11th section. In *Taylor v. Carr* (30 L. J. 201, M. C.) by one of the rules of a cotton mill, any person absenting himself on account of sickness or any other cause, was immediately to give notice to the overlooker; in default thereof all wages then earned were to be forfeited. A weaver in the mill, in the middle of the day, asked the overlooker for leave of absence for half a day, promising to return to work the next morning at six. The weaver did not return the next day till half past one in the afternoon; and it was held that she did not forfeit her wages under this rule, for she could not be said to be absent without notice merely by continuing her absence longer than the period which she had mentioned. Upon the authority of that case, the County Court Judge ought to have held that the second rule did not apply; but in any case this comes within the 11th section of the Employers and Workmen Act 1875. [CLEASBY, B.—This was no claim for wages or other sum due to the plaintiff.]

Channell appeared for the defendant, but was not heard.

CLEASBY, B.—It is impossible to say that there was not in this case ample evidence upon which to base the County Court judge's findings of fact.

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The number of sets worked by the winders merely furnish a mode of calculating the amount of wages to be paid each week; their service and employment is found, as a fact, to be weekly. The time required for notice does not necessarily fix the period of service, and we cannot say that the judge was wrong in determining that the plaintiff's was a weekly hiring. This being so, we have to consider whether, under the circumstances, there is any debt due to the plaintiff from the defendant. Since this court has been sitting, we have had a similar point before us (*Saunders v. Whittle*, 33 L.T. Rep. N. S. 816); the authorities are clear that if a servant voluntarily leaves his service without notice, he cannot recover for the work done during the broken period of his hiring. There were in this case no wages due to the plaintiff until she had completed her week from the Thursday morning before she absented herself, and she had therefore no claim, in the words of the 11th section of this Statute, "for wages or other sum due for work done, before such absence or leaving work."

GROVE and FIELD, JJ. concurred.

Judgment for defendant affirmed.

Solicitors for plaintiff, *Shaw and Tremellen*, for *Ainsworth and Son*, Blackburn.

Solicitors for defendant, *Milne, Riddle, and Mellor*.

Feb. 5 and 11, 1876.

MAYOR, &C., OF WORCESTER, v. THE ASSESSMENT COMMITTEE OF THE DROITWICH UNION.

Poor rate—Local board of health—Rateable value of waterworks—Statutory limitation charges on. The restrictions imposed by law on a public body as to the profits derivable from the occupation of waterworks and other property of that description is to be regarded in considering the profitable occupation of that body.

The Local Board of Health of W. were the owners and occupiers of certain waterworks in the parish of C., and supplied the inhabitants of W. with water at a charge considerably less than they were entitled to exact under the provisions of the Public Health Act 1848. The respondents, within whose union the parish of C. was situated, rated them as though they had been a company who occupied the works solely for the purpose of profit, and on a basis far exceeding the profits actually made.

Held, that the rateable occupation was to be measured by the profits actually derived from the occupation, and not by the profits which might be derived by a company occupying the works solely for the purpose of profit.

SPECIAL case for the opinion of the Court of Queen's Bench stated between the parties by consent, and by the order of Blackburn, J., in pursuance of 12 & 13 Vict. c. 45, s. 11.

The facts are as follows:

1. The appellants are the mayor, aldermen, and citizens of the city of Worcester. who being the council of the said city are the Local Board of Health and Urban Sanitary Authority for the said city.

2. The respondents are the assessment committee of the Droitwich union in which the whole of the parish of Claines is situated, but which parish is partly in the city and partly in the county of Worcester.

3. In the year 1849 the Public Health Act 1848 (Statute 11 & 12 Vict. c. 63), was applied to the city of Worcester, and the appellants became the Local Board of Health for the said city.

4. In 1856 the appellants, in pursuance of the powers conferred by the before-mentioned statute (which statute may be referred to by either party as part of the case), and for the purpose of supplying the sanitary requirements of the said city purchased certain land in that part of the parish of Claines which is situated within the municipal boundary of the city of Worcester but which forms part of the Droitwich Poor Law Union, and is for poor law purposes distinct and separate from the said city of Worcester.

5. On the land thus purchased, consisting of 2a. 1r. 14p. at Barbourne, and 1a. 0r. 33p. at Rainbow Hill, in the said parish, the appellants erected waterworks and a reservoir, which, with certain mains and pipes extending throughout the said city of Worcester for the supply of water to the inhabitants of the said city of Worcester cost 30,000*l.* (including 2076*l.* the price of the said land).

6. On 2nd March 1858 the appellants duly fixed a rate of 4*d.* in the pound per annum on the net annual value of the dwelling houses and premises supplied with water for domestic use, cleanliness, and drainage, and an additional charge for water used for trade and other special purposes, and also a certain scale for water supplied by meter. In fixing the above mentioned rate the appellants took into consideration, not so much the profit to be made out of the water as a commercial speculation, as its value as a sanitary agent in preserving the health of the said city, and the necessity of bringing the supply within the reach of the poorest class of inhabitants, and in order to induce the inhabitants to discontinue their private sources of supply, and they accordingly fixed a price which has left but little profit above the actual cost of supply, but which has effected the object they had in view by promoting the general use of the water throughout the city.

7. The price which the appellants actually charge for household supply is only 4*d.* in the pound per annum upon the nett annual value, and for houses the nett annual value of which does not exceed 8*l.* per annum they only charge two-thirds of that amount, and when the rent of the houses includes the parochial rates (which is almost universally the case in the dwellings of the labouring class) the charge is only one half, or 2*d.* in the pound per annum on the rateable value. Thus a house let at 10*l.* per annum, the rateable value of which would be about 8*l.*, gets an unlimited supply of water for 1*s.* 9*d.* per annum if the tenant pays the rates, and for 1*s.* 4*d.* per annum if the landlord pays them, while a house the rateable value of which is 20*l.* per annum gets all the water required for domestic purposes for 6*s.* 8*d.* per annum, and warehouses, shops, and offices of the same rateable value at 3*s.* 4*d.* per annum.

8. The appellants have also a scale of charges for water supplied (not by meter) for trade purposes, e.g., to fishmongers, 10*s.* per annum; greengrocers, 4*s.* per annum; livery stables, 1*s.* per annum for each stall; washerwomen, 4*s.* per annum.

9. The charges for supply by meter range from 3*d.* per 1000 gallons for the largest quantities, and going up to 7*d.* per 1000 gallons when the supply is less than 20,000 gallons per quarter, and this is

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the maximum charge. The above charges are to be taken as below those that would be charged by the appellants if they were an ordinary trading body.

10. In 1866 the existing waterworks proving insufficient, the appellants purchased additional land, consisting of 5a. 1r. 26p., at Barbourne, in the said parish of Claines; and between the years 1867 and 1871 expended about 18,000*l.* (including about 2300*l.* paid for such additional land) in enlarging the then existing works. The said further sum of 18,000*l.* and the former sum of 30,000*l.* were raised by mortgage of the general district rates of the said city of Worcester, repayable by annual instalments, extending over thirty years. The interest and instalments of principal payable in the year ending 31st Aug. 1873, amounted to 2976*l.* Of the said sum of 48,000*l.* the sum of 37,250*l.* or thereabouts has been expended in the said parish of Claines.

11. In 1869, whilst the extension of the said works was in progress, a new valuation list for the parish of Claines was approved by the assessment committee of the Droitwich union.

12. On 13th June 1873, a supplemental valuation list for the said parish was approved by the said assessment committee, and the former was cancelled.

13. On 22nd Oct. 1873, a new valuation list, or supplemental valuation list, for the said parish, was approved by the said assessment committee, in which both of the above mentioned assessments were cancelled.

14. On 17th Dec. 1873, notice of objection and appeal against the said valuation list was served on the overseers and on the assessment committee, the principal and main ground of objection being that the appellants were over assessed or rated in respect of the gross estimated rental of the waterworks and land occupied by them in the said parish of Claines.

15. The appellants failed to obtain any relief from the assessment committee, and they have appealed to the Court of Quarter Sessions against the poor rates based on the said valuation list made on 22nd Oct. 1873, their principal grounds of such appeal, and the only one now raised being the same as above stated.

16. By the accounts of the Local Board of Health, which are annually audited, printed, and circulated in accordance with the Municipal Corporation Act, the Public Health Act, 1848, and the Local Government Act, 1858, it appears, as the fact is, that the whole net income derived from the said waterworks during the eight years previous to such appeal, averaged about 651*l.* per annum, without any deduction having been made for rates, taxes, expenses of management, collection of water rate, depreciation of plant and machinery, and other matters which, in making a commercial account, would have been allowed for.

17. The appellants contend that the provisions of the Public Health Act contain the only authority for the appellants to charge a water rate on consumers of water, and that such a rate only is authorised by the statute as might be reasonably expected to be necessary to defray the expenses incident to the water supply, and that they have no authority by the said Act or otherwise to receive any more money from the consumers than is required to pay the above-mentioned expenses. And further, that as the inhabitants have, on the

faith of the existing rates, adopted the water supply of the appellants, and suffered their private resources to fall into disuse without special causes, it would be a breach of good faith to alter such rates. And that therefore the appellants are only rateable for the rent which a tenant from year to year would give for the land subject to the existing rates, and the same restrictions (if any) as those under which the appellants hold it, and not that which a tenant entirely unfettered might give.

18. The respondents, on the other hand, contend that it is right to rate the appellants in respect of the waterworks in Claines (as directed by sect. 1 of the 6 & 7 Will. 4, c. 96) at what a tenant would give with liberty to raise the price of water as he might think proper, so far as not restricted by law; that there were no restrictions by law in the present case, and that the fact that appellants, in fixing their rates, looked only to the benefit of the inhabitants and ratepayers of the city of Worcester only transfers the advantage and benefit of the property from themselves to those inhabitants and ratepayers for whom they are trustees, and that it would be unfair that the inhabitants and ratepayers of the city of Worcester should enjoy this advantage and benefit at the expense of the parish of Claines and the rest of the Droitwich Union.

19. If the court should be of opinion that the contention of the appellants is right, then the said rate is to be amended, and so much of the valuation list as refers to the land and works in question is to be cancelled; and the income that the appellants have actually received from the land and works shall be taken as the fair annual value thereof, and the assessment shall stand at 600*l.* as the gross estimated value of the said land and works, and 540*l.* as the rateable value thereof, as aforesaid.

20. If the court should be of opinion that the contention of the respondents is right, then the assessment of 1750*l.* as the gross estimated value, and 1400*l.* as the rateable value, is to stand.

21. The court is to have power to draw inferences, and to send back the case for further information if required.

Dowdeswell, Q.C. and *Castle*, for the appellants. —It is not denied that these waterworks are liable to be rated; the question is whether the corporation of Worcester, having provided these works out of public moneys, are to be placed in the situation of private speculators, conducting waterworks as they think proper, and solely with a view to their own interest. The appellants are a public body, subject to the provisions of the Public Health Act 1848 (11 & 12 Vict. c. 63) which controls their powers. See sects. 75 to 78, and sects. 89 and 93. It is submitted that where a body has vested in it by Act of Parliament the power of levying rates for certain purposes, and such power is limited, the true principle is that the rate is only to be assessed on profits actually made in carrying out *bonâ fide* the purposes for which such body was elected. [*CLEASBY, B.*—Then if no profits are made there can be no rate. *Field, J.*, referred to *Staley v. Castleton* (33 L. J. 178, M. C.). The case of the *Mayor of Liverpool v. Overseers of Wavertree* (39 Justice of the Peace, 101) is precisely in point. There the corporation of Liverpool held land in the parish of Wavertree, from which they pumped water, which, with water obtained from other sources, was sold over a large

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area, including the parish of Wavertree, at a rate which was only sufficient to cover the whole expenses, the corporation being prohibited by statute from making any profit by the supply of water. The court (Blackburn, J., and Lush, J.) held that they were not liable to be rated as a trading company making a profit, and that the test was what a yearly tenant would give who was subject to the restrictions put upon his use of the land by the statute. In the case of the *Mersey Docks v. Cameron Jones* (11 Clarke, H. L. Rep. 443; 20 C. B., N. S., 56) Lord Chelmsford in the course of his judgment says, "If an occupier shows no benefit of any description from his occupation, it forms no part of the general ability of the parish" (see Clarke, H. L. Rep. 519). They likewise cited

Allison v. Monkwearmouth, 4 Ell. & B. 13; 23 L. J. 177, M. C.;

R. v. London and North-Western Railway Company, L. Rep. 9 Q. B. 134; 29 L. T. Rep. N. S. 910; 43 L. J. 57, M. C.;

Overseers of Sunderland v. Sunderland Union, 18 C. B. 531; 34 L. J., 721, M. C.

H. Matthews, Q.C. and A. B. Jelf, for the respondents, contended that for the purpose of rateability the fact of the appellants being a public body whose powers are in some degree limited by Act of Parliament ought not to be regarded, and that the capacity of the tenement to produce and not the actual produce was the true test of what should be its rateable value. They referred to

R. v. Longwood, 13 Q. B. 116; 18 L. J. 65, M. C.;

R. v. Kentmere, 17 Q. B. 551; 21 L. J. 13, M. C.;

Liverpool v. West Derby, 6 E. & B. 704; 25 L. J. 112, M. C.;

R. v. Manchester, 21 L. J. 160, M. C.;

R. v. Rhymney, L. Rep. 4 Q. B. 276; 10 B. & S. Rep. 198;

Metropolitan Board of Works v. West Ham, 23 L. T. Rep. N. S. 490; L. Rep. 6 Q. B. 193;

R. v. Longwood, 17 Q. B. 871.

Dowdeswell replied.

Our. adv. vult.

The judgment of the court (CLEASBY, B., and FIELD, J.) was delivered on 11th Feb. by Cleasby, B.—The question in this case is not the rateability of a public body in respect of premises occupied by them for public purposes. That question has been for some time settled; and it is not disputed that the appellants, who are the Local Board of Health for Worcester, are liable to be rated in respect of waterworks erected and occupied by them for the purpose of supplying the inhabitants with water. The question is, whether the rateable occupation is to be measured by the profits actually derived from the occupation, or by the profits which might be derived from it by a person or a company who occupied the works solely for the purpose of profit. The fact being that the corporation, having in view the benefit of the inhabitants, have made the scale of rates so low as to leave a profit only of 600*l.* upon the rates actually received, after deducting the expenses connected with the providing of the water, collection, &c., upon which amount they contend they ought to be rated; whereas the respondents contend that a trading company, with the same power of trading, might have realised a net profit of 1400*l.*, in which amount they say the rate ought to have been made. It seems to me the respondents cannot maintain the rate they contend for, and that the restrictions which are put by law on a public body as to the profit derivable from the

occupation of waterworks or gasworks, or other property of that description, must be regarded in considering the profitable occupation of that body. For example, if the local board was prohibited from charging more than 2*d.* a week on a dwelling house, and the waterworks were so complete and the demand so great that a private trading company would be able to charge 6*d.* a house, we should feel, no doubt, whatever, that the local board, whose duty it was not to let to a trading company, but themselves to occupy, could only be rated upon the occupation and the rate which they were compelled to charge. This is not the present case but only an illustration of a restriction put by law upon the value of the occupation, and the effect of it could not be disputed, and indeed was barely disputed in the course of the argument. The hypothetical tenant subject to no restriction cannot represent the real occupier who is by law subject to restrictions; this conclusion would be well supported by *Reg. v. Metropolitan Board of Works* (19 L. T. Rep. N. S. 348; L. Rep. 4 Q. B. 15; 38 L. J. 24, M. C.); and *Metropolitan Board of Works v. Overseers of West Ham* (*ubi sup.*), and is fairly borne out by the opinion of Wightman, J., and Crompton, J., in *R. v. Longwood* (17 Q. B. 871). We were also referred during the argument to another case, *Mayor of Liverpool v. Overseers of Wavertree* (*ubi sup.*), and it may be said to have been there expressly decided. The only question, therefore, is, whether a public body, exercising their powers properly for the benefit of the inhabitants, and making their rates *bonâ fide* for that purpose, and so regulating their conduct by the restriction, as it may be called, of acting in obedience to the Act of Parliament, can be properly represented for the purpose of rating by a hypothetical tenant acting under no such restriction. We are of opinion they cannot; they only acquire the right to the rates by the Act of Parliament, for the purpose of carrying the objects of the Public Health Act properly into effect, and the profitable occupation which they in fact have, is the only one which they can properly have, and it would be strange to rate them, not in respect or what they can properly enjoy and do enjoy, but in respect of what they cannot properly enjoy and do not enjoy. We adopt the judgment of Lush, J., in the before cited case of *Metropolitan Board of Works v. Overseers of West Ham* (*ubi sup.*), that the proper mode of estimating the profitable occupation is to take it as it actually is. No distinction was attempted to be made between the money derivable from the rates properly so called, and that derived from agreements with traders and manufacturers. The question above discussed was the only one argued before us; and it appears to us, for the reasons above given, that the contention of the appellants is right, and that as the sum of 600*l.* properly represents the value of the profits actually had, the gross estimated rental ought to be reduced to that sum, and the rateable value to 540*l.*

Judgment for the appellants.

Solicitors: Church, Sons and Clarke, agents for Southall, Worcester, for appellants.

Solicitors: Tucker and Lake, agents for Bearcroft, Droitwich, for respondents.

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[Div. App.]

Thursday, Feb. 17, 1876.

STOTT (app.) v. DICKINSON (resp.).

Coal Mines Regulation Act 1872 (35 & 36 Vict. c. 76, ss. 41 and 72)—Abandoned mine—Owner—Conclusion of agreement—Contractor.

In 1860 appellant proposed in writing to take from the landlord certain coal mines for fourteen years, from Michaelmas of that year, at a certain rent, a lease to be granted and accepted with provisions contained in a then existing lease of other mines. The landlord accepted this proposal in writing, but no lease was executed. One of the provisions mentioned was, that when and so soon as the pits, shafts, roads, &c., should be discontinued or become useless, the lessee would fill up or remove the same, unless the lessor should signify his wish that the same should be kept open or continued.

In 1871 the appellant discontinued working these mines.

In Dec. 1875 he was convicted by justices under the Coal Mines Regulation Act 1872, s. 41, upon a charge of not causing the tops of the shafts of these mines to be kept securely fenced for the prevention of accidents on the 29th Nov. previously.

Held, upon a case stated, that appellant was not at the date charged an owner of the shafts within the interpretation of that term in sect. 72.

Sect. 41 applies to a mine abandoned or discontinued at any time before or after the time of the Acts coming into operation.

THIS was a case stated by two justices of the peace in and for the county of Lancaster, under the statute 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of this court on questions of law which arose before then as hereinafter stated.

At a petty sessions holden at the county sessions room, in the Town Hall, in Little Bolton, in and for the division of Bolton, in the county of Lancaster, on the 27th Dec. 1875, an information preferred by Joseph Dickinson (hereinafter called the respondent) against James Stott (hereinafter called the appellant), under sect. 41 of the Act 35 & 36 Vict. c. 76, charging "for that he, the said James Stott, within three calendar months last past, that is to say, on the 29th Nov. last, at Kearsley, in the said county, then being the owner of a certain coal mine there situate, the same being a coal mine within the intent and meaning of the Coal Mines Regulation Act 1872, and which mine was then abandoned and the work thereof discontinued, did not after notice in writing duly given by the said Joseph Dickinson, as such inspector of mines as aforesaid, cause the tops of the two shafts of the said mine to be kept securely fenced for the prevention of accidents, contrary to the form of the statute in such case made and provided," was heard and determined by the said justices, the said parties respectively being then present, and upon such hearing the appellant was duly convicted before them of the said offence, and they adjudged him to forfeit and pay the sum of 10*l.*, to be paid and applied according to law, and also to pay to the said respondent the sum of 1*l.* 6*s.* for his costs in that behalf; and if the said several sums were not paid forthwith, they ordered that the same should be levied by distress and sale of the goods and chattels of the said appellant; and in default of sufficient distress, they adjudged that the said appellant should be imprisoned in the county prison for the Hundred of Salford in the said county for the space of one month, unless the

said several sums and all costs and charges of the said distress and of the commitment and conveying of the said appellant to the said prison should be sooner paid.

And whereas the appellant being dissatisfied with the justices' determination upon the hearing of the said information, as being erroneous in point of law, did pursuant to sect. 2 of the said statute 20 & 21 Vict. c. 43, apply to them in writing to state and sign a case setting forth the facts and the grounds of such their determination as aforesaid for the opinion of the court, and duly entered into a recognisance as required by the statute in that behalf.

Now, therefore, the said justices in compliance with the said application and the provisions of the statute stated and signed the following case:

Upon the hearing of the said information, it was proved on the part of the respondent, and found as a fact, that he (the respondent) was one of Her Majesty's Inspectors of Mines, and was duly authorised by the Secretary of State for the Home Department to take proceedings against the appellant for the offence set out in the information.

It was proved by the respondent that in the month of Sept. 1875, his attention was drawn to the dangerous state of some disused pits in the township of Kearsley, in consequence of which the respondent visited the pits and found that the covering of one shaft had holes in it large enough for a person to drop through. This shaft was partly covered up, and the other shaft had one small hole in the cover, the plank cover entirely rotten at one end, and would have formed a trap if anyone had stepped on it. An occupation road goes close past these pits, and it was a likely place for accidents. The respondent then addressed the following letter to the appellant:

Pendleton, Manchester, 13th Sept. 1875.

Dear Sir,—Information has been received by me this evening that the old pits at Unity Brook, late in your occupation are in a dangerous state. It appears that the planks with which they were covered have become decayed, and that as children are frequently playing near, it is feared that an accident may occur. I feel sure that no one would regret such an occurrence more than yourself. Will you therefore be so good as to inform me who is the owner responsible for the secure fencing, and if it be yourself that you will have the fencing done without delay?

Faithfully yours,

JOSEPH DICKINSON, Inspector of Mines.

Jas. Stott, Esq., Westhoughton.

On the 14th Sept. 1875, the appellant addressed the following letter to the respondent in reply to the respondent's letter of the 13th Sept.

Westhoughton, Bolton, Sept. 14th 1875.

Dear Sir,—The pits of the old Unity Brook Colliery. My tenure of the place ceased five years or more ago, and before its expiration I offered to restore the ground, fill up the pits, &c., conditionally on having the privilege of moving the buildings. I never got any reply, but I have since the place ceased to produce coal at various times made the coverings of the pits temporarily secure to prevent accidents. I must now, however, decline to do anything more or to accept the slightest responsibility. The property is Major Starkie's, and Mr. T. F. Whitehead, of Bolton, is his mining agent. I should think a communication to him would command prompt attention.

Faithfully yours,

J. Dickinson, Esq.

JAS. STOTT.

After the receipt by the respondent of this letter, the respondent had some correspondence with the agents of Major Starkie. and on the 26th Oct. 1875, he (the respondent) again visited the pits and found them unworked, and again on the

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29th Nov. 1875, respondent visited the pits and found them in the same condition as on the previous visits. On the 6th Dec. 1875, respondent received from the appellant the following letter:

Westhoughton, Bolton, Dec. 6th 1875.

My dear sir.—Old pits at Unity Brook. A fortnight ago (Nov. 23rd) I wrote to Mr. Hopwood saying that I would (without prejudice) see that these pits were made secure at least for a time. I examined their state and ordered the work done, and I am annoyed it is not completed. You may prosecute me, but cannot hold me responsible.

Faithfully yours,

Joseph Dickinson, Esq.

JAMES STOTT.

On the 10th Dec. 1875, the respondent received the following letter from the appellant:—

Westhoughton, Bolton, Dec. 10th 1875.

My dear Sir,—I hope you will not, after all, find it needful to prosecute either Major Starkie or his agents for the unsafe condition of the old pits at Unity Brook; they are now all right, and had the man I instructed a fortnight since last Monday done his duty and fulfilled his promise, the provocation would not have arisen.

Faithfully yours,

J. Dickinson, Esq.

JAS. STOTT.

In reply to this letter the respondent wrote to the appellant as follows:—

Pendleton, Manchester, 11th Dec. 1875.

Dear Sir,—Old pit at Unity Brook. I have received your letter of yesterday, but after all the delay you will not be surprised to hear that the matter is now in Messrs. Holden and Holden's hands, and the informations against you and Mr. Starkie are signed. The hearing is fixed for Monday, the 20th inst. Still faithfully yours,

James Stott, Esq.

JOSEPH DICKINSON.

On the 12th Dec. 1875, the appellant sent the following letter to the respondent:—

Westhoughton, Dec. 12th 1875.

Dear Sir,—Old pits at Spindle Point. Your kindness (as you subscribe yourself "still" yours faithfully) will, I trust, permit me to trouble you with one more letter on this subject to explain what I think might, with advantage, have been explained sooner.

1. I never had a lease.

2. There never was even a stamped agreement.

3. Never any memoranda of conditions except as to royalties, term, and a note that conditions should be those usual in that estate leases.

4. It is five or six years since my occupation came to an end.

5. At that time I offered to fill up the pits, and from that day to this never had a reply; now, however, Mr. Starkie is desirous I should fill up these pits.

6. I am negotiating for some of Mr. Starkie's coal here for my company, and quite expect, if he is fixed by you, he will be so vexed as to shut the matter up. (On this last account alone do I fear the result of the prosecution).

7. On the 23rd Nov. I was at the old pits, and ordered the manager at the present U. Brook Colliery to get them secured at once, and I even told him prosecution was imminent; on the 24th early I left for the west of Ireland; I did not return till Dec. 7th.

8. The manager referred to is leaving, and quite as much on account of this matter as anything else, his only excuse being his pretended close application to his colliery duties.

Faithfully yours,

J. Dickinson, Esq.

JAS. STOTT.

On the part of the respondent it was proved that on the 6th Dec. 1875, the appellant forwarded the following telegram to Mr. Heywood, the estate agent of Major Starkie, the lessor of these pits:—

From J. Stott, Mail Packet, Holyhead, to Thos. Hopwood, Esq., Whalley.—Ordered pits secured a fortnight since to-day; only got your telegram in West of Ireland late on Saturday.

And on the same day the appellant forwarded the following telegram to Mr. Whitehead, the mining agent to Major Starkie:—

From J. Stott, Mail Packet, Holyhead, to F. J. Whitehead, Esq., Mawdaley-street, Bolton.—Ordered pits

secured fortnight ago; will write you to night; have wired inspector.

On the part of the respondent it was proved that on the 20th Nov. 1875, the appellant forwarded to Mr. Hopwood, Major Starkie's agent, the following letter:—

Westhoughton, Bolton, Nov. 20th, 1875.

Dear Sir,—I have a pleasant recollection of the time Major Starkie allowed me for payment of rent accruing from the Old Unity Brook Colliery; and whatever may be my conviction as to liability for the present insecure condition of the pits, I am willing (of course without prejudice) to make them thoroughly secure within the meaning of the Mines Inspection Act, and to do so without loss of time. For this purpose I shall go over them on Monday morning.

Yours very truly,

T. Hopwood, Esq.

JAS. STOTT.

On the part of the respondent the following document was put in and admitted as evidence:—

Sept. 4th, 1860.

The undersigned, Mr. Jas. Stott, of Kearsley Mount, coal proprietor, proposes to take from Le Gendre Nicholas Starkie, Esq., the mines called the Doe and Five, quarter mines under his lands in Kearsley, lately in lease to the trustees of Ellis Fletcher, Esq., for a term of fourteen years from Michaelmas, 1860, minimum rent to be for the first year 150*l.*, and for the remainder of the term 200*l.* per annum. The rent per Cheshire acre of one foot in thickness, and so in proportion, to be 110*l.* A lease to be granted and accepted, embodying *mutatis mutandis* the provisions contained in Mr. Starkie's lease of mines in Kearsley to Messrs. Knowles and Stott.

JAS. STOTT.

I, the undersigned, agree to and accept the foregoing proposal of Mr. James Stott.

Witness my hand, the 3rd Oct. 1860.

LE GENDRE N. STARKIE, Senn.

This document was stamped with a 1*l.* stamp.

On the part of the respondent, a counterpart of the lease to Messrs. Knowles and Stott, referred to in the above-mentioned agreement, was produced and put in as evidence. This lease is dated 1st Sept. 1857, and is made between Le Gendre Nicholas Starkie, Esq., of the one part, and James Knowles and William Stott of the other part, and is a lease of

All those, the mines, beds, veins, and seams of coal and cannel, called respectively the Trencher, Bore Mine, the Cannel Mine, the Yard Mine, and the Plodder Mine, already opened and worked, and also the Half Yard Mine, and the Three Quarters Mine intended to be opened and worked, lying within and under all or any part or parts of all the ancient inclosed lands and grounds, situate in the township of Kearsley aforesaid, whereof the said Le Gendre Nicholas Starkie is now seized as tenant for life in possession.

In this lease is the following covenant:—

And also that when and so soon as the said pits, shafts, roads, railings, cuts, canals, reservoirs, clay pits, and other places and conveniences, or any of them, shall be discontinued or become useless, the said lessees, their executors, administrators, and assigns will fill up or remove the same, unless the said lessor, or other the person or persons for the time being entitled as aforesaid, shall signify his or her wish that the same shall be kept open or continued, in which case the same shall be left open accordingly, with all the air gates, levels, tunnels, soughs, drains, sluices, and other works and conveniences belonging thereto, in proper and sufficient repair and good working condition.

On the part of the respondent it was proved that the pits referred to in the above agreement and lease were the pits called the Old Unity Brook Pits, and which were worked by the appellant, and the pits to which the information in this case relates.

On the part of the respondent it was proved that these pits were not then worked, and that they had not been filled up, and the banks levelled, according to the terms of the agreement and lease.

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On the part of the respondent, it was stated by Mr. Whitehead, Major Starkie's mining agent, that as between Major Starkie and the appellant the liability of the appellant to fill up the pits and level the banks still exists.

It was contended on the part of the appellant that he was not the owner of the mine within the meaning of the Coal Mines Regulation Act 1872, and that he was not legally liable to fence these pits.

It was admitted by the respondent that the appellant had not worked the pits in question for about five years.

It was admitted by the respondent that he had laid an information against Major Starkie as the landlord of these pits for not fencing the pits in accordance with sect. 41 of the Coal Mines Regulation Act 1872, and he, the respondent, considered Major Starkie equally liable with the appellant to fence.

It was admitted by the respondent that some correspondence had taken place between himself and Major Starkie's agents which caused him to issue summonses against both the appellant and Major Starkie, in order to ascertain who was the owner, and who was liable to fence the pits.

The said justices, however, having regard to the interpretation of the word "owner" in sect. 72 of the Coal Mines Regulation Act 1872, and the covenant in the lease, dated 1st Sept. 1857, and other evidence, were of opinion that the appellant was the owner within the meaning of sects. 41 and 72 of the said Coal Mines Regulation Act 1872, and as such the person liable to fence the pits gave their determination against the appellant in the manner before stated.

The question of law arising on the above statement for the opinion of this court, therefore, is whether the appellant is the owner of the shafts within the meaning of the said sects. 41 and 72 of the Coal Mines Regulation Act 1872, and legally liable to fence them.

If the court should be of opinion that the said conviction was legally and properly made, and the appellant is liable as aforesaid, then the said conviction is to stand; but if the court should be of a contrary opinion, then the said conviction is to be quashed.

Torr, Q.C. (with him *Foard*), argued for the appellants.—By the Coal Mines Regulation Act 1872 (35 & 36 Vict. c. 76), s. 41, "where any mine to which this Act applies is abandoned, or the working thereof discontinued, at whatever time such abandonment or discontinuance occurred, the owner thereof, and every other person interested in the minerals of such mine, shall cause the top of the shaft any and side entrance from the surface to be and to be kept securely fenced for the prevention of accidents; provided that: (1) Subject to any contract to the contrary, the owner of the mine shall as between him and any other person interested in the minerals of the mines be liable to carry into effect this section, and to pay any costs incurred by any other person interested in the minerals of the mine in carrying this section into effect. (2) Nothing in this section shall exempt any person from any liability under any other Act or otherwise. If any person fail to act in conformity with this section, he shall be guilty of an offence against this Act. Any shaft or side entrance which is not fenced as required by this section

and is within fifty yards of any highway, road, footpath, or place of public resort, or is in open or uninclosed land, shall be deemed to be a nuisance within the meaning of sect. 8 of the Nuisances Removal Act for England 1855, as amended and extended by the Sanitary Act 1866." This Act of 1872 was not, by sect. 2, to come into operation until the 1st Jan. 1873; and it was admitted by the respondent that the appellant had not worked the pits in question for about five years; the Act cannot have a retrospective effect upon a mine abandoned two years before it came into operation. [QUAIN, J.—The 41st section says "at whatever time such abandonment or discontinuance occurred;" and the object of the section is said to be prevention of accidents. Moreover that is not the point reserved; we are only asked if appellant was the owner of the shafts.] Sect. 72 is the interpretation clause, "the term 'owner' when used in relation to any mine, means any person or body corporate who is the immediate proprietor, or lessee, or occupier of any mine, or of any part thereof, and does not include a person or body corporate who merely receives a royalty, rent, or fine from a mine, or is merely the proprietor of a mine subject to any lease, grant, or licence for the working thereof, or is merely the owner of the soil, and not interested in the minerals of the mine; but any contractor for the working of any mine or any part thereof shall be subject to this Act in like manner as if he were an owner, but so as not to exempt the owner from any liability." The appellant's agreement was at an end at Michaelmas 1874, and after that time he would have been a trespasser if he had attempted to comply with the respondent's demand upon him to fence the shaft. The charge upon which the appellant was convicted was that he within three calendar months last past, that is to say, on the 29th Nov. last, then being an owner, &c., did not after notice in writing duly given cause the shafts to be securely fenced. The 29th Nov. last, i.e. 1875, was more than a year after appellant had any right on the land. [QUAIN, J.—Why "within three calendar months last past" ?] That is the limitation imposed by sect. 63, sub-sect. 1, "from the time when the matter of such complaint or information respectively arose." It is sufficient that the appellant's right to enter for any purpose ended in 1874.

Gorst, Q.C., for the respondent.—I presume I need not answer the contention against the retrospective effect of the 41st section. [GROVE, J.—No. Clearly it applies to mines abandoned at any time before the Act passed.] The appellant was guilty of a continuing offence from the day the Act came into operation until the summons. He would clearly have been liable until the end of his agreement, and part of that agreement was to fill up or remove the pits and shafts. [GROVE, J.—Only unless the lessor signified his wish that the same should be kept open or continued. There is no evidence of what his wish was.] The mining agent stated that the appellant's liability to fill up and level the pits and banks still existed; and in his letters the appellant admits his liability under his agreement. Further, the term "owner" is defined to include any contractor for the working of any mine or any part thereof. So long as the appellant's contract was not completed, he continued to be a contractor. [QUAIN, J.—Surely,

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after Michaelmas 1874, he would be a trespasser if he had gone upon the ground.]

Torr, Q.C. was not heard in reply.

GROVE, J.—The only question for us is whether the appellant was the owner of these shafts on the 29th Nov. 1875. He was certainly not the proprietor of the mine. He was not the lessee; in one sense he never was lessee, but there would have been no difference to my mind whether under lease or agreement if he were tenant; his agreement, however, was concluded at Michaelmas 1874. His occupation ceased long before that, so he could not be occupier. Was he then a contractor for the working of any part of the mine? It is doubtful whether the lessor could compel him to fence the shafts; but even if he could, that would not be the working of the mine. Besides, we know nothing of the condition upon which alone he could have any right to enter upon the land to level the pits. After Michaelmas 1874 the appellant was not in any sense the owner of these shafts. Up to that time possibly his liability continued.

QUAIN, J.—I am of the same opinion. The appellant, when he was charged, came within neither of the words included in the interpretation of "owner." I do not think he ceased to be the occupier when he ceased to work the mine; but after Michaelmas 1874 he did not lease, occupy, or contract for the working of any part of the mine. I think the matter is free from doubt, and the conviction must be quashed.

Judgment for appellant.

Solicitors for the appellant, *Chester, Urquhart, Mayhew, and Holden.*

Solicitor for the respondent, *The Solicitor to the Treasury.*

Thursday, Feb. 7, 1876.

ST. HELEN'S CHEMICAL COMPANY (apps.) v. ST. HELEN'S CORPORATION (resps.)

Nuisance—Public sewers—Sulphuretted hydrogen gas—Mixture of liquids from different drains—The Nuisance Removal Act for England (18 & 19 Vict. c. 121, ss. 8 & 12.)

From the appellants' premises two culverts or barrel drains, some yards apart, communicated with the public sewer under a main street: through one drain liquid impregnated with muriatic acid, and through the other liquid impregnated with sulphur were respectively discharged by the appellants from their works into the sewer, and there mingled with each other and the ordinary drainage. The combination in the sewer produced sulphuretted hydrogen gas, which escaped into the main street and the adjacent houses, and was injurious to health.

By a local Act the sewers and drains, and the entire management of the same, with the appurtenances, were vested in and belonged to the respondents, who were to cleanse and flush the same, and also to provide proper traps to prevent stench.

There was evidence that the sewer had not been flushed or cleansed, and that but for defective trapping no gas could escape from the sewer; but the justices found as a fact that this was a nuisance which arose from the act or default of the appellants, and made an order of abatement upon them under 18 & 19 Vict. c. 121 s. 12.

Held, upon a case stated, that the interpretation clause (sect. 8) did not limit nuisances to open drains, but included a public sewer; that, assuming the respondents to blame, the appellants were not the less guilty of a breach of the statute; and that the order was rightly made.

THIS was a case stated by two justices of the peace in and for the county of Lancaster, under the statute 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of the court on questions of law which arose before them as hereinafter stated.

At a petty session holden in and for the petty sessional division of St. Helens, at St. Helens, in the said county, on the 25th Jan. 1875, a complaint, preferred by Henry William Turner on behalf of the mayor, aldermen, and burgesses of the borough of St. Helens, who are the local sanitary authority of the borough of St. Helens (hereinafter called the respondents), under sect. 12 of the Nuisance Removal Act for England 1855, for "in or upon a certain street there, called Old Atlas-street, in their district, under the Nuisance Removal Act for England 1855, the following nuisance exists, viz., a drain so foul as to be a nuisance and injurious to health, and that such nuisance is caused by the act or default of you," meaning the said appellants, was heard and determined by the said justices, the parties respectively being then present, and upon such hearing the appellants were convicted by them of the said offence, and they ordered them to abate the nuisance within twenty-one days.

Upon the hearing of the complaint it was proved on the part of the respondents, and found as a fact by the justices, that the drain in Old Atlas-street referred to was a certain public sewer, passing under Old Atlas-street, and forming part of the drainage system of St. Helens. That sulphuretted hydrogen gas was generated in the said public sewer in Old Atlas-street, below the appellants' works; that such sulphuretted hydrogen gas escaped into the said street in such quantities as to be a nuisance and injurious to the health of persons passing along the said street, and also to the inhabitants of the adjacent houses. It was also proved and found by the said justices as a fact that there were two culverts or barrel drains leading from the chemical works of which the appellants are owners and occupiers, which were both connected with the aforesaid public sewer in Old Atlas-street at points some yards from each other; and it was not disputed that the said culverts or barrel drains were properly connected with the said sewer, and that the appellants had a perfect right to drain into the said sewer from their said premises. That from the uppermost one of such drains, liquid, impregnated with muriatic acid, and from the other, liquid impregnated with sulphur, were respectively discharged by the appellants from their said works into the said sewer or drain in Old Atlas-street. That the said liquids combined with each other and mingled with the ordinary drainage in the sewer. That the combination of the said liquid so impregnated and discharged as aforesaid produced sulphuretted hydrogen gas, which was the gas the production and escape of which formed the cause of complaint. It was also proved that the contents of the sewer immediately above the point of entry of the appellants' uppermost culvert or barrel drain was ordinary sewage matter, in which was no acid or sulphur.

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Evidence was given on the one side, and denied on the other, that the water impregnated with sulphur from other land than the appellants, viz., from land belonging to the respondents, ran into the sewer at about the point where the appellants' lower drain entered it; but the justices found as a fact that the nuisance arose from the act or default of the appellants, as above set forth, and made an order for its abatement accordingly. No nuisance was proved to exist in either of the appellants' said two drains.

There was also evidence that the sewer in question, in which the alleged nuisance was said to exist, had never been flushed nor had any other measure been adopted for the purpose of from time to time cleansing the said sewer.

There was also evidence that, but for defective construction or trapping of the sewer, no gas could escape from it, either into the street or into the adjoining houses.

By sect. 8 of the said Nuisance Removal Act 1855 (18 & 19 Vict. c. 121), it is enacted that the word "nuisances" under that Act shall include "Any premises in such a state as to be a nuisance or injurious to health. Any pool, ditch, gutter, watercourse, privy, urinal, cesspool, drain, or ashpit, so foul as to be a nuisance or injurious to health. Any animal so kept as to be a nuisance or injurious to health. Any accumulation or deposit which is a nuisance or injurious to health: Provided always that no such accumulation or deposit as shall be necessary for the effectual carrying on of any business or manufacture shall be punishable as a nuisance under this section, when it is proved to the satisfaction of the justices that the accumulation or deposit has not been kept longer than is necessary for the purposes of such business or manufacture, and that the best available means have been taken for protecting the public from injury to health thereby."

Sect. 12 enacts

In any case where a nuisance is so ascertained by the local authority to exist, or where the nuisance in their opinion did exist at the time the notice was given, and although the same may have been since removed or discontinued, is in their opinion likely to recur or to be repeated on the same premises or on any part thereof, they shall cause complaint thereof to be made before a justice of the peace; and such justice shall thereupon issue a summons requiring the person by whose act, default, permission, or sufferance, the nuisance arises or continues, or if such person cannot be found or ascertained, the owner or occupier of the premises on which the nuisance arises, to appear before the justices in petty sessions assembled at their usual place of meeting, who shall proceed to inquire into the said complaint; and if it be proved to their satisfaction that the nuisance exists or did exist at the time when the notice was given, or if removed or discontinued since the notice was given, that it is likely to recur or be repeated, the justices shall make an order in writing under their hands and seals on such person, owner, or occupier for the abatement or discontinuance, or prohibition of the nuisance.

By sect. 8 of the Sanitary Act 1866, it is enacted that "any owner or occupier of premises within the district of a sewer authority shall be entitled to cause his drains to empty into the sewers of that authority," on condition of complying with the regulations of the authority in reference thereto.

By the "St. Helens Improvement Act 1869" (32 & 33 Vict., c. cxx. sect. 149), it is enacted that "all existing and future public sewers and drains within the borough, and all existing and future sewers and drains in and under the streets and

courts, with all the works and materials thereunto belonging, whether made or provided at the cost of the corporation or otherwise, and the entire management of the same, with the appurtenances, shall vest in and belong to the corporation, and the corporation shall cleanse and flush the same." And by sect. 163 "all sewers and drains, whether public or private, shall be provided by the corporation or other persons to whom they severally belong, with proper traps or other coverings, or means of ventilation, so as to prevent stench." The said sewer in Old Atlas-street was an existing sewer at the time of the passing of the St. Helen's Improvement Act.

The appellants contended as matter of law—

1. That the word "drain" in sect. 8 of the said Nuisance Removal Act 1855, meant an open drain, and not a covered barrel drain, such as those from the appellants' works, or as the sewer in Old Atlas-street.

2. That the alleged nuisance was not such a nuisance as contemplated by the Nuisance Removal Acts, inasmuch as it was generated and arose (if it did arise from the matter discharged from their drains) after it had been discharged into the sewer, which was by law the proper place for it to be discharged into, and into which they had under the Sanitary Acts a right, and were in fact bound to discharge it.

3. That the appellants, in getting rid of their drainage matter by so discharging it, fulfilled their obligations and were not answerable for the state of the public sewers arising from the chemical action of such drainage matter. But on the other hand the respondents, as the local sanitary and sewer authority, were responsible for the state of the public sewers, and it was their duty as such authority, and especially under the St. Helen's Improvement Act, sect. 149, before referred to, which requires them to flush the sewers to prevent by trapping or otherwise the escape of the sewer gas into the outer air.

The respondents on the other hand contended that the nuisance was clearly one within the scope of the Nuisance Removal Acts; that there was nothing in those Acts to limit their operation to open drains. That the fact of the matter discharged by the appellants' drains being a product of a manufacture, distinguished it in respect of the appellants' liability from ordinary drainage or sewage matter, that is, house drainage; and that the appellants had no right under the Sanitary Acts or otherwise to discharge it into the street sewer.

The questions submitted for this honourable court are:

1. Is the nuisance complained of and found by the justices to exist, in fact, a nuisance within the meaning of the Nuisance Removal Acts.

2. Whether, on the facts above stated, the order for abatement was properly made upon the appellants. If these questions be determined in the affirmative, the said justices' order will stand, otherwise not.

Webster argued for the appellants.—According to the definition in sect. 8 of the Act of 1855 the only drain which can be a nuisance must be of the same kind as the other nuisances there described, that is, an open drain, or pool, ditch, gutter, watercourse, or cesspool; it cannot refer to a sewer into which any owner or occupier is entitled to empty his refuse, nor even to the culverts or barrel

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drains which were properly connected with the sewer, and in which indeed it was proved that no nuisance existed. Even if any person could be convicted of causing a nuisance in a public sewer, in this particular case the appellants are not responsible. The corporation of St. Helens are, by the local Act, expressly required to cleanse the sewers, and to provide them with proper ventilating traps; this of itself should render the corporation alone liable for this nuisance, if it existed; and moreover the case finds that there was evidence of their negligence in both these particulars. A distinction is drawn in the Public Health Act 1848 between sewers and house drains; the former by sect. 48 are to be entirely under the management and control of the Local Board of Health; and by sect. 46 that body is to keep them so as not to be a nuisance or injurious to health, and properly cleansed.

Manisty, Q.C. (with him *Gully*) for respondents. —The arguments on the appellants' behalf have been advanced unsuccessfully before this: In *Brown v. Russell*, and *Francomb v. Freeman* (L. Rep. 3 Q.B. 251), it was held that under this Act the question whether or not the persons against whom the proceedings are taken, have a legal right to cause their sewage to flow in the given channel is immaterial. The first of these two cases was stronger than the present, because there the person ordered to abate the nuisance drained his premises into a barrel drain which also received the sewage of other premises. This drain passed for about 300 yards under a turnpike road, and thence the sewage was conveyed into an open drain, which was the nuisance, the matter from the appellants' premises in itself being sufficient to cause it. The order to abate was held to have been rightly made. There is no distinction between open and closed drains, nor between sewers and house drains, for the purposes of this Act of 1855. The difference in the provisions concerning sewers and house drains in the Act of 1848 is not incorporated in either of the subsequent Acts. The definitions of "nuisances" in sect. 8 are not exclusive; the nuisances may be drains of another kind from those there described, and may be either sewers or barrel drains. Although it is stated in the case that there was evidence of the nuisance being caused by the corporation, and evidence of their negligence, neither was found as a fact by the justices.

Webster in reply. —The cases cited have no relation to the present. In one, the nuisance was an open drain; and in the other, a watercourse. Here the nuisance is the escape of gas from the public sewer, which is the fault of the corporation.

Grove, J. —In this case I am of opinion that the conviction was right, and the order of the justices should be affirmed. The facts found are that a sewer, part of the public system of a district, receives two covered drains from the appellants' premises, where chemical works are carried on. It is admitted that these drains are properly connected with the sewer, and that no nuisance exists in either of the drains. But through one of these drains, liquid impregnated with muriatic acid, and through the other, liquid impregnated with sulphur, pass from the appellants' premises into the public sewer, where they mix and generate sulphuretted hydrogen gas. This gas, it is found, escapes into the street under which the sewer lies, and into the adjacent houses, and causes a nuisance. The contention on the first point is that

the appellants have a right to discharge liquids through their drains which are not of themselves noxious, and it is no business of theirs if these liquids mix in the public sewer and cause a nuisance. It would be extraordinary if an injurious compound of two separately innocent fluids could be justified under these statutes. Probably few of the nuisances which this legislation was intended to restrain, are produced by one elementary cause, and we have to consider whether the Acts of Parliament compel us to hold that the appellants have evaded their provisions. Under sect. 12 of the Act of 1855, when a local authority has ascertained the existence of a nuisance, and made a complaint, the justices shall summon the person, by whose act, default, permission, or sufferance, the nuisance arises or continues; and if satisfied that the nuisance exists, shall make an order of abatement or discontinuance or prohibition of the nuisance. If this were a nuisance, there can be no doubt that the appellants are the persons by whose act, default, permission or sufferance it arose. The interpretation clause, sect. 8 of the same Act, does not strictly define all nuisances; it merely enacts that nuisances shall include certain things there mentioned, amongst them a drain so foul as to be a nuisance or injurious to health. Although a drain is there coupled with other things which can only be open and exposed, I do not see that the Act should apply less to a covered than to an open drain. But then it is said there is no nuisance existing in the drains themselves, which communicate with the sewer, and the appellants are not liable for what occurs in the sewer. There is a distinction in the Act of 1848, between sewers and house drains (sects. 43 to 54), but it does not seem to me to go so far as to render it impossible for a nuisance to exist in a sewer; but whatever is the effect of that distinction, it is not in any way imported into the subsequent Act of 1855. It is only a special application of the words for the purposes of the particular Act in which the distinction is drawn. There is nothing, therefore, to prevent this being a nuisance from its becoming injurious to health for the first time in a sewer; nor would it be reasonable at all so to limit the application of the Act. An argument on the second point is that the corporation of St. Helens can be alone responsible for this nuisance if it exists. It is not, however, found by the justices that the gas caused by the appellants could not have escaped from the sewer if the trapping had been defective; but, assuming that the corporation were not free from negligence, this is a public matter; and although the corporation are here the accusers, that would not exonerate the appellants. Upon the findings in the case, the appellants are not less guilty of a breach of the statute because another party is also guilty. As to the cases referred to, they are not conclusive upon the points raised here, but they support the result to which we have arrived and are consistent with our determination. The order of the justices will be affirmed.

QUAIN, J. —I am entirely of the same opinion.

Judgment for respondents.

Leave to appeal was applied for on behalf of the appellants, but refused.

Solicitors for appellants, *Maples, Tensdale, and Co.*, for *Beasley and Oppenheim*, St. Helens.

Solicitors for respondents, *Gregory, Rowcliffes and Co.*

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HARE (app.) v. OSBORNE (resp.)—EARP v. FAULKNER.

[Ex. Div.]

Thursday, Feb. 17, 1876.

HARE (app.) v. OSBORNE (resp.)

Licensed person — Suffering gaming — Private friends—35 & 36 Vict. c. 94, s. 17; 37 & 38 Vict. c. 49, s. 30.

The appellant, a licensed person, was, after the hours of closing, bonâ fide entertaining some private friends at his own expense, and these friends, in his company, were playing cards for money. He was convicted under the Licensing Act 1872, s. 17, of suffering gaming to be carried on on his premises.

Held, upon a case stated, that there was nothing in s. 30 of the Licensing Act 1874, which exempts from liability for supplying intoxicating liquors to private friends, to render this conviction unlawful.

THIS was a case stated by two justices of the peace acting for the Newark division of the county of Nottingham, under the statute 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of the court on a question of law which arose before them as hereinafter stated.

At a petty sessions holden at Newark-on-Trent, in the said county, on 5th Jan. inst., Charles Hare, of South Clifton, in the said county, alehouse keeper (called the appellant), was charged before the said justices, on the complaint of John Osborne, of Newark-on-Trent, police superintendent (called the respondent), for that, "he being at the time of the committing of the offence hereinbefore mentioned, the keeper of certain licensed premises (to wit), the Red Lion Inn, situate at South Clifton, within the division of Newark, in the said county, within six calendar months next before the prosecution of the offence hereinbefore mentioned (to wit), on the 29th Dec. in the year aforesaid (i.e., 1875), and, whilst he was so licensed as aforesaid, did then and there unlawfully suffer gaming, (to wit) cards, to be carried on on his said premises."

Henry Darbyshire, a police constable stationed at Clifton, proved that on Dec. 29th last, he was passing the Red Lion Inn, at South Clifton, about eleven o'clock at night, when he heard voices within, and distinguished that persons were playing cards for money. He subsequently obtained admission to the premises, and there found several persons present. The landlord stated that they were his private friends, and he considered that he had a right to entertain them as such.

The said justices' attention was drawn to the case of *Patten v. Rhymer* (29 L. J. 189, M. C.).

The appellant's advocate admitted the persons in the inn were playing at cards for money, but contended that the Legislature when inserting clause 30 in the Licensing Amendment Act of 1874, whereby a licensed person was authorised to entertain and supply liquors after the hours of closing to his private friends at his own expense, intended that the licensed person should have the same right as any private person to entertain his friends in any manner he pleases, and that, therefore, neither the landlord nor his friends were liable to any penalties under the Licensing Acts.

The said justices were of opinion that, notwithstanding the persons on the licensed premises were, as they had no reason to doubt, and found as a fact that they were, private friends, to whom the landlord might after hours give at his own expense intoxicating liquors, under sect. 30 of the

Licensing Act 1874, yet he was not thereby justified in allowing them to play for money. The justices, therefore, convicted the appellant.

The appellant being dissatisfied with this determination as being erroneous in point of law, requested a case to be stated for the opinion of the court.

Should the court be of opinion that the appellant being a licensed person may not during closing hours permit his private friends to play at cards for money; then this conviction is to stand, otherwise it is to be quashed.

Rolland argued for the appellant.—The case cited before the justices, *Patten v. Rhymer* (29 L. J. 189, M. C.) was decided upon the Act 9 Geo. 4, c. 61, and it was there held that facts, similar to those found here, constituted an offence against the tenor of the licence. The licence, according to the schedule, was required to have the following provisos concerning the innkeeper, "that he do not wilfully or knowingly permit drunkenness or other disorderly conduct in his house or premises, and do not knowingly suffer any unlawful games or any gaming whatsoever therein." And the words of 35 & 36 Vict. c. 94, s. 17, do not differ greatly from those contained in that form of licence. "If any licensed person (1) Suffers any gaming or any unlawful game to be carried on on his premises . . . he shall be liable to a penalty." But the Licensing Act 1874 expressly distinguishes between the entertainment of public guests and private friends; a distinction which did not exist before. By 37 & 38 Vict. c. 49, s. 30, no person keeping a house, licensed under this or the principal Act, shall be liable to any penalty for supplying intoxicating liquors, after the hours of closing, to private friends *bonâ fide* entertained by him at his own expense." The effect of this is to render a public-house, during the unlicensed hours, a private house in which the owner may entertain his friends in any way in which another person might be justified in doing at a house not licensed.

The respondent did not appear.

GROVE, J.—I do not think this case is arguable. The appellant is admitted to be a licensed person, and it is also admitted that he, in the words of the 17th section of the Act of 1872, suffered gaming to be carried on on his premises. The exemption in sect. 30 of the Act of 1874, as to the entertainment of private friends by supplying intoxicating liquors at the landlord's own expense, has nothing whatever to do with playing cards for money. The conviction must be affirmed.

QUAIN, J.—I am of the same opinion.

Judgment for respondent.

EXCHEQUER DIVISION.

Reported by H. LUSH and A. FAWCER, Esqrs., Barristers-at-Law.

Thursday, Dec. 9, 1875.

EARP v. FAULKNER.

Contagious disease — Cattle infected therewith — Straying — Scienter — Knowledge of servants — Negligence of master.

An action will lie to recover damages sustained by the negligence of servants having the care of cattle which they know to be suffering from an infectious disease in allowing such cattle to intermingle with other cattle.

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Upon the trial of such an action it was proved that the condition of the cattle was known to the servants of the defendants at the time the cattle came into contact with those of the plaintiff, and that shortly before defendants had been convicted at the petty sessions for allowing their cattle infected with the foot-and-mouth disease to be at large in a field insufficiently fenced. The certificate of such conviction was tendered and received in evidence, and the jury found in favour of the plaintiff.

Held that the knowledge of their servants was sufficient to make the defendants responsible, and that there was evidence of negligence to support the findings of the jury. That the certificate was improperly received in evidence, but this was cured by Order XXXIX., rule 3 of the Judicature Act (38 & 39 Vict. c. 77), as no substantial miscarriage of justice had been thereby caused.

THIS was an action to recover compensation for permitting cattle infected with the foot-and-mouth disease to come into contact with and thereby to infect the plaintiff's cattle, and was tried before Quain, J., at the last Stafford Spring Assizes, when a verdict was entered for the plaintiff with leave to the defendants to move to set aside the verdict on the ground that it was consistent with the findings of the jury that the disease might have been communicated to the plaintiff's cattle, at a time when there was no knowledge of such disease existing in their cattle on the part of the defendants; and also for a new trial on the ground that a certificate of conviction had been improperly received in evidence. The plaintiff was a cattle dealer, occupying a farm of about 100 acres near Wolverhampton, the defendants were farmers and cattle dealers at Wolverhampton. In the autumn of 1874 the defendants took from a Mr. Mason some keep for their cattle, i.e., the right to graze the grass, or aftermath, in certain fields adjoining the plaintiff's lands; the fences between the plaintiff's land and that hired by the defendants were out of repair, and in November of that year the defendants put some cattle into one of the fields hired by them. At that time the cattle were free from foot-and-mouth disease, although they had suffered from the same disease some few months before. Some of the cattle strayed on to the plaintiff's land, and were stated by the plaintiff to have infected his cattle that were in an adjoining field; the district inspector subsequently went down and examined the defendants' cattle, and found some of them suffering from foot-and-mouth disease. The defendants were summoned before the bench of magistrates at petty sessions, and convicted for keeping cattle infected with foot-and-mouth disease in a field insufficiently fenced.

Upon the trial the jury found that the defendants, by themselves or by their servants, knew of the state of health of the cattle at the time of their being put into the field adjoining the plaintiff's land, and that putting them there was negligence in the defendants.

A rule nisi having been obtained in Easter Term,

Staveley Hill, Q.C. and J. O. Griffiths, Q.C., showed cause.—The question is, did the defendants, either by themselves or by their servants Downs and Dairs, know of the infected state of their cattle? The jury have found that the disease was communicated to the plaintiff's cattle by the defendants',

and that Downs, a servant in the defendants' employ, knew of the state of the cattle; and even if he did not know it was gross negligence on his part not to have ascertained that such was the case. The defendants knew the state their cattle were in, for they were convicted for keeping cattle suffering from foot-and-mouth disease, in a field insufficiently fenced, even if the certificate of such conviction, which was put in at the trial, was improperly received in evidence, it does not follow that there must be a new trial, as, by Order XXXIX., sub-sect. 3, of the Judicature Act (38 & 39 Vict. c. 77), "A new trial shall not be granted on the ground of misdirection, or of the improper admission or rejection of evidence, unless, in the opinion of the court to which the application is made, some substantial wrong or miscarriage has been thereby occasioned in the trial of the action; and if it appear to such court that such wrong or miscarriage affects part only of the matter in controversy, the court may give final judgment as to part thereof, and direct a new trial as to the other part only."

H. Matthews, Q.C. and Badcliffe Cooke, in support of the rule, cited

Cook v. Waring, 2 Hurl. & Colt. 272;

Raphael v. Bank of England, 17 C. B. 161.

KELLY, C.B.—I am of opinion that upon the substantial merits of the case the rule must be discharged. The action was brought to recover damages for that the defendants knowing their cattle to be infected with the foot-and-mouth disease, allowed them to stray on to the plaintiff's premises and to infect his cattle that were then in his fields. It is quite clear that unless the summing up of the learned judge was wrong, the jury could not with justice have found any other verdict. Now, as to the question when the diseased state of their cattle was known to the defendants or to their servants, it is proved by the evidence called upon the trial, that there were only four occasions, viz., 9th, 13th, 15th, and 18th Dec., upon which the plaintiff's cattle or any animal of his came into contact with the defendants' cattle. The question which arises thereon is, whether there is any evidence to justify the jury in finding that the defendants' cattle could have infected the plaintiff's. Now, the 9th is out of the question altogether because the learned judge in summing up told the jury that the act of the plaintiff in bringing into his field a cow that he had found straying on the high road, if such cow infected his cattle, was an act for which the plaintiff was alone responsible, and that though the defendants' cattle might have also come into contact with the plaintiff's upon that day, the defendants would not be liable. As to the 18th, the jury have found that the defendants' cattle did not come into contact with the plaintiff's on that day; there are, therefore, only two other days left, viz., the 13th and 15th Dec. The jury have found that upon both of these days the defendants' cattle came into contact with the plaintiff's. Now is there any evidence that either the defendants or their servants knew of the diseased state of their cattle on or prior to the 13th? There is evidence that Downs, a servant in the defendants' employ, knew of the existence of the disease at that time; and it was clearly proved and found by the jury that on both those days the defendants' cattle and the plaintiff's came into contact. Now, as to the defendants' personal knowledge of the state of their cattle, it was proved

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that a cow belonging to the defendants, and which had been ordered to be slaughtered on account of its being infected with the foot-and-mouth disease, had been in the fields in which the defendants afterwards placed the cattle which strayed on to the plaintiff's land. This, in my opinion, was notice to defendants that the field in which the cow had been was infected and made dangerous and not safe to turn other cattle into. It has been contended on behalf of the plaintiff that it was gross negligence in the defendants not to have known the state of their cattle; and it is the same for the purpose of this action as if they had known and neglected to take proper precautions to prevent their cattle straying. I am inclined to think that it is equivalent and that it was the duty of the defendants to have made themselves acquainted with the condition of their cattle, and such would be my opinion if I was called on to decide the point; but as the jury have found that defendants did know of the state of their cattle, the point does not arise here. Now as to the improper reception in evidence of the certificate of the defendants' conviction for keeping cattle infected with the aforesaid disease in a field insufficiently fenced, I am of opinion that the certificate of conviction was improperly received in evidence, and if it had not been for Order XXXIX., rule 3 of the Judicature Act (38 & 39 Vict. c. 77) there would have to be a new trial. It is with great reluctance that I apply it to this case, for if the learned counsel for the defendants had known that he would have been met in this way he would have tendered a bill of exceptions to the judge's ruling; but as the rule says that there shall be no new trial on the ground of the improper reception of evidence, unless in the opinion of the court some substantial wrong or miscarriage has been thereby occasioned, I think we are bound by it, as there can be no doubt that the plaintiff has sustained a severe loss, and I do not think that the certificate influenced the jury is arriving at the verdict they did. The rule must, therefore, be discharged.

CLASBY, B.—I am of the same opinion as my Lord; the rule of law is clear that if a man's cattle trespass on the land of another person, the owner of the cattle is responsible, provided there was no defect contributing thereto on the other man's part by allowing his fences to remain out of repair, and in this case trespass might have lain against the defendant for allowing his cattle to stray. But I will not deal with the case in that way, I will put it as if the defendants' cattle had been lawfully going along the highway, when it would have been the duty of the defendants, knowing that their cattle were so infected, to have taken care that they did not intermingle or get into the same field with the plaintiff's. The charge is that the defendants knowingly permitted their diseased cattle to intermingle with the plaintiff's. Now it is quite sufficient to support the conclusion at which the jury arrived to have proved that a cow belonging to the defendants, and infected with the disease, and which was subsequently slaughtered on account thereof, had been kept in the same field as the defendants' cattle were afterwards turned into, for a cow in such a condition would be calculated to infect the field and any other cattle going therein within a short time. But beside this, the jury have found that Downs the defendants' servant knew of the state of the cattle on or before

the 13th Dec. It is not essential to prove the knowledge of the defendants themselves; the knowledge of their servants is quite enough to make the defendants liable. It would be unreasonable to say in such a case that the remedy should only be against the servant; the defendants ought to have known the state their cattle were in. With reference to the reception of the certificate of conviction in evidence, I quite agree with what has been said by my Lord; the Act was passed to prevent any injustice being done, and this case comes within the exception named in the rule.

POLLOCK, B.—I am of the same opinion. I do not think that we ought to disturb the verdict of the jury as long as it is founded upon the evidence brought before them on the trial; and from what is now before us I think that the jury had evidence before them which would warrant them in finding, as they did, and that the defendants' knowledge of the state of their cattle at the time of their intermingling with the plaintiff's was included in the findings of the jury. Now, as to the reception of the certificate of conviction in evidence, there can be no doubt that if the Judicature Act had not been passed there would have to be a new trial; but on looking at the rule I think that it applies as the rule is a reasonable one, and there has been no substantial wrong done by the reception of such evidence. The rule must be discharged.

Rule discharged.

Solicitors for the plaintiff, *Clarks, Woodcock, and Rylands*, Lincoln's Inn.

Solicitors for the defendants, *Thorne, Smith, and Thorne*, Wolverhampton

Feb. 2 and 3, 1876.

WOOLER AND WIFE v. KNOTT.

Landlord and tenant—Lease of public house—Tenant's covenant not to do any act that "can or may affect lessen or make void the licence"—Conviction of tenant by justices for offences against the Licensing Acts—Conviction not recorded on licence—Breach of covenant—Forfeiture—Licensing Acts 1872 and 1874 (35 & 36 Vict. c. 94, and 37 & 38 Vict. c. 49.)—Construction.

Subsequently to the coming into operation of the Licensing Act 1874, the defendant became the lessee of a public house belonging to the plaintiffs, and by the lease (which contained the usual clause for forfeiture in case of breach of covenant), the defendant covenanted "not to do, omit, or permit, or suffer to be done or omitted, any act, matter, or thing whatsoever that can or may affect, lessen, or make void either or any of the licences for the time being granted to the said public house." The defendant was convicted before the justices of having committed, on the same day, two offences against the Licensing Acts 1872 and 1874, but the convicting justices directed, under sect. 13 of the Act of 1874, that neither of the convictions should be recorded on the defendant's licence.

In an action by the plaintiffs, the lessors, to recover the possession of the premises from the defendant, the lessee, on the ground of forfeiture, and for damages for breach of covenant, it was Held by the court (Kelly, C.B., and Huddleston, B.), on demurrer to the plaintiff's statement of

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claim, that the conviction of the defendant not having been followed by a record of the conviction on the licence, the licence was not "affected" within the meaning of the covenant in the lease, and that there had been no breach of covenant by the defendant, and consequently no forfeiture. Goodtitle dem. Luxmore v. Saville (16 East, 95), and the dicta therein of Lord Ellenborough, C.J., and Le Blanc, J., cited and discussed.

This was an action by the plaintiffs to recover possession of a public house and premises, of which the defendant was tenant under a lease from the plaintiffs, on the ground that the defendant, having been convicted by the justices under the Licensing Acts 1872, 1874, for offences against the said Acts, had thereby committed a breach of her covenant in the said lease, and had so incurred a forfeiture of such lease.

The plaintiff's statement of claim:

1. On the 29th Aug. 1874, the plaintiff Dorothy Hannah Wooler, then Dorothy Hannah Heslop, spinster, by deed let to the defendant a public house or inn called the Black Lion Hotel, and premises, situated in Middlesbrough, in the county of York, for a term of six years from the 13th May 1874, at the yearly rent of 50*l.*, payable half yearly, the first payment of such rent to be made on the 23rd Nov. then next.

2. By the said deed the defendant covenanted with the said plaintiff, D. H. Wooler, her heirs and assigns, to pay the said yearly rent of 50*l.* at the times and in the manner so appointed as aforesaid for the payment thereof, and to "keep the said public house or inn and premises open as a public house, and that in the usual customary way and manner as houses of that description were kept, and that she would not do or omit or permit, or suffer to be done or omitted, any act, matter, or thing whatsoever, that could or might affect, lessen, or make void either or any of the licences for the time being granted to the said public house or inn and premises."

3. The said deed also contained a clause or proviso whereby it was agreed and provided that in case the rent thereby reserved, the same being legally demanded, should be in arrear for twenty-one days, or "in case any breach or default should be made in any of the covenants, clauses, or agreements in the said deed contained, upon the defendant's part to be observed and performed, it should be lawful for the said plaintiff, D. H. Wooler, her heirs and assigns, into or upon the said premises, or any part thereof, in the name of the whole, to re-enter and the same to have again, re-possess, and enjoy, as in her and their former estate as if the said demise had not been made, and the said defendants from thence to expel, remove, and put out, anything in the said deed to the contrary notwithstanding."

4. On the 26th day of Sept. 1875, the said D. H. Wooler, then the said D. H. Heslop, intermarried with and became the wife of the plaintiff, Edward Wooler.

5. On the 14th Oct. 1875, the defendant kept open the said public-house during prohibited hours. And on the same day she permitted drunkenness, and was herself drunk in the said public-house; and she was afterwards, on or about the 18th day of Oct. 1875, duly convicted before the magistrates sitting at Middlesbrough aforesaid, and fined by them in respect of the two former of the said offences.

6. No payment or satisfaction whatsoever has been made by or on behalf of the defendant to the plaintiffs or either of them in respect of the occupation by her of the said demised premises for the period of time which has elapsed since the 13th May 1875, from which time up to the present she has remained and still now remains in the possession and occupation thereof.

The plaintiffs claim—1, possession of the said public-house and premises; 2, 1000*l.* damages for the defendant's breaches of the said covenant respecting the mode of conducting the business of the said public-house and premises.

Statement of defence:

Demurrer by the defendant to the plaintiffs' statement of claim as bad in law, on the ground that it does not show any breach by the defendant of the covenants in the said deed contained, or of any of them, whereby the plaintiffs have a right to re-enter upon and recover possession of the said premises, or to receive from the defendant any damages for breach of covenant, or any payment or satisfaction for occupation by her of the said premises; and on other grounds sufficient in law to sustain this demurrer.

Joinder in demurrer by the plaintiffs.

The plaintiffs' points.—First, that the facts alleged in the statement of claim, and admitted by the demurrer, are sufficient to entitle the plaintiffs to judgment in this action in respect of the matters claimed in such statement; secondly, that the facts alleged in the 5th paragraph of the statement of claim, and admitted by the demurrer, constitute a clear breach of the covenant mentioned in the second paragraph; thirdly, that the facts alleged in the 5th paragraph show that the defendant omitted or permitted or suffered to be done or omitted matters that could or might have affected the said licences for the time being within the true intent and meaning of the said covenant; fourthly, that the facts alleged in the 5th paragraph show, that the defendant did not keep the said public house or inn and premises in the usual and customary manner as houses of that description are kept, inasmuch as she did not keep it in accordance with the licensing statutes in force for the time being; fifthly, that upon the admitted facts, the defendant was guilty of offences against the provisions of the 35 & 36 Vict. c. 94, and the 37 & 38 Vict. c. 49, which were of a nature to affect and lessen and tended to make void the said licences by virtue of the several provisions of the said Acts; and sixthly, assuming the defendant was, upon the admitted facts, guilty in point of law of a breach of either of the covenants referred to in the 2nd paragraph, it follows that the plaintiffs are entitled to recover possession of the said demised premises under the proviso for re-entry, which is referred to in the 3rd paragraph.

The defendant's points: First, it does not appear by the statement of claim how any of the facts therein mentioned was or were a breach or default of or in any of the covenants, clauses, or agreements in the said deed contained, on the defendant's part to be observed and performed, which entitled the plaintiffs to recover possession of the said public-house and premises, or to recover any damages as claimed by the plaintiffs; secondly, it does not appear by the said statement that any rent reserved by the said deed was in arrear, or that the defendants did not keep the

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said public-house or inn open as a public-house in the usual and customary way and manner as houses of that description were kept; thirdly, it does not appear by the said statement what licence or licences was, or were, or had been for the time being granted to the public-house, or inn and premises, or how and in what manner the defendant did, omitted, or permitted, or suffered to be done or omitted any act, matter, or thing that could or might affect, lessen, or make void either or any of the licences for the time being granted to the said public-house, or inn, and premises; fourthly, if it be intended by the statement of claim to rely on the Licensing Acts of 1872 and 1874, and any licence which may have been granted, or is affected or regulated under or by virtue of those statutes or either of them, with respect to the said public-house, then it is to be observed that neither the 13th section of the former of the said statutes, which imposes a penalty, on persons licensed to sell excisable liquors by retail in any house or premises, for the offence of permitting drunkenness in such houses and premises, nor the 9th section of the latter statute, which imposes a penalty on such persons, &c., for the offence of keeping open such premises for the sale of intoxicating liquors during the time at which such premises are by the said statute directed to be closed, enacts that the committing by or the conviction of the licensed persons for such offences, or either of them, shall cause the licence or licences granted to such person to sell excisable liquors as aforesaid to be affected, lessened, or made void. By sect. 30 of the Licensing Act 1872 and sect. 13 of the Licensing Act 1874 it is only after two previous convictions of either of the offences of which the defendant was convicted, and where such two previous convictions are directed by the convicting justices in their discretion to be recorded on the licence, that a third conviction of either of such offences, also ordered to be recorded on such licence, causes a forfeiture of such licence. Sect. 13 of the 37 & 38 Vict. c. 49, enacts that the justices convicting any person of either of the offences of which the defendant was convicted, shall, as part of their sentence, direct whether or not the said conviction shall be recorded on the licence of such person. The statement of claim does not allege that any previous conviction of the defendant for either of the said offences had been so directed or ordered to be recorded on the licence, or even that any previous conviction of the defendant of such offences, or either of them, had ever been made or taken place. 6. The said Licensing Act 1872, sect. 15, enacts that any licensed person permitting his premises to be a brothel, shall not only be liable to a penalty not exceeding 20*l.*, but shall on conviction forfeit his licence. Other offences of a more venial nature do not by the said licensing Acts, or any other law, entail or cause such forfeiture, unless not only repeated but repeated under such circumstances of aggravation, negligence, or wilful default by the person licensed as to induce the convicting magistrates as part of their sentence to order such conviction to be recorded on the licence. Only on a conviction of the said offences, or either of them, of which the defendant was convicted after two previous convictions which have been so ordered to be recorded on the licence, is the licence forfeited. The defendant having been convicted and fined as in the 5th paragraph of the statement

of claim is alleged, had undergone the punishment intended and prescribed by the statute. But neither of such convictions having been recorded, or ordered to be recorded on her licence, it is a harsh, forced, incorrect, unsound, and illegal construction of her covenants in her said lease, and of the dependent clause or condition of re-entry by the lessor, and contrary to the intention of the parties to the said lease to hold that the lessee has committed a breach of contract, and thereby has incurred a forfeiture of the estate and interest granted to her by the lease, in procuring which she may have invested all her means, and on retaining which her livelihood may depend.

By an agreement between counsel on both sides these additional facts were taken as admitted in the course of the argument, viz., that the justices who convicted directed, as part of their sentence, that the convictions should not be recorded on the defendant's licence, and that consequently neither of such convictions was so recorded.

Cave, Q.C. (with whom was *Heath*), for the defendant, in support of the demurrer.—The court are called on to say whether these two convictions, unaccompanied by any record of them on the back of the licence, constitute a breach of the lessee's covenant and a consequent forfeiture. Has the defendant done anything which, in the actual words of the covenant itself, "can or may affect, lessen, or make void the licence?" There is no pretence for saying that the licence has been "lessened" or "avoided," and therefore the sole question is, has it been "affected." Under sect. 13 of the Act of 1872, permitting drunkenness on the premises is an offence, and it is now an offence under sect. 9 of the Act of 1874, to keep a public house open for the sale of intoxicating liquors during prohibited hours, sect. 24 of the Act of 1872 being repealed. If two convictions are recorded on the licence, and then a third conviction ensues, the licence is rendered *ipso facto* void, and the premises are disqualified, unless the justices otherwise order (sect. 30 of the Act of 1874); but, in the absence of a record of the conviction on the licence, the licence is not avoided nor are the premises disqualified by any number of convictions. The indorsement of the licence is the test, and if the licence is not directed to be indorsed with a record of the conviction, it is not in any way "affected" by the conviction. Under the Act of 1872 the licence was to be indorsed by the justices' clerk, unless the justices otherwise directed; but by the latter Act of 1874, the burden is thrown upon the justices, and they are required to inspect the register of licences (which is provided for by sect. 31 of the Act of 1872), and to declare as part of their sentence whether the conviction shall or shall not be recorded on the licence. The Act of 1874 came into operation on the 30th July in that year, and the lease here was executed on the 20th Aug. following, and it is probable that the person who drew this covenant intended the word "lessen" to refer to the provision of that Act under which (s. 49) a licence may be reduced from a seven day to a six day licence, or (s. 7) the hour for closing may be made earlier, and each word of the covenant would thus have a definite meaning. An offence against the Act not followed by conviction cannot "affect" the licence, nor could the parties have meant to leave the question of forfeiture to a jury upon so vague, indefinite, and wide a question as that of drunken-

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ness. Covenants, the breach of which involve a forfeiture, are always construed most strictly and with a strong leaning against the forfeiture.

Morgan Lloyd, Q.C. (with him was *Willis*) for the plaintiffs *contra*.—Whether or not the justices direct the licence to be indorsed is not the question, for whether the licence be indorsed or not the conviction must be recorded on the register of licences (sect. 31 of the Act of 1872), and thus the premises are immediately affected. There is a vested cause of action which is not and cannot be touched by the exercise of the justices' discretion. Protection to the landlord from proceedings which may incur the loss of the licence is needed, and by so reading the covenant a plain meaning is given to the words, "which may or can affect," &c. The words are not "any act which shall have affected" as the defendant's construction would seek to make them. That it is the conviction, and not the record of it on the licence which disqualifies the premises is obvious from sect. 56 of the Act of 1872, by which, on conviction of the tenant for an offence against the Act, "and such offence is one, the repetition of which may render the premises liable to be disqualified," the owner of the premises is to have notice of the conviction; but not a word is said about recording it. In the plain and ordinary understanding of language, a conviction for an offence against the Act must be held to "affect the licence." He cited *Goodtitle dem. Luemore v. Saville* (16 East, 95), where the rule as to the construction of clauses of forfeiture is laid down.

Cave, Q.C., was not called on to reply.

Kelly, C.B.—In this case it appears to me that no offence has been committed leading to a forfeiture, and therefore our judgment should be for the defendant. The words of the covenant, the breach of which, it is alleged, has caused the forfeiture, are that the tenant "will not do, omit, or permit or suffer to be done or omitted, any act, matter, or thing whatever, that can or may affect, lessen, or make void, either or any of the licences for the time being granted to the said public house, or inn and premises." Now it appears that there was only one licence in existence at the time in question. I am glad to have had the assistance of my brother Huddleston, who was a member of the Legislature when one or both of these important Acts were passed, and who, therefore, is accurately acquainted with the question and the provisions of the statutes relating to it. Let us then, first of all, consider what is the state of the law upon the matter. The object of the landlord, is, of course, that the licence shall be kept intact, and ultimately un-avoided. Now, a licensed tenant may be convicted of one, or even of two, offences against the Act, but the licence is not avoided, and no forfeiture effected unless those two convictions are recorded on the licence itself, and are followed by a third conviction. The justices have the power of doing an act by which, and it is the first act by which, under these statutes, the licence may be in any wise affected, and that is, they may order the conviction to be indorsed upon the licence; but unless and until that indorsement is made, the licence is entirely unaffected. In a sense, no doubt, the licence may be said to be affected directly the offence is once ordered to be, or is, indorsed upon it; but it is only in case that is followed by subsequent offences, and the subsequent result of such

offences, that the licence is avoided. The question, then, is, whether anything that has been done, or that may be done, which renders it more or less probable that at last the licence will be avoided, can be said to "affect" the licence and work a forfeiture. In considering the question, I do not propose to follow closely either Lord Ellenborough or Le Blanc, J., in the views taken by them upon the subject of forfeitures in *Goodtitle dem. Luemore v. Saville* (16 East, 95). In my judgment, in order to work a forfeiture of property, the acts which are to effect the forfeiture or affect the property, should be expressed in language so clear, express, and intelligible, as to leave no room or reason for doubt in the mind of the judge who is called upon to decide the question, that the act in question does, according to a fair and reasonable construction of the language used, and the understanding and intelligence of the parties to the contract, amount to a forfeiture. Indeed, as has been justly observed by the learned counsel for the defendant, it would be highly inconvenient and unjust that persons who may have invested, it may be, their whole fortune, in taking and setting up a public house, should, by reason of the uncertainty or ambiguity of the language of their lease, be kept in perpetual dread of the risk of a forfeiture, which might be their ruin. I do not, therefore, propose to take, on the one hand, the too severe and strict view, or, on the other hand, the too lenient view of the language here used with regard to offences against these Acts of Parliament; but I say that, upon every principle of common sense and justice, the particular acts which are to constitute or to incur a forfeiture ought to be most clearly defined and expressed, and to be most clearly understood between the parties. Now it was contended by Mr. Lloyd for the plaintiffs, that any act amounting to an offence against the Licensing Acts would be a breach of the tenant's covenant, and cause a forfeiture, even before it is ascertained or known whether there will or not be a conviction. But see what the result of that would be. It is an offence against the Act, under the closing clause, if the premises are allowed to be kept open after the prescribed time for closing, and it might be that an accident had happened in the neighbourhood, and the injured person might be brought to the house in a dying state, and the house might be kept open beyond the hour for closing, in order to administer the requisite necessaries and stimulants, in the hope of saving the man's life, and thus an offence against the Act would have been committed. But who in such a case would dream of prosecuting for it? or, if anybody did, what magistrate would convict the innkeeper? I can only say, if the parties meant and intended to contract, that such acts as these should be followed by such consequences, nothing would have been easier than to say in a few words that, if the tenant should commit any offence against the Act followed by prosecution and conviction, and if he should repeat the offence and be again convicted, then the premises should be forfeited. If that was the intention of the parties, and the tenant chose to enter into such a covenant, and take his chance of the consequences, then no one could complain. It would be easy to express these consequences and what would be the cause of a forfeiture, in a single sentence, or even in a single line, if such were intended. I think it is only

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when something is done which directly operates upon—I might almost say which touches—the licence, and which if it is followed by other acts is to lead to its avoidance, that the licence can, within the meaning of these words, be said to be “affected.” An unendorsed licence is just as operative for all purposes as it was the day after it was granted, and as if no offence had been committed, and no conviction had taken place, and it is therefore not in anywise “affected.” As to anything being done that would “lessen” the licence, I confess I do not know how a licence can be “lessened” or what does, or can, or cannot “lessen” it. But the substantial question is whether anything has been done which “may or can” affect the licence. At the present moment the licence is just as valid and valuable as it was before, and it is only that something has been done which may or may not render it more or less probable that on some future occasion it may be forfeited. The words of this covenant are not, in my opinion, sufficiently clear and intelligible to be held to work a forfeiture, and the licence cannot be said to have been “affected.”

HUDDESTON, B.—This question arises in the shape of a demurrer to a statement of claim under the Judicature Act, and I own when I heard Mr. Cave taking the most technical objections to the form of the statement of claim, I for one, speaking for myself, determined, in so far as I possibly could, to prevent the recurrence of those special demurrers, which certainly at one time rendered the observations upon the administration of justice somewhat well founded; and if this had been a mere technical objection to the form in which the statement of claim was drawn, I at least should not have given it any particular favour. But a very substantial question arises here. We have to consider, upon the facts which have been admitted upon both sides, whether there has been a forfeiture under a covenant which is set out in the statement of claim. The covenant has been already alluded to, and the facts that are to be taken as admitted, which show that there has been a forfeiture, and are not only the facts stated in paragraph 5 of the statement, but one also which was very properly admitted by Mr Lloyd, will enable us to come to a just conclusion. The facts to be taken as admitted were, as I think, that the defendant had been convicted of keeping the house open in prohibited hours; of suffering drunkenness upon the premises, and of being drunk herself; and that two of such convictions, or two convictions for one or both cases, took place before the magistrates. But, and this is a fact which is admitted, these convictions were not accompanied by that which is placed in the discretion of the justices, namely, an indorsement recording them on the licence. What then is the meaning of the covenant here, and in what way are we to interpret it? In *Goodtitle dem. Luxmore v. Saville* (*ubi sup.*) Lord Ellenborough in his judgment said: “In the construction of covenants of this sort they are neither entitled to favour or disfavour, whether they are to create a forfeiture or to continue an estate; but we are to put the fair construction upon them according to the apparent intention of the contracting parties.” And Le Blanc, J., in the same case said, “the court must be thoroughly satisfied of the construction of the lease contended for as establishing such forfeiture before they give an

opinion which is to destroy the lease.” Now in the present case I have not without difficulty come to a conclusion, and, in doing so, I have adopted Lord Ellenborough’s rule, and have endeavoured to look at the covenant neither adversely nor favourably; but according to what appears to be the clear and fair construction of the contract entered into, and what was the intention of the parties; not forgetting the well known rule that a covenant is to be construed most strongly against the stipulating party. As to the limited interpretation that Mr. Cave gave to the words “affect, lessen, or make void,” and his argument, that in the mind of the framer of this deed there was present the distinction introduced by the Licensing Act of 1874, which was passed in July 1874, the covenant in question being entered into in the following August, I can only say that I am not inclined to give much weight to that argument, which would attribute such immense and unusual diligence to the drawer of this deed. The Lord Chief Baron has alluded to my experience acquired in another place; but I may say that I have not been guided solely by that experience, nor have I allowed it to interfere with the full and proper interpretation of the Act. But it may not be amiss to remember that before the two recent Licensing Acts were passed there were certainly always two, if not more, licences, one by the magistrates, and one from the excise, and it may well be that the person who drew this covenant had that state of things in his mind in putting in the words “either or any of the licences.” I think that these words, “affect, lessen, or make void,” must be read according to their common, ordinary English meaning. My Lord, referring to the word “lessen,” said it was difficult to tell exactly or to understand how one could “lessen” a licence. But the licence is granted not to the premises, but to the individual. Of course, if it is taken away from the individual it affects the premises, and if the licence is taken away from the individual in the middle of the term it would “lessen” the term of that licence. But I think we must take the words “affect or lessen” as general terms, referring to certain acts, which may interfere with or diminish the duration or, it may be, the value of the licence. There is no doubt that the licence itself, that is speaking literally, the document, is not affected unless there is a record upon it of the conviction. and unless there is such a record the premises are not “affected.” I recollect, as a matter of history, the great arguments used against Lord Aberdare’s Act of 1872 with reference to its requiring a record of the conviction to be indorsed on the licence in every case unless the convicting magistrate or justices directed that it should not be so recorded; and that Act also required a register of all convictions to be kept. It was said that a result not at all intended was often the consequence of that enactment, inasmuch as, though the justices might not order the conviction to be recorded, yet the clerk was bound under the Act to record it on the licence in the absence of a special direction to the contrary, and the justices may have inadvertently omitted to give any direction. This was considered to be an undesirable state of things, and, accordingly, the 13th section of Cross’s Act of 1874 made it imperative upon the convicting justices, before passing sentence in the case of a conviction, to take into consideration not only the offence then in question, but

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the previously recorded convictions, if any, and to declare as part of their sentence whether the present conviction should or should not be recorded upon the licence. The burden is thus thrown upon the justices. I think, not giving to the words "may affect" the extended meaning for which Mr. Lloyd argued, viz., that they mean any act which, if other steps follow, will affect the licence, but giving to them a fair interpretation, that the reasonable construction of the covenant is, if the justices, having all the circumstances before them, choose not to order the conviction to be indorsed on the licence, then the licence is not affected; if, on the other hand, they choose to have it so indorsed, then the licence is affected substantially; then, for the first time there is something which may be regarded as the first step in a series of steps, which may end in that which may cause a forfeiture. That first step is a record of a conviction on the licence. By thus construing the words of this covenant I think we shall really be dealing fairly between the two parties, and putting on the words the interpretation which they may be reasonably supposed to have themselves intended. Mr. Morgan Lloyd, who omitted no possible point in favour of a harsh construction of the covenant, drew an argument from the 56th section of the Act of 1872, enacting that on conviction of a tenant for an offence, the repetition of which may render the premises liable to be "disqualified," the justices' clerk shall serve the owner of the premises with a notice of the conviction. It is obvious from the marginal note that the object of the section was to protect the owners, not only such owners as brewers, but mortgagees, trustees, and others interested in the property. Mr. Lloyd's argument, and it was a fair one, was that from the use of the phrase "repetition of the offence," the Legislature must be taken to have imagined that the mere conviction without indorsement on the record would affect the owner. I do not, however, think that that ought to alter our view of what is the fair meaning and construction of this covenant, and whether, upon the facts admitted, there has been a forfeiture. I have arrived at my present conclusion, not without considerable difficulty and doubt, but I congratulate myself upon being able to come to the same conclusion as that arrived at by the Lord Chief Baron, and to say that the defendant is not liable. *Judgment for the defendant.*

Solicitor for the plaintiffs, O. B. Wooler.

Solicitors for the defendant, Iliffe, Russell, and Iliffe, agents for Barron, Darlington.

Feb. 24 and 26, 1876.

(Before BRAMWELL, CLEASBY, and AMPHLETT, BB.)

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Municipal corporation—Alderman supplying goods to town council—Disqualification—"Having an interest in a contract"—Alderman acting subsequently to contract without re-election—Action against for penalties—5 & 6 Will. 4 c. 76, sects. 28 and 53.

By sect. 28 of the *Municipal Corporations Act* (5 & 6 W. 4 c. 76) "no person shall be qualified to be elected, or to be a councillor or an alderman of any borough . . . during such time as he shall

have, directly or indirectly, by himself or his partner, any share or interest in any contract or employment with, by, or on behalf of the council of such borough." And by sect. 53 of the same statute, "if any person shall act as . . . alderman or councillor . . . for any borough . . . without being duly qualified at the time of making the declaration hereinbefore required in that behalf, or after he shall cease to be qualified according to the provisions of this Act, or after he shall become disqualified to hold any such office, he shall, for every such offence, forfeit the sum of 50l., to be recovered, &c."

The defendant was a tradesman and an alderman of the borough of M., and between 19th June and 31st Dec. 1874, different orders for the supply of goods by him for the use of the Corporation were given to him on the part of the town council, the defendant from time to time sitting in his capacity of alderman on the committee of the council by whom the resolutions for the ordering of the goods were passed. The orders were in due course on each occasion sent to the defendant's shop, and the goods therein specified were supplied by him; the prices of the goods supplied on the several occasions being 3s., 6s., 6s., 10l., 2l. 10s., and 5s. respectively. The total amount (13l. 10s.) was paid by the town council to the defendant by a cheque on the 6th May 1875.

In an action against the defendant for penalties under sects. 28 and 53 of the statute, for acting as an alderman after having become disqualified, the declaration charged that before and at the time of committing the offence, &c., the defendant, being an alderman of the borough, had become disqualified to hold the office by having an interest in certain contracts for the supply of goods to the town council for reward to the defendant, and after becoming so disqualified, and within three months before suit, he acted as alderman for the said borough, contrary to the form, &c.; and it was, upon the facts above stated,

Held, by the Court (Bramwell, Cleasby, and Amphlett, BB.), that the dealing in question was a contract within sect. 28 (see *Nicholson v. Fields*, 31 L. J. 233, Ex.; 7 H. & N. 810), but that the allegations in the declaration were not proved, and the defendant, by acting as an alderman, as alleged, had not rendered himself liable to the penalties imposed by sect. 53.

By Bramwell, B.—Sect. 28 only shows that the defendant was not *de jure* an alderman, and sect. 53 imposes a penalty upon a person, not for acting when not *de jure* an alderman but, for acting without being duly qualified at the time of making the declaration required by the statute upon his election.

By Cleasby, B.—The words of sect. 53, "after he shall become disqualified, &c.," must be read to mean, "after he shall become disqualified, and while he is so disqualified."

THIS was an action by the plaintiff, as a burgess of the borough of Macclesfield, to recover under sect. 53 of the *Municipal Corporation Act* (5 & 6 Will. 4, c. 76) divers penalties of 50l. each against the defendant, for having acted as an alderman for that borough on various occasions after he had become disqualified to hold that office, by reason of his having a share or interest in a certain contract with the council of the said borough, within the meaning and provisions of sect. 28 of the said statute. By his declaration the plaintiff charged

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that, before and at the time of committing the grievances thereafter mentioned, the borough of Macclesfield was a borough named in Schedule A of the Municipal Corporations Act (5 & 6 Will. 4, c. 76), and the defendant claimed to be an alderman of the said borough, and to use and exercise the office of alderman of the said borough; and before and at the time of committing the said offences the defendant had become disqualified to hold the office of alderman of the said borough, according to the said statute, to wit, by having a share and interest of and in certain contracts with the council of the said borough, to wit, certain contracts for the supply of goods by the defendant to the said council, for reward to be paid by the said council to the defendant for the same. Yet the defendant, not regarding the said statute, after the passing of the said statute, and after he had become so disqualified as aforesaid, and within three calendar months before the commencement of this suit, on divers, to wit, six several occasions, acted as alderman for the said borough, contrary to the form of the statute in such case made, whereby he forfeited for each of the said offences 50*l.*, amounting, to wit, to 300*l.* Yet he had not paid the same.

The defendant pleaded not guilty (by Statute 21 Jac. 1, c. 4, s. 4 (Public Act), and upon that plea issue was joined.

At the trial, before Lord Coleridge, C.J., at the last summer assizes at Chester, the following appeared to be the facts of the case as either proved or admitted.

The plaintiff was a Burgess of the borough of Macclesfield, which is a borough within schedule A of the Municipal Corporations Act (5 & 6 Will. 4, c. 76), and the defendant was an inhabitant of the same borough, carrying on the trade and business of a tallow chandler there, and was also an alderman of the said borough, and had previously been mayor of the borough. It appeared that between the 19th June and the 31st Dec. 1874, six different orders were given to the defendant on the part of the town council for the supply of goods (tallow) by him, for the use of the corporation, the defendant, from time to time, sitting as alderman on the committee of the town council by which the resolutions were passed ordering the said goods to be supplied. These orders were in due course sent to the defendant's shop, and the goods therein specified were supplied by him. The bill or invoice showing the different transactions was subsequently sent in to the town council:

The amount of the account (13*l.* 10*s.*) was paid in one sum by the town council by cheque on the 6th May 1875, and the account was duly receipted and signed by the defendant. Subsequently, and previously to the commencement of this action, on the 11th June 1875, the defendant sat and acted five times as an alderman of the said borough without having been re-elected, and it was to recover penalties under sect. 53 of the Municipal Corporations Act, in respect of his so acting, he being disqualified to act under sect. 28 of the statute, that the present action was brought.

The learned judge being of opinion that the case came within the mischief pointed out by the Act, a verdict was found for the plaintiff for 250*l.*, being five penalties of 50*l.* each, and though leave to move was refused to the defendant by the learned judge, execution was nevertheless stayed

to give him an opportunity of moving, if advised so to do.

A rule *nisi* was accordingly obtained by *McIntyre*, Q.C., on behalf of the defendant, during the last Michaelmas sittings, calling on the plaintiff to show cause why the verdict for him should not be set aside, and a new trial be had on the ground that the learned judge misdirected the jury in telling them that any supply of goods to the council was within sect. 28 of the 5 & 6 Will. 4, c. 76, and disqualified the defendant from being an alderman.

The following are the sections of the Municipal Corporations Act (5 & 6 Will. 4, c. 76) which are material:

Sect. 28: That no person shall be qualified to be elected, or to be a councillor or an alderman of any such borough . . . unless he shall be seized or possessed of real or personal estate, or both, to the following amount, that is to say . . . or during such time as he shall have, directly or indirectly, by himself or his partner, any share or interest in any contract or employment with, by, or on behalf of such council. Provided that no person shall be disqualified from being a councillor or alderman of any borough as aforesaid by reason of his being a proprietor or shareholder of any company which shall contract with the council of such borough for lighting or supplying with water, or insuring against fire, any part of such borough.

Sect. 52: Provided that if any person holding the office of mayor, alderman, or councillor for any borough shall be declared bankrupt . . . or being an alderman, shall be absent for more than six months at one and the same time (except in case of illness) from the borough of which he shall be . . . alderman or councillor, then, and in every such case, such person shall immediately become disqualified, and shall cease to hold the office of such . . . alderman or councillor as aforesaid. . . . and the council thereupon shall forthwith declare the said office to be void, and shall signify the same by notice in writing under the hands of three or more of them, countersigned by the town clerk, to be affixed in some public place within the borough, and the said office shall thereupon become void.

Sect. 53: That if any person shall act as mayor, alderman, or councillor . . . for any borough without making the declaration hereinbefore required in that behalf, or without being duly qualified at the time of making such declaration, or after he shall cease to be qualified according to the provisions of this Act, or after he shall become disqualified to hold any such office, he shall for every such offence forfeit the sum of 50*l.*, such sum to be recovered with full costs of suit by any person who will sue for the same within three months after the commission of such offence by action of debt or on the case in any of Her Majesty's Superior Courts of Record, &c. . .

Arthur Williams, with whom was *The Solicitor-General* (Sir H. S. Giffard, Q.C.) now showed cause for the plaintiff against the rule. It has not hitherto been decisively settled how far such a transaction as the present comes within the provisions of sects. 28 and 53 of the Municipal Corporations Act, and that is the question now to be decided. The plaintiff contends that as soon as the defendant first entered into this contract, on the 9th June 1874, he became disqualified, or ceased to be qualified, under sect. 28, and by acting afterwards, whilst so disqualified, became subject to the penalties imposed by sect. 53. [BRAMWELL, B.—Suppose after payment of the amount he had resigned, and had been re-elected?] That would be different, and is what he should have done. He must be re-elected in order to regain his qualification. The material question is whether the transaction here comes within the meaning of sect. 28, as being the "having any share or interest in any contract, &c." The section makes him at once

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disqualified on becoming interested, and during such time as he shall be so. There are many decisions upon this and similar statutory provisions passed with a view of preventing the corruptions ensuing from such transactions between officials of public bodies and corporations, and members while in office. There are statutes, for instance, relating to poor law guardians, turnpike trustees, and so on. Sect. 28 here differs in its terms from those other statutes. In *Le Feuvre v. Lankester* (3 E. & B. 530; 23 L. J. 254, Q. B.), the defendant, an alderman of a municipal borough, to a district wholly comprised within which the Public Health Act 1848 was applied, and the corporation of which borough were constituted the Local Board of Health, contracted to supply the board with iron railings, and purchased the iron for the purpose of performing his contract; and afterwards, continuing to be an alderman, was elected mayor. In an action against him for penalties under sects. 28 and 53 of the present Act, for acting as mayor while disqualified by being interested in a contract with the council, it was held that it was not an interest in a contract within sect. 28, and there was no liability to penalties. In the course of the argument that point was disposed of by Crompton, J., who said: "This was an action under sect. 6 of the 55 Geo. 3, c. 137, the words of which are much more extensive than those of sect. 28 of 5 & 6 Will. 4, c. 76. If the contract with those executing the works had been colourable, so that Lankester was really interested in the contract, it would be another affair. The fact that goods used in a contract were supplied by a member of the council may be evidence that he had a concealed interest in the contract, but nothing of the sort is found here, and it would be a very strange thing to hold a member of the council liable to penalties because in the ordinary course of trade a contractor bought articles at the member's shop." The distinction between that case, as stated by Crompton, J., and the present one is obvious. [BRAMWELL, B.—If you cite that case for the purpose of distinguishing it from the present one you need not do so, for we are all agreed as to that.] Technically speaking, no doubt the purchase of two pennyworth of nails over the counter is a contract, and would technically come within the terms of the section, but of course the section must be viewed and construed reasonably. The intention of the Legislature here was clearly to prevent any such transactions going on. The matter was substantially concluded by *Nicholson v. Fields* in this court (31 L. J. 233, Ex.; 7 H. & N. 810). There, in an action against a Town Commissioner, under a local Act, incorporating the Commissioners Clauses Act 1847, for acting as commissioner after disqualification, a bill made out by defendant and addressed to the commissioners, for lime supplied at different times and receipted by defendant, was held evidence for the jury that he was concerned in a contract within the Commissioners Clauses Act (10 & 11 Vict. c. 16, s. 9), and that he thereby became disqualified under sect. 15 of the same Act, which imposes a penalty on commissioners acting after having become disqualified. The words in the section of that Act are substantially the same as those here. All the objections possible to be raised to a transaction like the present are dealt with and got rid of in the judgments in that case. Pollock, C.B., expressly said that the small-

ness of the amount was immaterial, and had nothing to do with the question, for that every description of dealing by the commissioners was intended to be put an end to. Martin, B., too, thought that where articles were supplied on credit from time to time over the counter, though of small amount, there would be evidence of a contract; and Channell, B., said: "I think we are giving a very wholesome effect to a very important Act of Parliament, which is intended to guard against not only actual abuse, but any possibility of abuse, and that in so doing we give a reasonable construction to the Act, and one which we may reasonably suppose the Legislature intended, and that we should be defeating its intention unless we went the length we do in making this rule absolute." The wording of sect. 28 is peculiar. It should be read as putting two distinct alternatives. A man shall not be "qualified to be elected during such time, &c.," so that if elected, while a contract exists, he would be subject to penalties for acting without being duly qualified. The words "during, &c.," were put in to meet the contingency of election or re-election, and are solely applicable to that. The words "or to be an alderman," refer to the continuance of the qualification. Had it been properly framed the section would have had two branches; first, disqualifying from election during such time, &c.; and, secondly, it would have said, "and he shall cease to be an alderman," as in the Commissioners Clauses Act. The moment the defendant became disqualified he could not act until re-elected. The words "cease to be qualified" in sect. 53, mean when he becomes "disqualified," and for acting after becoming "disqualified" he is subject to the penalty. The office may not be vacant until he is removed by proceedings in the nature of a *quo warranto*; but he cannot act till purged by re-election. [AMPHLETT, B., referred to sect. 52 as showing the meaning of the word "disqualified," and referred also to the property qualification of an alderman under the first part of sect. 28, and asked if an alderman on ceasing for a day or a week to have that qualification, though he should afterwards regain it, would require to be re-elected before he could act again.] It would seem to be the logical consequence that he must be re-elected. [AMPHLETT, B.—Justices of the peace are under heavy penalties for acting without qualification, but it is laid down in Burns' Justice, that becoming disqualified by loss of property will not prevent a justice acting, without any fresh commission, after regaining his qualification.] A commission, which would have to be renewed at the pleasure of the Crown, differs from an express statutory provision like the present. The proviso at the end of sect. 28 shows that the section means a disqualification operating upon his being an alderman. The object of the Legislature is very clear, and it would be entirely frustrated and the statute become illusory, if the defendant's contention and construction were to prevail. (He cited also *Barber v. Waite* (1 A. & E. 514; 3 Nev. & Man. 611), and the observations of Taunton, J. there, as to the object of the Legislature in statutes of this kind.)

M'Intyre, Q.C. and *Coxon*, for the defendant, *contra*, supported their rule, and contended that the real and true meaning of the words, "shall not be qualified to be elected, or to be," &c., "during the time," &c., is, that whilst a contract continues in

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existence, whether for a long or short time, a man shall cease to be qualified to be elected, or to be qualified to act or to be an alderman, but that his office is not vacated; and sect. 52 greatly aids that argument by showing that when the Legislature intended the office should be vacant, and the man should cease to be an alderman, it used apt, proper, and distinct words to effect the object. Two sets of circumstances were in the mind of the Legislature, and those mentioned in sect. 52 are not alluded to in sect. 28. Certain qualifications necessary for election are specified in sect. 28, and then come the words of disqualification now before the court. No doubt, during the time of an existing contract a candidate for office would be disqualified for being elected; but if the contract were completed during the canvass, what is there to prevent his being qualified to be elected? So, if the contract be entered into by an alderman, though he may have been in a state of suspension during the progress of it, the moment it is completed he is free, and requires no re-election. Had it been otherwise the Act would have declared the office vacant, and have directed a new election. It may be that during the progress of the contract, a *quo warranto* might have issued against him to show cause by what right he was an alderman. The section relied on by the plaintiff means that he shall not sit or act as an alderman during the continuance of his interest in a contract, but that if that interest ceases the moment the contract is completed, and every thing has been performed under it, then the disqualification ceases, and he is no longer disqualified from being an alderman, and does not require re-election. *Nicholson v. Fields* (*ubi sup.*) cited by the plaintiff is completely distinguishable. There there was no temporary disqualification, but an absolute cesser of holding the office, and on attempting and claiming the right to exercise the functions of the office under such circumstances he properly came within the penalty clause in the Act of Parliament in that case. So here, if a bankrupt alderman were to act he would be liable under sect. 52 of the Act to all the penalties, because he had by express enactment, by becoming bankrupt, "ceased to be" an alderman, and "ceased to be qualified to be" one. But under sect. 28 it is not a continuing disqualification beyond the time when the contract is concluded. [BRAMWELL, B.—Suppose an alderman to have committed some disqualifying act, and no *quo warranto* to be applied for within a year, does he thereby get over the disqualification?] Certainly, it is thought that he would. The case in the Queen's Bench of *Reg. v. Francis* (18 Q. B. 526; 21 L. J. 304, Q. B.), is precisely in point upon that very question, and the effect of that case is that if a man continues in office for more than a year after the last dealing, he cannot be ousted upon a *quo warranto*. The disqualification here existed only during the continuance of the contract, and the liability to penalties must be commensurate with the continuance of the disqualification, and therefore the liability to penalties is only in respect of his acting during the time the contract continues. The section is, no doubt, obscurely worded, but being a highly penal one, it must be construed most favourably to the subject, who is not to be mulcted in a heavy penalty in the absence of very clear and distinct grounds for making him liable. [BRAMWELL, B.—

There is this to be said on the other hand, that this being a highly reprehensible practice, the words of the statute should not be unnecessarily strained in order to give a liberal interpretation in favour of the subject.] Had a casual sale like this been intended to be prevented it would have been done by express words. [BRAMWELL, B.—I am afraid the case of *Nicholson v. Fields* (*ubi sup.*) is against you so far as it decides that a dealing such as this is a contract within the statute.] The contrary is not here contended for, but, unless the Legislature has clearly shown its intention that a contract, although concluded and done within five minutes, is to operate as a thorough disqualification, and that a man cannot accept office, or act in office, except at the risk of these onerous penalties, then the defendant ought not to be held liable, and this rule ought to be made absolute.

BRAMWELL, B.—I think that this rule should be made absolute, as the plaintiff did not, in my opinion, prove his case. Whether the Legislature intended that such contracts should or should not be within the purview of the Act is another matter; but I think that if a shilling's worth of stationery were bought of an alderman by or on behalf of the corporation, it would be a contract within the Act of Parliament between the corporation and that alderman. Probably, if the Legislature had intended it, they would have used the word "dealing," or some such expression. However, independently of any reasoning upon the matter, I think the case is concluded by that of *Nicholson v. Fields* (*ubi sup.*) where a somewhat similar contract was involved. In that case it was a bill for lime supplied to certain commissioners. In the present case it is a supply of candles or tallow. The question is whether the defendant's position comes within the 28th sect. of the Act. Now, where it is necessary that the case should be logically stated, either under the old system or under the more modern form of pleading, one cannot help getting some assistance, by referring to the mode of stating it adopted by the pleader; and I think that if we look at the declaration here, it will be found that the plaintiff has not proved his case. For what does the declaration say? It says that the borough of Macclesfield is a corporation within the Municipal Corporations Act, that the defendant claims to be an alderman of the borough, that before and at the time of the committing of the grievance he had become disqualified to hold the office of alderman of the borough. That has certainly not been proved; because Mr. Williams concedes that if he had put himself up for election as an alderman at the time the declaration is speaking of, he would undoubtedly have been qualified to hold the office. It is true that possibly he could not have put himself up at that time, because he was already in office, and perhaps could not be removed except by a *quo warranto*; but still, if in some way or other he had got out of office, he would not have been, as the declaration says he was, "disqualified to hold the office of alderman." The declaration then goes on and says, "to wit, by having a share and interest in certain contracts with the council of the said borough." Now I construe that to mean, and it is obviously its plain meaning, that at the time he committed the offence he had an interest in a contract. If it had meant "having had," it should have said so, but it does not. This, to my mind, shows

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the facts properly and correctly; but it also satisfies me that the plaintiff has no case. Now, instead of dealing with the declaration, I will deal with the substance of the matter. It is alleged that the defendant by what he has done has brought himself within the 53rd section of this Act of Parliament. Before considering the 53rd section it will be as well to direct our attention to the 52nd section, to which my brother Amphlett referred during the argument, and pointed out that that section states what is a disqualification, namely, that if any person holding the office shall be declared a bankrupt, or if any of the other things therein mentioned shall happen, he shall immediately become disqualified, and shall cease to hold the office. The 53rd section is this, "That if any person shall act as mayor, alderman, or councillor, &c. . . without being duly qualified at the time of making the declaration therein-before required, or after he shall cease to be qualified according to the provisions of this Act, or after he shall become disqualified . . ." Now the defendant had not become "disqualified," because that means "disqualified" as previously stated, and that he had certainly not become. Therefore the question is, whether he had "ceased to be qualified according to the provisions of this Act." In order to ascertain whether he had "ceased to be qualified," Mr. Williams referred us to the 28th section of the Act, and said that that showed that he had "ceased to be qualified." Now let us see what that section does say. It says, "No person shall be qualified to be elected" (and Mr. Williams desired us for the moment to leave out the words "or to be, &c.") during such times as he shall have any share or interest in any contract, &c." If that were all, of course that would not do for Mr. Williams, because the defendant had no interest at the time he was elected; but then Mr. Williams goes on to say, "No person shall be qualified to be elected, or to be an alderman of the borough, during such time as he shall have any interest in any contract," &c. The meaning of that, he says, is that he shall not be elected if at the time of the election he is interested in a contract, and that he shall not "continue to be," during the time that he is so interested, an alderman of the borough. The learned counsel had some little difficulty to contend with in the words "during, &c.," but he was not, I think, averse from adopting this mode of dealing with them, that is, either to say that some sense must be made of them in some way which it was not for him to point out, or that, at all events, if the words were to continue in, then we were to take them with this consequence, that inasmuch as the man cannot be an alderman during the time he shall have ceased to be *de jure* an alderman, and shall be liable to be turned out upon a *quo warranto*, and does not come into a lawful aldermanic condition, that is to say, he does not resume the aldermanic status lawfully on ceasing to be interested in a contract, therefore the 28th section was to be read thus: "He shall not be elected if he is interested at the time of the election, and if he become interested afterwards he shall cease to be an alderman *de jure*." Now I do not think that that ingenious argument is well founded. I am not at all sure that the meaning is not one that is very commonly and properly expressed by the preclusion of doubts in this way; the law maker supposes that it is not enough to

say that the man shall not be elected, because it might be said "they ought not to elect him, but they have done so." And so it is not unfrequently guarded against by this sort of expression, "he shall not be elected, or, if elected, he shall not be"—so and so. I am not sure that the Legislature had any further meaning in the words they used in that section than that. But, supposing we were to put upon them the meaning which Mr. Williams says we ought to do, and were to read them thus, "he shall not be elected if, at the time of his election, he is interested in a contract, or if, after election, he become interested in a contract, he shall cease to be an alderman." Is that within the 53rd section? The 53rd section says (I say nothing now about disqualification, as I have already dealt with that, but the 53rd section says) "that if he shall act without being duly qualified" a certain thing shall happen; but if Mr. Williams's argument was stretched to the utmost, and every part were made to agree together, it does not follow that the defendant here has acted "without being." The argument proves not that he is "disqualified," but that he is not an alderman at all. Now, if the statute had said that he shall not act, not being an alderman, then Mr. Williams's argument might have gone a long way to prove that he was not *de jure* an alderman; but the 53rd section says, "without being qualified." But he was qualified, because it is conceded, and it is manifestly so, that if by any chance he got out of office, he could immediately get in again by making himself duly qualified. It is impossible to read these words as "not being," because these consequences would follow, that if there was an informality in the election, which would subject the man to be turned out upon a *quo warranto*, during all the time he would be subject to penalties. As far as I know, there is no provision in the Act of Parliament against that. If we hold that this section is to extend to the case of a man who is acting, and who is not *de jure* an alderman, there is nothing to prevent his being subject to penalties. Without, however, having recourse to Mr. Coxon's argument as to the indulgent way of dealing with the subject, and giving the utmost weight to the plaintiff's argument, it seems to me that sect. 28 only shows that the defendant was not *de jure* an alderman, and that sect. 53 imposes a penalty, not upon a person who is acting when not *de jure*, or *de facto* an alderman, but upon one who acts without being duly qualified at the time of making the required declaration, and that is not the case with the defendant. There is another argument which has incidentally arisen, and which seems to me to be strong to show that that must be the meaning of the statute. Mr. Williams, in answer to our question, what would be the consequences of sect. 28 being interpreted, as he said it ought to be, and whether the office was *ipso facto* void, or whether it could be made void upon a *quo warranto*, said that it was not *ipso facto* void, but that it would be vacated upon a *quo warranto*. Now observe the consequence. The *quo warranto* must be moved for within a year. Suppose it is not moved for within that period, then the man is an alderman, and *de jure* an alderman, and cannot be turned out, and yet he cannot act without being subject to penalties. That seems to be an inconsistency, and to demonstrate that the contention on the part of the plaintiff here cannot be main-

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tained. But then it is said that we ought to deal with the words of these sections strictly, and to put upon them the construction for which the plaintiff has contended, because the consequence of not doing so would be very disastrous. I do not agree with that. I am by no means clear, as I said before, that the Legislature intended to deal with such a case as this in this way. I am very much inclined to think that if they had intended that such a case as this should be included in the section they would have used such a word as "dealing," or some such comprehensive expression. I think that very likely what they had in their minds was one of those continuing contracts, that is to say a contract for the supply of coal for a year or so, a contract to do a large job of building, or something of that kind, where a man may make a large profit if he has got friendly persons to contract with him; and I doubt very much whether the Legislature intended these words to comprehend the case of a trifling dealing over the counter, and where the price paid for the article was well known, though I think the words which they have used here will comprehend such a case. This is one of those cases where the law maker has had a general intent in his mind, and has realised his intent in a way which, if we look at either half of the enactment, perhaps we should say that he has not done it, but which, if we look at the whole, we should say that he has done it. I do not, for my own part, think that any of the disastrous consequences which have been pointed out will flow from our decision. Mr. Williams has suggested that if this were to be allowed we should have an alderman who is a stationer, on one day, giving an alderman who is a coal merchant an order, on different terms to those which he would allow to a member of the public, to supply coals, and that then the coals would be supplied and paid for, and thereupon the alderman, who is the coal merchant, would do the same good turn to the stationer. I doubt very much whether that is the sort of thing that was intended to be provided against or that was apprehended by the Act of Parliament as likely to take place. I really think that when the whole of the provision is looked at, it will be seen that the prohibition is against a man's acting during the continuance of a contract, and that that was the mischief which the Legislature intended to guard against, and that they were content that, after the contract was over, he should act, knowing that under those circumstances it would prevent the making of long contracts because of the disqualification penalty in the case of an alderman acting, and not caring much about prohibiting short contracts of this kind. Really I do not feel pressed by the difficulty which Mr. Williams put to us as to the policy of the Act of Parliament. Upon the words of the statute I think that there was no case to go to the jury, and consequently that this rule must be made absolute. There is, however, nothing to be tried, and I should suggest to the parties that they should have the point decided upon a special case; but if they cannot so arrange it, why of course it must go down again. No doubt they can carry it up to the Appeal Court; but supposing the Court of Appeal to agree with us, the only thing the parties could do would be to draw up an order for a new trial. I should think they had better agree upon a special case.

CLEASBY, B.—I have come to the same conclusion, feeling that to some extent the case is within the mischief pointed at by the statute, but feeling bound at the same time to give a somewhat strict interpretation to this penal section of it. I have not myself much doubt that this contract is not only within the mischief contemplated by the Act, but that it comes within the very terms of it. Considerable assistance is derived in construing the Act, from considering the terms of the subsequent statute of 15 Vict. c. 5, which explains the Act and amends it. In that latter statute there is the following clause: "That from and after the passing of this Act no person shall be deemed to have had or to have an interest in a contract or employment with, or on behalf of such council, commissioners, or trustees, by reason only of his having had or having a share or interest in any newspaper in which any advertisement relating to the affairs of any such borough, council, commissioners, or trustees may have been or may hereafter be inserted," which shows that it applies to single acts of that sort, and not to a permanent contract. It seems to me that without that Act of Parliament a mere contract of that description would have been sufficient. It was merely put in *ex abundanti cautela*, to prevent any such question arising. It seems to me to indicate some idea that the Act of Parliament would apply in the disqualification clause to a contract of that description. That being so, the question which we have to deal with arises, first of all, on the 53rd section, and then we shall have to refer to the 28th section. Now, the 53rd section, which imposes the penalty, enacts that the individual shall be exposed to the penalty if he acts "after he shall become disqualified to hold any such office." But these words must be read to mean, "after he shall become disqualified, and while he is disqualified." Now, it is conceded that although the defendant may be disqualified, it is not one of those permanent disqualifications which attaches to a person for a particular period, as is the case in respect of some other matters; but that he might be re-elected, and that he might be, after such re-election, entitled to act, and, therefore, the 53rd section must necessarily (and I do not think that that has been disputed at all) be read as if it had in it the words, "and while he is disqualified," and as if it made the penalty attach if he acted while his disqualification existed. That will throw us back upon what I will call the qualification or disqualification power, that is to say, the 28th section. Whilst saying, in the first instance, that I have myself not the least doubt that, notwithstanding those disqualifications which have been referred to here, the office would continue full—indeed, it is pretty plain, under the 52nd sect., which has been already referred to, the language of which is much stronger and which says that "the Council shall thereupon declare the office to be void, and shall signify the same by a notice in writing," and so on, to be affixed in a particular way, "and the said office shall thereupon become void;" there is very little doubt that until that course has been pursued the office is not void, and looking at the words of the statute the course pointed out thereby must be strictly followed. That, I think, is quite clear. We come then to the real difficulty in the construction of the 28th section, viz., the introduction into it of the words "during, &c." It is said that in

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reading this section it would be giving due effect to it, and not be rejecting anything in it if we were to read it thus: "He shall not be qualified to be elected, or to act as an alderman during, &c." That would, no doubt, to a certain extent, be departing from the language of the Act, because the words are "or to be," &c. Then if we are to read it so as to give some effect to the words, "during such time," &c., we must in some way deal with those words "during, &c." The learned counsel for the defendant has been unable to do that, and was rather in a difficulty to suggest any form of expression to carry this provision into effect, except by a total alteration of the language, so as to obtain the effect which he sought to give to it. I do not feel myself bound to reject the word "during," nor to give a different effect to it with reference to the different parts of the clause; and giving to the word, when applied to the words "qualified to be elected," that meaning which is suggested as the proper one, I do not conceive that without some stronger reason than has been shown we should be justified in giving a different meaning to it when applied to the words "or to be," &c. We must give a reasonable meaning to the words, and though I feel rather more strongly than my brother Bramwell does with regard to our looking at the mischief which the Act of Parliament was intended to remedy, still I think it is manifest in this instance, particularly, as is often the case in others, that the Legislature has only imperfectly remedied the mischief. The law does not allow us to introduce words in order to explain the meaning of an Act of Parliament. I am of opinion, therefore, that it is not made out in this case that the acting by the defendant as alderman alleged in the declaration, took place under the circumstances of disqualification mentioned in the Act of Parliament, and, therefore, that the defendant's rule must be made absolute.

AMPHLETT, B.—I am of the same opinion. I was present when the rule was moved for, and my mind at that time was so much impressed with the view that the case was within the mischief pointed at by the statute, that I was inclined to adopt what Mr. Williams stated to be the "common-sense view" of the matter; but I have now heard his very able argument in favour of the plaintiff, and I confess that further consideration has had upon my mind the reverse effect of that which he intended, and the result is that I have come, at the close of the argument, I will not say to a clear, but, to my mind, a satisfactory opinion, that this case does not fall within the statute. This being a penal statute we must look not only, on the one side, at the mischief intended to be remedied, but also on the other side, we must consider that persons are not to be made subject to penalties unless the offence charged is clearly brought within the purview of the statute. If we look at the words of the section they seem, as they stand, intelligible enough, and to require no violent interpretation to give a sensible effect to them. What the section says is that "no person shall be qualified to be elected, or to be an alderman, during the time that he shall have an interest in a contract," that is, if he is interested in a contract at the time of the election he shall not be qualified to be elected, and if he should afterwards become so interested he shall not be qualified to be an alderman during

such time as he shall be so interested. It has been submitted to us that he does not "cease to be" an alderman, but that he is not qualified *de jure* to act as, or to be an alderman, and therefore "that he might be removed by a *quo warranto*." That gives a plain and intelligible meaning to the words, and I do not see why we are to travel out of them in order to give a more extensive effect to the clause than it would otherwise have; and I am confirmed in that opinion by seeing that in the same clause (sect. 28) it is said, and almost in the same words, that "no person shall be qualified to be elected, or to be a councillor, unless he shall have a certain property qualification," which is therein specified. Then Mr. Williams would say, and consistently with his argument he could not say otherwise, that if the person had the proper property qualification at the time of his election, but afterwards for a few days, or a day, or even for a single moment, ceased to have it, although he never acted during the time he had no property qualification at all, then if he subsequently re-acquired a property qualification, yet, nevertheless, he would be subject to penalties for acting, and that the only way of getting rid of his disqualification would be by re-election, although the statute did not at all point to the necessity of such re-election. Now all that the statute requires with regard to property qualification is, that when a man acts as alderman he shall have a certain qualification. It is difficult, therefore, to say that if he has ceased to have such qualification, by reason of some circumstance happening after his election, and he has subsequently re-acquired it, that he would still be liable to penalties; that is to say, that he would have ceased *de jure* to be an alderman. The case is, I think, as I pointed out to the learned counsel in the course of the argument, very analogous to that of a justice of the peace. Now it is enacted by the 18 Geo. 2, c. 20, s. 1, that from and after a certain date there specified, no person shall be capable of being a "justice of the peace, or of acting as such, for any county, &c.," unless he has the property qualification of the nature and amount therein specified, and by the 3rd section, "any person, who shall act as a justice of the peace for any county, &c. . . without being qualified according to the true intention and meaning of this Act, shall for every such offence forfeit the sum of 100*l.*, such penalty to be recovered by anyone who chooses to sue for it." It has been argued that, although the Act says that no person shall be capable of being justice of the peace unless qualified, &c., yet if, after becoming a justice of the peace he ceases to have the qualification which he originally possessed, he still remains a justice of the peace, and his acts are not void, but that he is liable to the penalty. I have looked minutely at the law as it is stated on the subject in Burns' Justice of the Peace—a work of high authority on the subject—and though no cases are there cited, it is there stated that it has been decided, although the actual point was not before the court, that "if a justice of the peace has become disqualified, and afterwards obtains a proper qualification, then he may act without having a new commission," that is to say, he may act as a justice of the peace without being subject to the penalties of the statute. That seems to be very analogous to the case now before the court. However that may be, I think the proper course

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is to abide by the words which can bear a sensible meaning, and not to have recourse to that which Mr. Williams invites us to do, namely, either to omit the words "during, &c.," or to put in other words such as "cease to be," which would, I think, do violence to the section. And now, just one word with respect to sect. 52, which I think affords an argument that the Legislature had in their minds a distinction between what they considered to be more prejudicial conduct on the part of a mayor and aldermen than that comprised under the 28th section; because by sect. 52 it is enacted that "when a person holding the office of alderman or councillor shall be declared bankrupt, &c., or shall be absent for more than six months at one and the same time (unless in case of illness) from the borough of which he shall be alderman or councillor, not that he shall be disqualified from being elected or from being an alderman or councillor, but that he "shall thereupon immediately become disqualified, and shall cease to hold the office of alderman or councillor as aforesaid," and that the office shall thereupon be declared by the council to be void, and provision is then thereby made for filling up such vacancy. Now, the language of sects. 28 and 53 is very different from this, and it is indeed admitted by Mr. Williams, that in this case, there was no actual vacancy in the office. In my opinion the present case does not come within the words of sects. 28 or 53, and the defendant's rule, therefore, ought to be made absolute.

Rule absolute for a new trial. (a)

Solicitor for the plaintiff, *A. E. Francis.*

Solicitors for the defendant, *Stephens and Stephens*, agents for *Parrott and Co.*, Macclesfield.

Monday, Feb. 14, 1876.

GLEAVES v. MARRINER.

Ecclesiastical Dilapidations Act (34 & 35 Vict. c. 45), ss. 29 and 53—Avoidance of the living—Dilapidations—Liability of last incumbent—Time in which surveyor to inspect and report—Bishop's order.

The defendant, who was the incumbent of a benefice, resigned, and within three months of such resignation the bishop of the diocese directed the surveyor of the diocese to inspect the buildings and premises which were out of repair.

After the expiration of the three months the surveyor inspected the buildings, and made his report to the bishop, who thereupon, under the Ecclesiastical Dilapidations Act 1871 (34 & 35 Vict. c. 43), made an order upon the defendant for the costs of the repairs.

The new incumbent having brought an action upon this order against the late incumbent, the latter pleaded that the surveyor neither inspected nor reported to the bishop within three calendar months after the avoidance of the benefice, as required by sect. 29 of 34 & 35 Vict. c. 43.

Held, that this was no defence to the action, for the three months mentioned by the section do no refer to the time within which the surveyor is required to make his report to the bishop, but to the time within which the bishop is to give his direction to the inspector.

(a) The plaintiff has given notice of his intention to appeal from the above decision.

Semble, that the section is only directory even as regards the time within which the bishop is to give his direction to the inspector.

This was an action brought by the present incumbent of a living against the late incumbent, to recover the sum of 314*l.* 13*s.*, which he had been ordered by the bishop to pay for dilapidations pursuant to the Ecclesiastical Dilapidations Act of 1871 (34 & 35 Vict. c. 43).

The defendant, amongst other pleas, pleaded, that the surveyor did not inspect the buildings within three calendar months after the avoidance of the benefice, in accordance with sect. 29, and that the surveyor did not report to the bishop what sum was required to make good the dilapidations for which the defendant was liable within three calendar months after the avoidance of benefice, as required by the Act.

The plaintiff demurred thereto.

Cave, Q.C. and F. H. Scott for the plaintiff.—

The pleas are bad upon two grounds, either of which is sufficient to support the demurrer. Sect. 29 says that "Within three calendar months after the avoidance of any benefice after the commencement of this Act, unless the late incumbent shall under this Act be free from all liability to dilapidations, the bishop shall direct the surveyor, who shall inspect the buildings of such benefice, and report to the bishop what sum, if any, is required to make good the dilapidations to which the late incumbent or his estate is liable." Sects. 30 to 35 relate to the sending in of the surveyor's report, and the making the order by the bishop for the payment of the sum as found by the surveyor. Sect. 36. "The sum stated in the order as the costs of the repairs shall be a debt due from the late incumbent, his executors or administrators, to the new incumbent, and shall be recoverable at law or in equity." Sect. 53. "No sum shall be recoverable for dilapidations in respect of any benefice becoming vacant after the commencement of this Act, and to which this Act shall apply, unless the claim for such sum be founded on an order made under the provisions of this Act." The limitation of three months mentioned in sect. 29 can only apply to the bishop. It cannot apply to the surveyor, for, supposing the bishop away from home at the time of the avoidance, it might be impossible to communicate with him in time for the surveyor to inspect and report within the three months. Secondly, the section is only directory, and not absolutely imperative; if this were not so, the plaintiff's remedy would be barred by a delay in the bishop over whom he has no control, as, by sect. 53, he can only recover upon an order made by the bishop. [He was then stopped.]

Manisty, Q.C. and Forbes for the defendant.—

Before the passing of the Act, the universal practice was to settle the question of dilapidations immediately after the death or resignation of the incumbent, and this Act was merely in substitution of the old practice. The object of the Act is to insure that there should be a speedy inspection and report as to the dilapidations, and there is an obvious reason for such a course, as the dilapidations increase by time, and the liability of the estate of the late incumbent would be much larger if the time within which the inspection was to be made was unlimited. When a benefice is full, and under sequestration, sects. 12, 13 and 14 say that the surveyor shall inspect "as soon as conve-

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niently may be" after the bishop's direction, because in such a case speed is of no great consequence. The difference between the language used here and that used in sect. 29 shows very plainly what was meant by the Act when a benefice is avoided.

Cave, Q.C. was not called upon to reply.

BRAMWELL, B.—This is a very plain case. The limitation of time is not in respect of the surveyor. The words of the section are, "Within three calendar months after the avoidance of any benefice, &c., &c., the bishop shall direct the surveyor, who shall inspect the buildings of such benefice, and report to the bishop," &c., &c. If the words had been "and the surveyor shall inspect," &c., there might have been a possibility of suggesting that the three months applied to the time within which the surveyor was to inspect and report; but even then I doubt if they would apply. Beside this—and it is not to be supposed that I say anything to the contrary—there is the question whether the limitation of three months is anything more than directory, even as regards the time within which the bishop is to direct the surveyor.

CLEASBY, B.—I am of the same opinion. It would be strange if the plaintiff were to lose his right against the late incumbent because the bishop delays directing the surveyor until the three months are nearly expired, so that the surveyor has no time to inspect and report within the three months.

AMPHLETT, B.—I am of the same opinion. I am far from saying that if from accident, necessity, or some other cause, the bishop omitted to direct the surveyor within the three months, the late incumbent's estate would be free. Our judgment must, therefore, be for the plaintiff.

Judgment for the plaintiff.

Solicitors for the plaintiff, *Scott, Jarman and Trass*, agents for *F. C. Mayer, Burslem*.

Solicitors for the defendants, *Bell, Broderick and Gray*, agents for *Weatherhead and Burr Keighley*.

Wednesday, Dec. 8, 1875.

(Before KELLY, C.B., and CLEASBY and POLLOCK, BB.)

EDLESTON (app.) v. BARNEY (resp.)

Nuisances — Chimney emitting black smoke — Nuisances Removal Act 1855 (18 & 19 Vict. c. 121), ss. 12, 13, 14—23 & 24 Vict. c. 77, s. 13—Sanitary Act 1866 (29 & 30 Vict. c. 90), s. 19—Order for abatement of nuisance—Order prohibiting its recurrence—Two convictions for same offence under the two orders.

An order for the abatement of a nuisance caused by the sending forth black smoke from a chimney having been made on E. in 1871, under the Nuisances Removal Act 1855 and the Sanitary Act 1866, and another order prohibiting the recurrence of the nuisance having upon the complaint of B., under the 23 & 24 Vict. c. 77, s. 13, been made on E. in respect of the same chimney in 1874, E. was afterwards, in 1875, convicted and fined on each of two informations then laid against him, for having by one and the same act of sending forth black smoke from the said

chimney in Feb. 1875, disobeyed the said two orders respectively.

Held by the Court (Kelly C.B. and Cleasby and Pollock BB.) that E. could not be convicted twice in respect of an offence which was identically the same in each case, and that one of such two convictions, therefore, must be quashed.

THESE were two special cases stated by the justices of Halifax, under 20 & 21 Vict. c. 43, for the opinion of the court on appeal from two several orders of justices convicting the appellant under the circumstances hereinafter stated. By consent the two cases were heard together, and so far as is material for the present purpose, the facts were shortly as follows:

The appellant and his partner, George Briggs, carried on business as dyers at Sowerby Bridge, in the West Riding of Yorkshire, and in March 1871, they were summoned before the justices on an information charging that on a certain day therein named they did send forth black smoke from a certain chimney belonging to premises occupied by them (not being the chimney of a dwelling house) in such quantity as to be a nuisance, contrary to the provisions of the Nuisances Removal Act 1855 (18 & 19 Vict. c. 121), and the Sanitary Act 1866 (29 & 30 Vict. c. 90), which makes the Act of 1855 apply to smoke. The persons charged on this information did not appear on the return day of the summons, the 11th March 1871, and thereupon an order was made for the abatement of the nuisance under sects. 12 and 13 of the Act of 1855, which order, after reciting the information, proceeded as follows: "Upon proof . . . that the nuisance so complained of doth exist on the premises, and that the same is caused by the act or default of the said R. Edleston and G. Briggs, we, in pursuance of the Acts, do order the said R. Edleston and G. Briggs within one calendar month from the service of this order, or a true copy thereof according to the Act, to cease to send forth black smoke from the chimney aforesaid, so that the same shall no longer be a nuisance or injurious to health. And if the above order of abatement be not complied with, then we authorise and require the said John Barnes from time to time to enter upon the premises, and to do all such works, matters, and things as may be necessary for carrying this order into execution."

In March 1874, an information was laid under sect. 13 of the 23 & 24 Vict. c. 77 (under which the proceedings are similar to those under the Nuisance Removal Act 1855, but the complaint may be by an inhabitant) against the appellant and his partner G. Briggs, for sending forth black smoke from a certain chimney belonging to the premises occupied by them (not being the chimney of a private dwelling house) in such quantity as to be a nuisance, and that such nuisance was likely to recur.

The existence of the nuisance complained of was proved before the justices at the hearing of the information on the 14th March 1874, and the justices were of opinion that the same or a similar nuisance was likely to recur, and they accordingly made an order for the prohibition of the said nuisance in the following terms: "We, in pursuance of the statute in such case made and provided, do order the said R. Edleston and G. Briggs within fourteen days from the service of this order, or a true copy thereof according to the statutes,

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to discontinue the said nuisance; and we further, in pursuance of the said statutes, do prohibit the recurrence of the said nuisance."

On the 26th April 1875, two informations were laid by the respondent against the appellant, in which it was alleged that he, on the 9th Feb. 1875, unlawfully had not obeyed the order of abatement of the 11th March 1871, and the order of prohibition of the 14th March 1874, respectively. On the hearing of the first of these informations it was proved that on the 9th Feb. 1875, between the hours of ten and eleven o'clock in the forenoon, black smoke was emitted from the chimney for a period of eight minutes, in a quantity sufficient to be a nuisance, and the appellant was convicted and fined in a penalty of ten shillings and costs for disobedience to the order of abatement of the 11th March 1871. And immediately afterwards, upon exactly the same evidence, he was convicted and fined in a penalty of twenty shillings and costs for disobedience to the order of prohibition of the 14th March 1874.

The appellant contended that it was not competent to the justices to convict him twice, as the disobedience to both orders was by the same act. He also raised the point that as the orders had been made against him and one G. Briggs jointly, the respondent could not proceed against him alone, but as no reliance was placed by counsel for the appellant on this point, it is not necessary further to allude to it.

The question for the opinion of the court is whether the appellant could be so convicted twice in respect of the same penalty.

The appellant's points.—First, that the order for prohibition of the 14th March 1874, merged the order for abatement of the 11th March 1871, and from the time of the latter order having been made no penalty could be inflicted for contravention of the prior order; secondly, that the two informations of the 26th April 1875, for contravening the orders of 11th March 1871, and 14th March 1874 respectively, were laid in respect of one and the same act of nuisance alleged to have been committed, and that the appellant could not be convicted twice for the same act; thirdly, that concurrent penalties could not be inflicted for the same acts, although the acts might have been done in contravention of both orders, but that the respondent should have elected to proceed for penalties for disobedience to the one or the other order.

The respondents' points.—The order for abatement was a valid and subsisting order in which separate and successive convictions might be made for separate acts of disobedience: (*Reg. v. Waterhouse*, 26 L. T. Rep. N. S. 761; L. Rep. 7 Q. B. 545.) Secondly, that the order for prohibition did not supersede or vacate the order for abatement; thirdly, that the offence under the order for abatement is constituted by the unlawful neglect to cease committing the nuisance, but the offence under the order for prohibition consists in knowingly and wilfully disobeying the order, and the same act may, therefore, be an offence against both orders.

The following sections of the Nuisances Removal Act 1865 (18 & 19 Vict. c. 121) are material.

Sect. 12 enables the local authority to cause complaint to be made of any nuisance, and "if it be proved to the justices' satisfaction that the nuisance exists, or did exist at the time when the

notice was given, or if removed or discontinued since the notice was given, that it is likely to recur, or be repeated, the justices shall make an order in writing under their hands and seals for the abatement or discontinuance and prohibition of the nuisance as hereinafter mentioned."

Sect. 13. Gives authority to the justices to order work necessary to abate the nuisance, and if the justices are of opinion that such or the like nuisance is likely to recur, they may further prohibit the recurrence of it, and direct the works necessary to prevent such recurrence.

Sect. 14. "Any person not obeying the order of abatement, shall, if he fail to satisfy the justices that he had used due diligence to carry out such order, be liable for every such offence to a penalty of not more than 10s. per day during his default; and any person knowingly and wilfully acting contrary to the order of prohibition shall be liable for every such offence to a penalty not exceeding 20s. per day during such contrary action."

By the Sanitary Act 1866 (29 & 30 Vict. c. 90), s. 19, the word "nuisance" under the Nuisances Removal Acts includes "any chimney (not being the chimney of a private dwelling house) sending forth black smoke in such quantity as to be a nuisance."

Maule, Q.C. for the appellant.—The conviction for disobedience to the order of abatement is good, but the other conviction for disobeying the order of prohibition is bad, and should be quashed. Both convictions are for one and the same act, and the evidence given in support of the second conviction is identically the same as that by which the first conviction was procured. Both, therefore, cannot be allowed to stand, for the appellant would then be punished twice for the same offence.

Anstie for the respondent, *contra*.—Cumulative penalties are given by the statute, and on the proper construction of the statutes the single act of the 9th Feb. 1875, constituted two distinct offences, and therefore both convictions should be upheld. There is a difference between the two cases; disobedience to an order of abatement is an offence and punishable where the party has failed to use due diligence to comply with the order; and disobedience to an order of prohibition is an offence when the party prohibited knowingly and wilfully acts contrary thereto. Here the fact of the penalties being different shows that the two offences committed by the appellant are separate and distinct. He referred also to

Reg. v. Waterhouse, 26 L. T. Rep. N. S. 761; L. Rep. 7 Q. B. 545; 41 L. J. 115, M. C.;

Wemyss v. Hopkins, 33 L. T. Rep. N. S. 9; L. Rep. 10 Q. B. 378; 44 L. J. 101, M. C.

Maule, Q.C. was not called on to reply.

KELLY, C.B.—It is perfectly clear to my mind that one of these two convictions must be quashed. Taking the two statutes together, the result in substance is that the Legislature has made the causing or permitting the issue of black smoke from any chimney, not being the chimney of a private dwelling house, in such quantities as to be a nuisance, illegal and an offence. That is the offence which the appellant has committed in this case, and power is given to the justices under sect. 12 of the Act of 1855 to order such a nuisance to be abated, and any person disobeying an order for the abatement of such nuisance is liable

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for every such offence to a penalty not exceeding 10s. a day during his default. But the statute also gives further power to the justices to prohibit by order the recurrence of the nuisance in future, and imposes upon any person knowingly and wilfully acting contrary to such order of prohibition, a penalty not exceeding 20s. a day during such contrary action. In the case which has been referred to of *Reg. v. Waterhouse (ubi sup.)*, in the Court of Queen's Bench, the order there, which, like the earlier order here, was called an order of abatement, was treated as infringed on each occasion that black smoke issued. But I think it is pretty clear, from the construction which was put upon it by the Court of Queen's Bench, and especially by Blackburn, J., that that order was also in effect an order for the prohibition of the recurrence of the nuisance; and to that part of the order the judgment of the court gave effect. Now I cannot help thinking that any nuisance which existed so long ago as 1871, and was at that date directed by an order of justices to be abated, must have been abated a long time ago, and that the only way in which that order can be treated as having been disobeyed in 1874 is by construing it as an order of prohibition. The later order of 1874 was certainly an order of prohibition, or, at all events, it was an order for prohibition as well as abatement; and in 1875 two informations were lodged against the appellant, one for disobeying the order of abatement, the other for disobeying the order of prohibition. The appellant, I think, was justly and rightly convicted of disobeying the order of prohibition made in 1874, and that conviction should, I think, be affirmed; but as to the other conviction for disobedience to the order of abatement made so long ago as the year 1871, I am of opinion that that conviction should be quashed. But as the learned counsel for the appellant is desirous that the later conviction should be quashed, and the earlier one should stand, we see no objection to that course being taken, and so therefore it will be.

CLEASBY, B.—I also am of opinion that one of these convictions must be quashed. There is some difficulty in this case in applying the language of sect. 12 of the Act of 1855 to a nuisance that is made such by the Act of 1866, as interpreted by the Court of Queen's Bench. Under the Act of 1855 alone there would be little or no difficulty in applying the two penalties with regard to the nuisances with which that Act deals. The nuisances there enumerated are existing things, as, for instance, urinals, dust heaps, dung hills, and other accumulations of filth or refuse, and not certain acts done, producing certain results which are called nuisances. Nuisances, when ascertained by the local board to exist, are dealt with in sect. 12 in a precise way, and provision is made for the case of their being likely to recur, or to be repeated. Power is given, with this probability of a recurrence of the nuisance in view, for making two sets of orders, the one abating the nuisance itself as existing at the time, the other prohibiting its recurrence or repetition at any future time. What is made a nuisance by the Sanitary Act of 1866 is something of the same kind as those things which are dealt with in the Act of 1855. The Court of Queen's Bench, however, in *Reg. v. Waterhouse (ubi sup.)*, held that the nuisance is the act of emitting black smoke, and so, therefore, there

cannot be two convictions, inasmuch as there is only one condition—namely, the causing black smoke to be emitted, to which this state of things can be applicable. One of these convictions, therefore, must certainly be quashed.

POLLOCK, B.—The question which we have to determine here is whether the appellant ought to be convicted twice, and I am of opinion that he ought not to be. It is clear that there were two orders made, the one in 1871 and the other in 1874, and no doubt, therefore, logically speaking, as Mr. Anstie has argued, what was done by the appellant on the 9th Feb. 1875, was done by him in disobedience to both those orders, but, that being so, then comes the question whether the evidence being precisely and identically the same in each case, there can be two offences which can be dealt with concurrently, and visited with cumulative penalties. I think there cannot. I am far, however, from saying that that can never happen. It is quite possible that a man may, by one and the same act, violate the provisions of the revenue law, and of some other law. But here the statutes are *in pari materia*, the orders are *in pari materia*, and the conduct complained of in each information is the same. I am of opinion that one of these convictions should be quashed, and that our judgment, therefore, must be in favour of the appellant.

Judgment for the appellant. (a)

Solicitors for the appellant, Bower and Cotton, agents for Francis Jubb, Halifax.

Solicitors for the respondent, Layton and Jaques, agents for Holroyde and Smith, Halifax.

DIVISIONAL COURT FOR APPEALS FROM INFERIOR COURTS.

Reported by M. W. McKELLAR, J. M. LEE, and
R. H. AMFELT, Esqrs., Barristers-at-Law.

April 28 and 29, 1876.

CODD (app.) v. CABB (resp.)

Peace officer—Execution of office—Warrant—Trespass in search of game—Illegal arrest.

A warrant for neglecting to appear to a summons for trespass in search of coney, under 1 & 2 Will. 4, c. 32 s. 30, was issued against the appellant, directed to all the peace officers in the county. The respondent, a peace officer in the county, met the appellant and said he apprehended him under this warrant, but the warrant was not in his possession at the time. The appellant resisted, and having severely injured the respondent, escaped, but afterwards surrendered himself. The justices fined him 10s. for the trespass, and sentenced him to six months' hard labour for assaulting the respondent in the execution of his office.

Held, upon a case stated, that the arrest under the circumstances would not have been in the execution of the respondent's office, and that the conviction for assault must be quashed.

THIS was a case stated by three justices of the peace in and for the County of Devon under the stat. 20 & 21 Vict. c. 43, for the purpose of

(a) The judgments of the court as entered were that the conviction for disobedience to the order of abatement of the 11th March, 1871, should be confirmed, and that the conviction for disobedience to the order of prohibition of the 11th March, 1874, should be quashed.

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obtaining the opinion of the court on a question of law which arose before them as hereinafter stated.

At a petty sessions holden at the Guildhall in Totnes, in and for the division of Stanborough and Coleridge, in the county of Devon on the 20th Dec. 1875, an information, preferred by Alfred Cabe (hereinafter called the respondent), against Wm. Codd (hereinafter called the appellant) charging for that he (the said appellant) on the 16th Oct. 1875, at the parish of East Portlemouth in the said County of Devon, unlawfully did assault the said respondent, he being then one of the constables for the said county of Devon duly appointed and in the due execution of his office and duty as such constable, was heard and determined by the said justices, the said parties respectively being then present; and upon such hearing the appellant was duly convicted before them of the said offence, and they adjudged him to be imprisoned in the county gaol at Exeter in the said county of Devon, and there to be kept to hard labour for the space of six months. And the appellant being dissatisfied with such determination in point of law, applied to the said justices in writing to state and sign a case setting forth the facts and grounds of such determination for the opinion of this court. The said justices, in compliance with the said application, stated and signed the following case:—

On the 2nd April 1874, an information was laid before Richard Huxham Watson Esq., one of Her Majesty's Justices of the Peace for the county of Devon, by Wm. Hodge, of the parish of Berry Pomeroy, in the said county, woodman, against the appellant; for that he the said appellant on the 31st March 1874 at the said parish of Berry Pomeroy, did unlawfully commit a certain trespass by being in the day time of the same day upon a certain close of land in the possession and occupation of His Grace the Duke of Somerset, there in search of coney, and there without the licence or consent of the owner of the land so trespassed upon, or of any person having the right of killing the game upon such land, or of any other person having any right to authorise the said appellant to enter or be upon the said land for the purpose aforesaid." And the said justice thereupon issued a summons under his hand and seal requiring the appellant to appear on Monday, the 6th April 1874, at the hour of eleven o'clock in the forenoon, at the Guildhall in Totnes in the said county of Devon, before such justices of the peace for the said county as might then be there to answer to the said information, and to be further dealt with according to law.

On the same day a second information was laid before the said Richard Huxham Watson, Esq., by the said Wm. Hodge against the appellant, "for that he the said appellant on the 31st March 1874, at the said parish of Berry Pomeroy, unlawfully did assault and beat the said Wm. Hodge contrary &c.," and the said justice thereupon issued another summons under his hand and seal, requiring the appellant to appear at the same time and place as mentioned above to answer the charge of assault. The appellant was duly served with the summonses.

On the 6th April 1874, the said William Hodge appeared before the justices at the Guildhall in Totnes at the required time, but the appellant

did not attend, and a warrant for his apprehension for disobeying the aforesaid summons was on that day issued by the bench and placed in the hands of the Devon county constables. The said warrant was as follows:—

To the constables of the parish of Stoke Gabriel, in the county of Devon, and to all other peace officers in the same county.

Devon, to wit. Whereas William Codd, late of the said parish of Stoke Gabriel, miner, has been duly summoned to appear before Her Majesty's justices of the peace in and for the said county assembled at the Guildhall in Totnes, in the said county, on this 6th April 1874, at eleven o'clock in the forenoon, to answer an information laid against him, for that he, the said Wm. Codd, with one John Marshall, on the 31st March last, at the parish of Berry Pomeroy, in the said county, did unlawfully commit a certain trespass by being in the daytime on certain lands there situate in search of coney, without having first obtained proper authority. And whereas the said Wm. Codd hath neglected to be or appear at the time and place so appointed by the said summons, although it hath now been proved upon oath to me, the undersigned, that the said summons hath been duly served upon the said Wm. Codd.

These are therefore to command you in Her Majesty's name forthwith to apprehend the said Wm. Codd, and to bring him before me or some other of Her Majesty's justices of the peace in and for the said county, to answer unto the said information, and to be further dealt with according to law.

Given under my hand and seal this 6th day of April 1874, at Totnes, in the said county.

J. FINCHER TRIST. (L.S.)

The appellant was a miner, and then resided in the parish of Stoke Gabriel, which adjoins the parish of Berry Pomeroy, where the alleged offences were committed.

In accordance with the usual regulation when a warrant is issued by a magistrate for the apprehension of a person, the constables throughout the county were informed through the chief constable for the county of Devon that a warrant was in existence for the apprehension of the appellant.

It was proved on oath before the said justices at the hearing that the appellant was not met with by the police until the 16th Oct. 1875, when the respondent in uniform met him in the parish of East Portlemouth, in the said county of Devon, and said to him, "Is your name Wm. Codd?" The appellant answered, "Yes." The respondent then said, "I apprehend you under a warrant for not appearing at a Totnes Petty Sessions to answer a summons, and you must go with me." The appellant said in reply, "Not to day."

There was no evidence that the appellant made any demand whatsoever to see the warrant, but the warrant at that time was not in the personal possession of the respondent.

Upon the respondent attempting to apprehend the appellant, he was thrown down and rendered insensible for half an hour, and during that time the appellant made his escape.

On the 13th Dec. 1875, the appellant surrendered himself, and on the following day he was remanded and was ordered to be brought before the county magistrates sitting at the Totnes Guildhall on the 20th of the same month, which was done.

At the hearing of the three cases on the 20th Dec. 1875 at Totnes, the appellant pleaded guilty to the coney trespass, and the said justices convicted him, and adjudged him to pay the sum of 10s. by way of penalty and costs. The appellant paid the amounts.

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The said justices dismissed the second charge against the appellant of assaulting and beating the said William Hodge on the said 31st March 1874; and for the third charge made by the respondent against the appellant for assaulting him whilst in the execution of his office and duty as constable, they convicted him and adjudged him to be imprisoned in the Devon County Gaol, and there to be kept with hard labour for six months.

After the respondent in the third charge and his witnesses had been examined, the attorney for the appellant took the following objection:

That the attempted arrest was illegal, because the warrant of the 6th April 1874 was not in the possession of the respondent when he attempted to arrest the appellant, and therefore he was not in the execution of his duty as constable at the time he so attempted to arrest him.

There was no denial of the assault being made by the appellant on the respondent, and the said justices were satisfied that a very serious assault had been committed, and they convicted and sentenced him as before mentioned.

The appellant's attorney applied for a case under 20 & 21 Vict. c. 43, on the point of law raised, and the justices agreed to grant the same, and submit for the opinion of this court the question, Whether the warrant of the 6th April 1874, having been issued by a justice of the peace for the county of Devon for the apprehension of the appellant for disobeying a summons, and being in the hands of the Devon county constabulary, the respondent, as one of the officers of the same force, then on duty in uniform, but not having the warrant in his own personal possession at the time of the attempted arrest, was legally justified in attempting to arrest the appellant.

April 28.—*St. Aubyn* argued for the appellant.—*Galliard v. Laxton* (31 L. J. 123, M. C.) is a case exactly in point, and the considered judgment of Wightman, J. is a clear authority that this conviction was wrong. He said at p. 127, "We have already expressed our opinion that, if requested, the officers were bound to produce the warrant; and if so the keeping in custody after such request and non-compliance would not be legal; and it could hardly be contended that the arrest itself could be legal, though the detention, under the circumstances above supposed, would be illegal; and in this view of the case it appears to us that the officers were bound to have the warrant ready to be produced, if required, and that if they had it not, the arrest would not be legal. If an action had been brought against the officers for making the arrest, and they had pleaded a plea of justification under the warrant, they must, according to all the precedents, have pleaded that it was delivered to them to be executed; and though it is not stated in the precedents that they had actual possession at the time of the arrest, it is to be presumed from the allegation of delivery to them that they continued to hold it."

McKellar, contra, in support of the conviction.—*Galliard v. Laxton* was an arrest under a warrant for disobedience to a bastardy order, which is merely a civil process. The report of the case, (2 B. & S. 363), expressly limits the decision to a warrant of that nature; the argument for the appellant and the remarks upon it were chiefly addressed to warrants or writs between individual subjects; and the judgment itself distinguishes

the facts of the case from an arrest upon a warrant for felony. Wightman, J. says, at p. 372, "As they were obviously police constables we think that they were not bound in the first instance to produce the warrant at the time they made the arrest, but that as this was not a charge of felony, but rather in the nature of a civil than of a criminal proceeding, the warrant ought to have been produced, if required, and that an arrest without without such production would not be legal." The charge against the appellant here was made under 1 & 2 Will. 4, c. 32, s. 30, by which it is enacted, "That if any person whatsoever shall commit any trespass by entering or being, in the day time, upon any land in search of or pursuit of game, or woodcocks, snipes, quails, land rails, or coney, such person shall, on conviction thereof before a justice of the peace, forfeit and pay such sum of money, not exceeding two pounds, as to the justice shall seem meet, together with the costs of the conviction." This is not the less a criminal charge because the penalty is only a fine; it has been held that offences under this Act are criminal offences, and that the penalties are not in the nature of civil claims; *Cattell v. Ireson* (1 E. & B. 19). Moreover, in the case of *Galliard v. Laxton*, no counsel appeared for the respondent, and it is difficult to understand how the authorities there cited justify the conclusion of the court. *Mack-alley's case* (Coke's Reps. vol. 5, part 9, p. 65, b) was a charge of murder for killing an officer about to arrest a debtor on civil process: "It was answered and resolved (at p. 69, a) that it is true that it is held in the Countess of Rutland's case, that the sheriff, &c., or sergeant, ought, upon the arrest to show at whose suit, &c., but that is to be intended when the party arrested submits himself to the arrest, and not when the party (as in this case Murray did) makes resistance and interrupts him, and before he could speak all his words, he was by them mortally wounded and murdered, in which case the prisoners shall not take advantage of their own wrong." According to East's Pleas of the Crown (vol. 1, p. 319, § 84), even in cases of arrest upon process, notification of the officer's business is all that is necessary to make the arrest legal. He says, "If he be a known sworn officer, the law in the instances above-mentioned will imply notice; if he be a special bailiff named in the process he must declare his business and authority, as by using words of arrest or the like; and if such declaration be true and the process legal, and afterwards he be killed, it is murder; for after that declaration the party killing acted at his peril. But if the officer declare his business, it is not necessary he should produce the warrant itself where it is not demanded." And previously he says, at p. 302, § 70, "As to arrests in cases of misdemeanor and breach of the peace" . . . "But as in case of felony, so here, if the officer meet with resistance and kill the offender in the struggle, he will be justified; and if he be killed it will be murder." Assuming, however, that *Galliard v. Laxton* is decisive of the law concerning arrests upon civil process, the question here is whether this warrant is not rather analogous to one issued upon a charge of felony, the production of which is admittedly unnecessary. [DENMAN, J.—In *Reg. v. Chapman* (12 Cox C. C. 4) Hannen, J. acted upon *Galliard v. Laxton* in the case of a misdemeanor.] Attention does not seem there to

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have been called to the limited application of that decision.

Cur. adv. vult.

April 29.—BRAMWELL, B.—We are all of opinion that this conviction must be quashed. There is an authority which to my mind is exactly in point. Here the warrant was issued against the appellant in consequence of his non-appearance to a summons requiring him to answer a charge of trespassing in pursuit of coney, which is subject to a penalty upon summary conviction. In *Galliard v. Laxton* the warrant was for non-obedience to a bastardy order requiring the person against whom the order and warrant were issued to pay a certain sum per week to the mother of his child. This is the only difference between the two cases, and to my mind it constitutes no difference in principle. A distinction is drawn in that case between felonies and orders of the kind there considered. An arrest for felony may be made without a warrant at all; it is not, therefore, necessary for an officer making an arrest upon a warrant for felony to be able to produce the warrant. The judgment in *Galliard v. Laxton* treats felonies, however, as the only exception, and includes warrants issued for all other purposes in the rule upon which that case is decided. I not only think that case is in point, but I should have entertained the same opinion if there had been no authority on the subject. I have always had it in my mind, as an elementary idea, that a man who is arrested upon the authority of a warrant alone must have a right to see the warrant before he is compelled to submit, although I could not perhaps have given any reason for thinking so. It would be impossible for a man to exercise that right if the police officer making the arrest had not the warrant in his possession at the time; and it is immaterial, therefore, whether a sight of the warrant is demanded or not. In my opinion authority and reason agree in the appellant's favour. He had a right under the circumstances to resist his arrest, and there is no finding that he used excessive force in so doing. Our judgment is, therefore, for the appellant.

MELLOR, J.—I am entirely of the same opinion. I was party to the judgment in *Galliard v. Laxton*, and I think I can say it was our intention only to except felonies from the principle upon which we acted in that case. I have always considered that an officer cannot arrest without having with him a warrant to show, unless the offence be one for which no warrant is required. This, therefore, was not a legal arrest, and the appellant was justified in resisting.

DEMFAN, J.—I am of the same opinion. The conviction here was for assaulting a constable in the due execution of his office. The charge could be supported only if the officer were acting within his authority. In *Galliard v. Laxton* it was held that an officer had no authority to arrest a man upon a warrant without having the document at the time in his possession, when that warrant was issued to compel obedience to a bastardy order. We thought it desirable to take time to examine the authorities, and to consider further whether that decision applied only to civil process. The appellant in this case was charged with an offence more of a criminal than of a civil nature, but I see no distinction in the authority

of an officer to arrest upon warrant, so long as the offence charged is not felony. In felony no warrant is required at all, and its production, if it exists, is unnecessary; but in misdemeanor and in every other case, if a warrant be issued, it is the only authority for the arrest, and it must be within the power of the officer executing it to produce it at the time. The case of *Galliard v. Laxton* was acted upon by Mr. Justice Hannen in *Reg. v. Chapman*, a charge of murder tried on the Home Circuit, where the warrant had been issued upon a misdemeanor. It does not appear that the distinction contended for in the present case was taken before that learned judge, but as far as it goes that decision is exactly in point, and is one of considerable weight. It is most desirable for all police officers to know that in executing a warrant without being able to produce it at the time, they act at their own peril, and are not making a legal arrest.

Judgment for appellant.

Upon application for the respondent the court made no order as to costs.

Further application on the respondent's behalf was made for leave to appeal.

BRAMWELL, B.—We have each of us since yesterday consulted the judges of our own division on this subject, and besides being unanimous ourselves we find none of our brethren differ from us. We, therefore, refuse leave to appeal.

Solicitors for appellant, *E. W. and B. C. Mote*, for *Carter and Son*, Torquay.

Solicitors for respondent, *Parkers*, for *Hooper and Michelmors*, Totnes.

CHANCERY DIVISION.

(Before the MASTER OF THE ROLLS.)

Reported by G. WELBY KING and J. E. THOMPSON, Esqrs.,
Barristers-at-Law.

Saturday, Dec. 18, 1875.

JONES v. DANGERFIELD.

Sequestration—Sequestrator's liability for dilapidations—Ecclesiastical Dilapidations Act 1871 (34 & 35 Vict., c. 43.)

A benefice was under sequestration at the incumbent's death. During the vacancy the buildings were inspected by the diocesan surveyor, and the archbishop made an order under s. 34 of 34 & 35 Vic., c. 43., stating the cost of the necessary repairs, and that the personal representatives of the late incumbent were liable.

Held, under s. 53 of the Act, that the sequestrator was not liable, and was not entitled to deduct the amount due for repairs from the proceeds of the benefice in his hands.

Adjourned summons.

THE Rev. James Brothers, at the time of his death, in October, 1872, was incumbent of the living of Brabourne, in Kent. The benefice was under sequestration. A deed of assignment had been executed by Mr. Brothers in December 1851, of which Mr. Abraham Dangerfield, the sequestrator, was trustee. An order was made in the cause on the 27th June, 1863, which declared which of the creditors were entitled to the deed of assignment. Soon after the living became vacant, the buildings

were inspected and reported on by the diocesan surveyor, and, in pursuance of the Ecclesiastical Dilapidations Act 1871 (34 & 35 Vict. c. 43), the Archbishop of Canterbury made an order respecting the necessary repairs, the cost of which was estimated at 174*l.* 18*s.*, for which the personal representatives of the late incumbent were declared liable. Mr. Dangerfield collected the tithes which had accrued due in Mr. Brothers' lifetime, and under an order of the court dated 31st March 1875, paid £650 into court on account thereof, having been advised that he was liable to pay the cost of repairs out of moneys coming into his hands as sequestrator. The court was now asked to make an order that Dangerfield should pay into court 139*l.* 15*s.* 3*d.*, the amount certified to be due by him on paying the final amount as sequestrator, in order to decide the question of his liability for dilapidations. Mr. Brothers, who had taken the benefit of the Insolvent Act in 1853, died intestate, and it was stated that there were no assets to administer.

Davey, Q.C. and *Rigby* for the plaintiff, in support of the summons.

Chitty, Q.C. and *W. W. Karslake* for the sequestrator and for Mr. Perry, the new incumbent.—The condition on which sequestrations are granted is that the sequestrator keeps the buildings in repair, and is liable for dilapidations. Sect. 20 of the Act of 1871 enacts that the dilapidations are to be charged to the sequestrator in respect of the profits of the benefice. They referred to:

Hubbard v. Beckford, 1 Hag. Cons. 397;
Whinfield v. Watkins, 2 Phill. 1;
Cripp's Laws of Church and Clergy, 322.
Phillimore's Ecclesiastical Law, 1390.

Langley, for the official assignee of Mr. Brothers, claimed the balance of the fund after payment of the persons entitled under the deed of assignment.

Sir GEORGE JESSEL.—The question I have to decide concerns the liability of the sequestrator in respect of the balance in his hands from the profits of a sequestered benefice for dilapidations reported after the incumbent's death. The sequestration issued many years ago, and remained in force to the incumbent's death, in Oct. 1873. The avoidance occurred subsequently to the commencement of the Ecclesiastical Dilapidations Act 1871, and that Act, therefore, applies to this case. The law, whatever it was previously to that Act, is remodelled by it. By sect. 53 it is declared that no sum shall be recoverable for dilapidations in respect of any benefice becoming vacant after the commencement of the Act and to which the Act shall apply, unless the claim for such sum be founded on an order made under the provisions of the Act. Now the Act contains two distinct sets of provisions: the one, comprising ss. 12 to 24, provides for the inspection of buildings at times when a benefice is not vacant; the other, ss. 29 to 53, for the inspection of buildings on a vacancy. No inspection seems to have taken place of the buildings of this benefice in Mr. Brothers' lifetime; but after his death, that is, on the vacancy, an inspection took place, and the archbishop, according to sect. 34, made an order stating the repairs required to be done, and their cost, for which the late incumbent's executors and administrators were declared to be liable.

It appears to me that the provisions of sect. 20, and the other sections of that Act, have no bearing on the present case, but that it falls under sect. 36, which casts the liability on the executors or administrators of the late incumbent. The result is that the sequestrator is under no liability for repairs. I must make an order in the terms of the summons, as I am of opinion that the sequestrator is not liable for the dilapidations, and is not entitled to have the amount deducted from the profits of the benefice collected by him.

Solicitors, *Kingsford* and *Dorman* for *Hallett*, *Curry*, and *Furley*, *Ashford*; *Dangerfield* and *Blythe*; *A. S. Twyford*.

QUEEN'S BENCH DIVISION.

Reported by M. W. McKELLAR, J. M. LKLY, and R. H. AMPHLETT, Esqrs., Barristers-at-Law.

Monday, Jan. 17, 1876.

REG. v. RIPPON.

Quo warranto—Local board—Election to casual vacancy—11 & 12 Vict. c. 63.

A member of a local board resigned more than a year before his time for going out of office, as regulated by the board. At the next election, which annually took place to fill the three vacancies which occurred by rotation, notice was given that four candidates would be appointed; but no explanation of the fourth vacancy was published, nor was any distinction made either in the notice or at the election between the candidates for the different vacancies. After the election, the board selected that one who received the smallest number of votes of the four successful candidates to fill the casual vacancy.

Held, upon a quo warranto, that there was no authority before the Public Health Act 1875, for thus filling up a casual vacancy; and that the election was void.

THIS was a rule to show cause why an information in the nature of a *quo warranto* should not be exhibited against the four defendants, Jabez Rippon and three others, for exercising the office of members of the Local Board of Newbold-cum-Dunston, in the county of Derby, on grounds therein stated.

From the affidavits it appeared that the said local board consisted of nine members, the whole of whom were appointed at the first election in Sept. 1873. It was arranged by the board that three of their members should go out of office annually in rotation; and the election to fill those vacancies is in pursuance of 37 & 38 Vict. c. 89, s. 26, now held on the 26th March of each year.

On 26th Feb. 1875, a member of the board, whose period of office would not expire according to the arrangement of the board until March 1876, resigned; and in consequence there were four vacancies to be filled up in March 1875.

On the 6th March 1875, the chairman of the board duly published a notice of the election, containing the particulars thereof required by sect. 23 of the Public Health Act 1848 (11 & 12 Vict. c. 63). He stated in the said notice that the number of persons to be elected was four, but

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made no reference to the cause of the fourth vacancy, nor explained that there was any distinction in the periods for which the successful candidates would serve.

The election was held in the same manner as if all the vacancies had occurred by rotation. Eleven candidates were nominated, and the four defendants obtained the highest number of certified votes. They were declared by the chairman to be duly elected; and the local board subsequently selected the defendant Rippon, who had received the smallest number of votes of the four successful candidates, to fill the casual vacancy occasioned by resignation. The other three defendants, who received the highest number of votes, were at the same time selected to fill the vacancies caused by rotation.

The objection upon which the relator relied was stated in the rule to be that there were only three vacancies for the term of office for which the election was held.

Cave, Q.C. and Foulkes showed cause.—If this objection be valid, there must have been two separate elections, for which there is no provision in the Public Health Acts. By sect. 13 of the Act of 1848, with respect to all districts, "And the first election for any district or part of a district shall take place on a day to be appointed by order of Her Majesty in Council or by Parliament (as the cases may require); and one-third of the number elected for the whole or any part or parts of a district respectively shall go out of office on such day in each year subsequently to that of the first election as shall be appointed by such order in council or provisional order as aforesaid (as the case may require); and the order in which the persons first elected shall go out of office shall be regulated by each local board. . . . But no person elected shall in any case continuously remain in office for more than three years; and on the days appointed for going out of office a number of persons shall be elected equal to the number of those so going out, and so many others as may be necessary to complete the full number of the local board of health in respect of which the election is to be made." This last paragraph is perfectly consistent with what has been adopted as the practice in this case; and although there is no express provision for filling up vacancies caused by resignation, they are clearly contemplated in the statute. In the 14th section such vacancies are twice alluded to, and one of its paragraphs is, "And in the event of any vacancy in the number of persons elected by death, resignation, or otherwise, between the times appointed for election as aforesaid, or if at any time the said local board be without its full number of members, the remaining members shall continue and be as competent to act until the time appointed for election, or until the full number is selected or elected (as the case may require), as if no vacancy had occurred." There is no suggestion of any separate elections for any different kind of vacancies in the sections relating to notice, nomination, or election; e.g., sects. 23, 24, or 27. Where there is no express provision with respect to these elections, it has been held that the board must do its best to constitute itself: (*Howitt v. Manfull*, 6 E. & B. 736.) That in this case the board did its best, is clear from the fact that it obeyed by anticipation the provisions of the Public Health Act which

has since been passed; by 38 & 39 Vict. c. 55, schedule 2, rule 65, this very course is prescribed in the case of a casual vacancy being filled up at an annual election. This new Act consolidates without altering the old law, so that it may be said retrospectively to justify the proceedings of the board in this case. Although 21 & 22 Vict. c. 98, s. 24, sub-sect. 7, provides one plan of filling casual vacancies by choice of the board within a month, that is merely permissive; and the board in this case has clearly followed the intentions of the statute.

Bigham appeared for the relator to support the rule, but was not heard.

COCKBURN, C. J.—I think the objection to this election is fatal. I do not say how many elections ought to have been held, but it is clear to me that a distinction ought somehow to have been made between the casual and the regular vacancies. In default of express regulation possibly this could only have been secured by separate elections. There was no provision in any of the Acts in force at the time of this vacancy for filling it by election; and although the Act of 1848 alludes to vacancies of the kind, it provides no means for filling them at all. The Legislature has now made good this omission by specific legislation; but previously to the Act of last year the voters should have had an opportunity for distinguishing the kinds of vacancies for which they supported their candidates. There was no such opportunity given them here, and I am therefore of opinion that the election was void.

MELLOR, J.—I am of the same opinion. I do not see why all the four new members should not have been elected at the same time; but at all events, there should have been some notice as to the difference in the offices for which the votes were to be given. There was at that time no means of fixing which of the elected candidates should fill the casual vacancy, and the voters were not consulted on the subject. I do not consider this can be a valid election.

FIELD, J.—I am of the same opinion.

Rule absolute.

Solicitors for relator, *Stevens and Co.*, for *W. T. Jones*, Chesterfield.

Solicitors for defendants, *Palmer Bull and Fry*, for *C. S. B. Busby*, Chesterfield.

Wednesday, Jan. 19, 1876.

REG. v LEE.

Highway—Indictment for non-repair—Highway not found as in summons—Costs of prosecution— 5 & 6 Will. 4, c. 50, s. 95.

By 5 & 6 Will. 4, c. 50, s. 95, if, on the hearing of any summons respecting the repair of any highway, the duty or obligation of such repairs is denied by the surveyor on behalf of the inhabitants, the justices may direct an indictment, and the judge of assize before whom the indictment is tried may direct the costs to be paid by the parish.

Upon the trial of an indictment directed under this section, it was found that the common highway for horses, carts, and carriages, as described in

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the summons, was only a footpath and bridle-way.

Held, that the justices had no jurisdiction to make their order upon this summons; and that therefore an order for costs made by the judge of assize at the trial must be quashed.

A RULE nisi had been obtained calling upon Robert Lee, the prosecutor, to show cause why a writ of *certiorari* should not issue to remove into the High Court of Justice a certain order of assize made by Field, J., at York, on 3rd Aug. upon an indictment against the inhabitants of the township of Ellerton, for the non-repair of a certain highway in the said township, ordering the costs of the prosecution to be paid out of the rates and levied on the said township, in pursuance of 5 & 6 Will. 4, c. 50.

By sect. 95 of that statute it is enacted "That if on the hearing of any such summons respecting the repair of any highway, the duty or obligation of such repairs is denied by the surveyor on behalf of the inhabitants of the parish, or by any other party charged therewith, it shall then be lawful for such justices, and they are hereby required to direct a bill of indictment to be preferred and the necessary witnesses in support thereof to be subpoenaed at the next assizes to be holden in and for the said county, or at the next general quarter sessions of the peace for the county, riding, division, or place wherein such highway shall be, against the inhabitants of the parish or the party to be named in such order, for suffering and permitting the said highway to be out of repair; and the costs of such prosecution shall be directed by the judge of assize before whom the said indictment is tried or by the justices of such quarter sessions, to be paid out of the rate made and levied in pursuance of this Act in the parish in which such highway shall be situate; provided, nevertheless, that it shall be lawful for the party against whom such indictment shall be so preferred at the quarter sessions aforesaid, to remove such indictment by *certiorari* or otherwise into his Majesty's Court of King's Bench."

It appeared that on the 5th Aug. 1874 the said Robert Lee preferred an information before justices against the surveyors of highways of the township of Ellerton alleging that part of a highway described as a common highway for horses, carts, and carriages, within the said township, was out of repair. At the hearing of the summons issued upon this information the surveyor of the township denied their liability to repair the highway, and the justices thereupon ordered an indictment to be preferred against the inhabitants of the township; an indictment was accordingly preferred before the grand jury at York at the assizes in March 1875. A true bill having been found, the indictment came on for trial before Field, J. at York, in Aug. 1875, when, the evidence being insufficient to support the allegation that the highway was a cart and carriage way, the learned judge so directed the jury. It was, however, not disputed at the trial that the highway was a public bridleway and footpath, and at the close of the case the learned judge, under the provisions of 14 & 15 Vict. c. 100, amended the indictment by striking out all the words having reference to a cart and carriage way, and upon the indictment, so amended, a verdict of guilty was recorded.

Application was made on behalf of the prosecu-

tion to the judge for an order under the above sect. 95 of 5 & 6 Will. 4, c. 50 for payment of the costs, and he, considering himself bound to do so under the Act, made the order. It was now sought to remove this order by *certiorari* for the purpose of quashing it.

At the hearing of the information before the justices there appeared to have been no admission then made on the part of the inhabitants that the road was a highway of the limited character afterwards admitted at the trial; but their solicitor objected to the jurisdiction of the justices on the general ground that the highway was not a common highway repairable by the township. It seemed also that the information being for non-repair of the road as a cart and carriage way, no special attention was called to the liability, whether admitted or otherwise, of the township to repair it as a bridle road.

Maule, Q.C. and *Wilberforce* showed cause against the rule on behalf of the prosecutor.—The jurisdiction given to justices by the Highway Act 1835 in such a matter as this is now governed by 25 & 26 Vict. c. 61, by sect. 19 of which it is enacted that "When on the hearing of any summons respecting the repair of any highway the liability to repair is denied by the waywarden on behalf of his parish, or by any party charged therewith, the justices shall direct an indictment to be preferred at the next assizes or at the next quarter sessions for the county, &c., wherein such highway is situate, against the inhabitants of the parish or the party charged therewith for suffering the said highway to be out of repair." It has been held under that section that the jurisdiction of the justices is limited to admitted highways; and that justices have no jurisdiction to order an indictment to be preferred where it is *bonâ fide* denied by the parties charged that the road is a highway, and the liability to repair the road if it is a highway is not denied (*Reg. v. Farrer*, L. Rep. 1 Q. B. 558; *Reg. v. Heanor*, 6 Q. B. 745). Here, however, the liability was denied generally, and therefore the justices had jurisdiction to direct the indictment. The prosecution succeeded in establishing a highway, and the judge at the assizes was compelled by the statute to make the order for costs which is now in question. [*MELLOB, J.*—The justices did not direct an indictment for the repair of a limited highway, which was the only highway established by the verdict.] There is nothing in the words of the section to limit the order for costs to a successful indictment. The amendment was made in the indictment upon the authority of *Reg. v. Sturges* (3 E. & B. 734).

Wills, Q.C. appeared to support the rule.

COCKBURN, C.J.—We do not think it will be necessary in this case to call on Mr. Wills. The power of a judge to order the costs of a prosecution ordered by justices under sect. 95 of the General Highway Act must depend on whether the justices who made the order had jurisdiction to make it. Now, it seems upon examination of the statute, that they only have jurisdiction when the highway in question is found to be a highway. The order here, accordingly, proceeded on the assumption that this road was a general highway, for it was in respect of the non-repair of such a highway that the inhabitants of the parish indicted were charged. This assumption failed to be proved in fact at the trial. It was only proved

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that this was a special or limited highway, and the prosecution having failed in this respect, the jurisdiction of the justices to order the prosecution failed, and consequently the judge had no power to make this order for costs.

MELLOR, J.—I am of the same opinion. I think that the order was made by the justices, they assuming that the road in question was a highway; and the costs which a judge on the trial of the indictment is empowered to give are limited to the costs of such a prosecution as that which the justices had jurisdiction to order and did order. There is here no question as to the amendment of the indictment at the trial because that was done by consent of both sides in order that it might accord with what was actually proved; but as the highway proved was not that ordered to be indicted, the costs of the prosecution cannot be ordered.

FIELD, J.—I am of the same opinion. I made the order at the trial reluctantly, because I thought I was compelled by the terms of the statute to do so. But now, on further consideration, and after hearing the argument of the case, I am satisfied that my Lord and my brother Mellor are right, and that in this and other cases where the prosecution fail in establishing that which is the foundation of the jurisdiction of the justices, substantial justice will be done by a construction of the section adversely to their right to claim an order for costs. The costs of this case were really those incurred by the prosecution in endeavouring to establish the cart way, in which endeavour they entirely failed.

Rule absolute.

Solicitors for the prosecution, *Learoyd and Co.*, for *Bantoft, Selby*.

Solicitors for the defence, *Williamson, Hill, and Co.*, for *England and Son, Howden*.

Jan. 20 and Feb. 25, 1876.

REG. v. COLLINS.

Quo warranto—Scrutiny of votes—Certificate of chairman—Titles of votes—Mistakes in counting—11 & 12 Vict. c. 63. s. 27.

At an election of members of a local board of health, the chairman certified under 11 & 12 Vict. c. 63, s. 27, that seven persons, of whom the defendant had the smallest number of votes, were elected. The relator, who was a candidate, had three votes less than the defendant.

Upon a scrutiny before a judge of assize without a jury it appeared that, by correction of mistakes in counting, the votes for the relator and the defendant were equal; that one vote for the relator had been mislaid and not counted at all; and that two votes for the relator which the chairman had found to be valid, no objection having at that time been made to them, ought not to have been received; one being written by some other person than the voter, contrary to sect. 25; the other being that of a person who had not been rated or paid rates, contrary to sect. 20:

Held by Mellor and Field, JJ., (Blackburn, J. dissenting), that by quo warranto only the mistakes in a chairman's mechanical acts, and not the titles of votes, can be rectified; and that

therefore the relator was ahead of the defendant, and was duly elected.

THIS was a *quo warranto*, the circumstances of which are fully described in the following judgment of Blackburn, J., before whom the case was tried at the Dorchester Summer Assizes 1875. The verdict was entered for the defendant, leave being reserved to the relator to move to enter the verdict for him.

The election of the members of the Local Board of Health for the Isle of Portland, the validity of which was questioned, took place in May 1874.

The rule for the *quo warranto* was made absolute on the 28th Jan. 1875. (Reported 23 W. R. 325).

The rule *nisi* in pursuance of the leave reserved at the trial was granted on the 4th Nov. 1875 upon the motion of *Kingdon*, Q.C. for the relator who relied upon the authority of

Reg. v. Cross, 19 L. T. Rep. N. S. 35;

Reg. v. Diplock, L. Rep. 4 Q. B. 549.

The following is the 27th section of the Public Health Act 1848, (11 & 12 Vict. c. 63):

That the chairman shall, on the day immediately following the day of the election and on as many days immediately succeeding as may be necessary attend at the office of the local board of health, and ascertain the validity of the votes by an examination of the rate books and such other books and documents as he may think necessary, and by examining such persons as he may see fit; and he shall cast up such of the votes as he shall find to be valid and to have been duly given collected or received, and ascertain the number of such votes for each candidate. And the candidates to the number to be elected who being duly qualified shall have obtained the greatest number of votes shall be deemed to be elected and shall be certified as such by the said chairman under his hand; and to each person so elected the said chairman shall send or deliver notice of such election; and the said chairman shall also cause to be made a list containing the names of the candidates together with (in case of a contest) the number of votes given for each and the names of the persons elected; and shall sign and certify the same and shall deliver such list together with the nomination and voting paper which he shall have received to the local board of health at their first or next meeting (as the case may be), who shall cause the same to be deposited in their office, and the same shall during office hours thereof be kept open to public inspection, together with all other documents relating to the election, for six months after the election shall have taken place, without fee or reward; and the said chairman shall cause such lists to be printed and copies thereof to be affixed at the usual places for affixing notices of parochial business within the parts for which the election shall have been made.

Jan. 20.—*Cole*, Q.C. and *Pinder* on behalf of the defendant now showed cause against the rule.

Kingdon, Q.C. and *A. Collins* were heard in support.—The arguments and the authorities discussed are fully stated in the following written judgments of the court.

Our. adv. vult.

Feb. 25.—BLACKBURN, J.—This was a *quo warranto* on the relation of Andrews calling on the defendant to show by what title he acted as a member of a local board of health. The plea was that the defendant was duly elected and this was traversed. The issue came on for trial before me and a jury at the last assizes at Dorchester. As the case involved a scrutiny it was agreed that the jury should be dispensed with and that what I found as facts were to be considered as found by the jury. It appeared that there were seven

vacancies and nine candidates. The voting papers were duly collected and received and the chairman proceeded on the proper day to ascertain the number of valid votes for each candidate in pursuance of the 11 & 12 Vict. c. 63, s. 27. The nine candidates consisted of six persons whose election was not disputed, and of Collins, Andrews, and Coombe. The chairman certified that the six others and Collins were duly elected. He made out a list, containing the names of the candidates and the number of votes given for each and the names of the persons elected, which he signed and certified; and he delivered it along with the voting and nomination papers to the local board who, in pursuance of the section, deposited this list together with the voting papers for public inspection as required by the section. The chairman did what, though not in terms required by the Act, was fair. He not merely put down the number of votes given for each candidate, but also made out and kept a list, by reference to the numbers of the voting papers of the voters whom he had reckoned as voting for each candidate, so that there was no difficulty in fact in ascertaining how he made out the majority. According to this list the six persons whose elections were not disputed had most votes; Collins had 382 votes, Andrews and Combe, 379 votes each. If the certificate was conclusive, Collins was entitled to the verdict. Subject to objections on both sides, evidence was received of three classes of mistakes. It was agreed that no inquiry should be made as to Coombes's votes, and that if Collins had a majority over Andrews, the verdict should be for him. The counsel for the relator proceeded to prove what may be called clerical errors by showing that votes which by the voting papers appeared not to have been given for Collins had been, as appeared by the list, by mistake put down for him, and that votes which as it appeared by the voting papers had been given for Andrews, had, as appeared by the list, not been put down for him but for some one else. The counsel for the defendant showed that there were similar blunders made with respect to Andrews. On the balance of these mistakes Andrews had three in his favour, showing an equality of votes between him and Collins. The counsel for the relator then showed a second kind of mistake. One voting paper had been mislaid and was not reckoned at all. It was found next day in the room, and proved to be a vote in favour of Andrews. This, if properly received, put Andrews in a majority of one over Collins. The counsel for the defendant then gave evidence of a third kind of mistake. He proved that one of the voting papers received, and, as it appeared by the list, reckoned for Andrews, was a vote by a person who could not write, and was wholly written and signed in his name by another person. It was not alleged that there was any intended fraud in this, but the vote was bad under sect. 25. Another vote which also was reckoned for Andrews was that of a person who had not been rated nor paid rates, and this vote was bad under sect. 20. The chairman had not had his attention called to either of these two last votes, and consequently did not examine any persons as to the genuineness of the signatures in the first case, or the rate books as to the last, or in point of fact come to any conclusion as to the validity of those votes before receiving them: though if his attention

had been called to them he had power, under sect. 27, to have investigated the matter. If evidence of this kind of mistake was admissible, Collins was again in a majority over Andrews. No further evidence was offered on either side. The counsel for the defendant contended that the certificate of the chairman was conclusive, and that no evidence of any mistake on his part was admissible; but that, if evidence of any one kind of mistake could be shown, all three sorts might be shown. The counsel for the relator contended that the certificate might be impeached by showing any errors in the mechanical process of reckoning and casting up the votes; but that no error could be shown in receiving votes as valid, as to which he might have made a judicial, or, at least, *quasi* judicial investigation, though an *ex parte* one. I directed a verdict for the defendant, reserving to the prosecutors leave to move with some arrangements as to appealing, which it is not necessary now to mention. A rule was obtained, which was argued before my brothers Mellor, Field, and myself, when the same points which were made at the trial were again stated. The case of *Reg. v. Cross* (19 L. T. Rep. O. S. 35) was cited. In that case the election of the defendant was questioned on the ground that the election was held before a person who was not the chairman. The issue taken was like this, whether the defendant was duly elected. It was proved that the person who held the election was duly appointed as deputy to the chairman. Then the counsel for the relator said, that the defendant to prove his election must affirmatively prove that he had a majority of votes, and that the certificate was not even evidence of his being so. Lord Campbell very properly overruled this objection. In doing so, he is reported to have said that the language of this section made the certificate conclusive. It is very probable that he did use such language, but the point was not before him, and the case can hardly be considered as showing his deliberate opinion. At most, the opinion of Lord Campbell, was but a *visi prius* decision, and as from the nature of the evidence, and the point really raised, it was not necessary for the decision of the case, it could not be reviewed *in banc.*, and is therefore of less weight as an authority. It was decided in *Reg. v. Backhouse* (L. Rep. 2 Q.B. 16), that the duties of the chairman were so far of a judicial nature, that he could not delegate them, except in the manner allowed by the statute. And even if there was no decision to that effect, I should not entertain any doubt that such was the law. But it does not follow that his decision was final and incontrovertible. The duties of a mayor of a corporation acting as returning officer at the election of a councillor are to this extent judicial, *Reg. v. Owens* (2 E. & E. 86); *Reg. v. White* (L. Rep. 2 Q. B. 557): yet his return may be questioned on *quo warranto*. The duties of the mayor and assessors revising the burgess list under 5 & 6 Will. c. 74, s. 18, are beyond doubt judicial. There have been several *quo warranto*s at least moved for to try the right to be on the burgess roll (see *R. v. Anderson*, 2 Q. B. 740; *Re Milner*, 5 Q. B. 589), without any objection being raised on the ground that their decision was final. I do not find any reported case in which the burgess was actually ousted, but the objection lay on the surface, and, if it had been thought good, would surely have been taken. No doubt

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the Legislature may make any tribunal they please the final judges of any matter they please, but I do not think they sufficiently express an intention to make the decision of a returning officer final merely by intrusting him with some powers of a judicial or quasi-judicial nature. It is a question in each case, on the construction of the particular statute, whether they have done so or not. If this be correct, the question for our decision depends entirely on the true construction of sect. 27 of 11 & 12 Vict. c. 65, and does not, I think, admit of much elucidation by argument. It seems to me, *prima facie*, unlikely that the Legislature should intend to make the decision of the chairman, on an inquiry made *ex parte* and in the absence of the parties interested, final and conclusive as to who was elected; and I cannot see with what object it should have been provided that the lists should be made out and deposited along with the voting papers for public inspection, unless it was to give an opportunity to the public to challenge his decision. If his decision can be reviewed at all, it must be by *quo warranto*. It is worth noticing that the Act now in force, 38 & 39 Vict. c. 55 (by rule 51 of schedule 2), provides that the examination shall no longer be conducted in the absence of the candidates or their agents, but as the agents, though allowed to be present, are forbidden to interfere, it remains *ex parte*, and it seems to me that the presence of the agents can only be useful with a view to call the decision of the chairman in question. If the local board of health had very unimportant functions to perform, it would have been an intelligible policy to prevent litigation by making the decision of the chairman, even though likely to be a local partisan, final; though I think the Legislature would have used clearer language if such had been their intention. But the functions of the local board are by no means insignificant. It seems to me that the true construction of sect. 27 is, that powers and duties are imposed on the chairman, so as to increase the probabilities that his decision, which puts the member whom he declares elected into possession, shall be right; but that there is an absence of language to express that his decision shall be final; and I think it not likely to have been intended that it should be so. I think, therefore, that evidence of all three classes of mistake was properly received, and that the rule should be discharged.

MELLOR, J. delivered the judgment of himself and FIELD, J.—This case was tried before my brother Blackburn sitting by consent without a jury, and it is upon the facts as found by him that the judgment depends. The case was argued before him, my brother Field and myself. The facts are sufficiently stated in the judgment of my brother Blackburn, and it is not necessary to repeat them. I cannot concur with him in the conclusion at which he has arrived, and I think that all the authority upon the subject which is to be found is adverse to the view which he has expressed. That some of the functions of the returning officer are judicial must, I think, be admitted; and certainly the expressions attributed to my brother Blackburn in *Reg. v. Lofthouse* (L. Rep. 1 Q. B. 439), and more especially to myself (ib. 441), are strong to that effect; and again in *Reg. v. Backhouse* (L. Rep. 2 Q. B. 16); and the same view was expressed by me not only of the law, but as to what had been actually

decided in *Reg. v. Lofthouse*. Again, we have the authority of Lord Campbell in *Reg. v. Cross* (19 L. T. Rep. O. S. 35), as to the effect of this sect. 27, when he stated that its operation was to make the certificate of the returning officer conclusive. It is true that this was an opinion expressed at *Nisi Prius*, and not so deliberately given as it would have been after argument *in banc*; but it is not the less an authority in favour of the view which I entertain of the effect of the 27th section. It is to be observed that the decision was given after much discussion, and at the end of the evidence; and I cannot doubt that it was a deliberate expression of Lord Campbell's opinion as to the true construction of the section. It determined the case, and I am not aware that it was ever questioned, although leave to do so was expressly reserved. It is true that the section does not contain such complete machinery as might have been provided. Still it may be asked, if the functions intended to be cast upon the returning officer were merely ministerial, why should language so inappropriate be used? He is required "to ascertain the validity of the votes by an examination of the rate books, and such other books and documents as he may think necessary, and by examining such persons as he may see fit." Again, with regard to the duties to be performed by him, he is "to cast up such of the votes as he shall find to be valid," and then in the result it enacts that the candidates to the number to be elected, who shall have obtained the greatest number of votes, "shall be deemed to be elected, and shall be certified as such by the chairman under his hand." It is not easy to discover by what words judicial duties can be assigned to an individual if the above are insufficient; and that this was Lord Campbell's opinion is clear from the words attributed to him in *Reg. v. Cross* (19 L. T. Rep. O. S. 36): "I am at a loss to see what words could have been employed better calculated to convey that intention." The Legislature appears to have assumed that all the machinery necessary for the distributing, collecting, and receiving the voting papers had been provided by the statute, and that the performance of the duties imposed upon the various persons employed in carrying out the election would be sufficiently secured by the penalty imposed by sect. 28; and I think that there is nothing inconsistent with the view I take of the nature of the functions of the returning officer in the fact that he is required to deliver a certificate, "together with the nomination and voting papers which he shall have received" to the local board of health, who are to deposit them in their office for six months for public inspection. I think that the Legislature intended to circumscribe the litigation likely to arise in the election of these temporary officers, and to prevent the title of votes from being inquired into by the expensive proceedings in *quo warranto*, leaving only mistakes and errors in the mechanical acts required to be done by the chairman to be rectified, but not permitting inquiry into acts done by the chairman when acting judicially. It seems to have been the object of the Legislature to limit litigation as far as possible in constituting these very numerous bodies called local boards of health. I do not think much assistance is to be derived from other cases in which different words are used, but that this case must entirely depend upon the

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express words used in sect. 27. I am, therefore, of opinion that the contention on the part of the relator was right, and that our judgment should be that the rule be made absolute.

Rule absolute to enter verdict for relator.

Solicitors for relator, *Harcourt and Macarthur*, for *Weston*, Dorchester.

Solicitors for defendant, *Combe and Wainwright*.

SOMERSET SPRING ASSIZES.

Reported by T. W. SAUNDERS, Esq., Barrister-at-Law.

Thursday, March 30, 1876.

REG. v. ROSA RUE.

Confession—Inducement—Second confession without inducement to a third party—Connection of the two confessions.

To render a confession admissible, it is not so much material to prove to whom or when it is made, as it is to ascertain the mind of the party making it, and see whether or not it is probable that it was made voluntarily.

The prisoner, a servant girl, was questioned by the mother of a child who had been found dead in a ditch; and she was asked whether she had anything to do with its disappearance; upon which she cried, and said, "If you won't send for the police I will tell the truth," whereupon her mistress replied, "I will not hurt you if you tell the truth; you will be much happier if you tell the truth;" and she promised not to send for the police; whereupon the prisoner made a confession, which upon the trial was rejected as being made under an inducement. It further appeared that shortly after this confession, the mistress sent for a neighbour and informed him of the confession, whereupon he had an interview alone with the prisoner, and asked her questions upon the subject, but he held out no inducement, and she then made a similar confession.

Held, that the second confession was so connected under the circumstances with the first, that it was inadmissible.

THE prisoner was indicted for the wilful murder of John Barnard, a child a year and nine months old.

Hooper and Neville appeared for the prosecution.

St. Aubyn (at the request of the judge) watched the case for the prisoner.

It appeared that the child, on the day of its death, had been last seen alive in the arms of the prisoner, who was a servant in the family of its parents, and it was afterwards discovered dead in a ditch of water, where it had died from suffocation. No charge at that time was made against the prisoner, but, about two months after, a fire having broken out in the farmyard of the Barnards, suspicion rested upon the prisoner with reference to it, and she was questioned upon the subject by Mrs. Barnard (the mother of the child), and after some conversation as to the fire, she said to the prisoner, "Had you anything to do with my child disappearing from the doorstep?" Upon this the prisoner cried, and said, "If you won't send for the police

I will tell the truth." To this Mrs. Barnard replied, "I will not hurt you if you tell the truth; you will be much happier if you tell the truth," and she promised not to send for the police. Upon this, it was proposed to give evidence of a confession then made, which, however, the learned judge refused to allow, as being inadmissible on the ground of the inducement. Evidence was then given that a neighbour (a Mr. Sweet) had been shortly afterwards sent for by Mrs. Barnard, to whom she stated the fact of the confession, whereupon, being in the room alone with the prisoner, he put certain questions to her which resulted in her also (as it was alleged) confessing to him.

Hooper proposed to give in evidence this alleged confession, and did so upon the ground that this was a voluntary confession made to another person without any inducement.

St. Aubyn contended that this second alleged confession was the offsprig of the inducement held out shortly before by Mrs. Barnard, and that the two were under the circumstances so connected as to be each inadmissible.

DENMAN, J.—There are cases which hold that a confession once rejected on the ground that it was made under an inducement, does not become admissible merely from the fact that it was again made to some other person who has not held out an inducement, the inducement being deemed to be a continuing one. But I am not at this moment aware of any case in which it has been held that where the person who held out the inducement is absent, then a confession made to a third party is not admissible, no fresh inducement having been held out. The general principle is clear, that if it is made out to the satisfaction of the judge that the statement was not made voluntarily, it is not admissible. It is not merely a question as to whom the confession is made to, or when it is made; but it is a matter in which you have to get at the mind of the prisoner, and see whether or not it is probable that the confession was made voluntarily in the proper sense of the word. The objection to it here is, that it would not have been made but for the previous involuntary statement, and it is made in answer to questions put by the person to whom it was made, which questions were induced by the information obtained from the person to whom shortly before a confession had been made under an inducement. [His Lordship here retired to consult with the Lord Chief Baron upon the subject. Upon his return he said:] Having considered the point with the Lord Chief Baron, we are both agreed in thinking that the confession to Sweet must be rejected upon the ground that it was so connected under the circumstances with the inducement held out by Mrs. Barnard as to be inadmissible in law.

The prisoner was convicted of manslaughter, and ordered to be kept in penal servitude for life.

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RICHMOND WATERWORKS COMPANY, &C., v. VESTRY OF RICHMOND.

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Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

(Before Vice-Chancellor MALINS.)

Reported by F. GOULD and JAMES H. HOBBS, Esqrs.,
Barristers-at-Law.

Feb. 10 and March 23, 1876.

RICHMOND WATERWORKS COMPANY, AND SOUTHWARK AND VAUXHALL WATERWORKS COMPANY v. VESTRY OF RICHMOND.

*Waterworks company—Statutory powers—Public Health Act 1848 and 1875—Urban sanitary authority—Monopoly of water supply—Transfer by incorporated company of all its shares to another company—Company able and willing to supply water—Injunction.**The R. Water Company was incorporated by Act of Parliament in 1835 to supply the parish of R. with water drawn from the Thames. The Public Health Act 1848, s. 75, empowered the vestry of R., acting as the local board, to construct waterworks and supply water for certain purposes to the district, but not without giving notice to any existing company, nor so long as any such company should be "able and willing to lay on water proper and sufficient for all reasonable purposes" required by the local board.**The R. Water Company supplied the parish until 1862, when the source of their water supply having become polluted, they applied to Parliament to authorise them to amalgamate with the S. Water Company, who were a neighbouring company, and who were able to procure purer water. The Bill was not passed, and the shareholders in the R. Company transferred all their shares and property to the S. Company, and practically ceased to exist, the S. Company supplying the parish, though they had no statutory powers enabling them to do so. In 1873 the vestry gave the R. Company, as the only authorised company, notice under the Act of 1848, of their intention to construct waterworks. The Public Health Act 1875, sects. 51, 52, empowered the vestry as urban sanitary authority, to supply water to the parish for all public and private purposes, but subject to conditions similar to those in the Act of 1848.**The R. and S. Companies brought an action to restrain the vestry from proceeding with their works, on the ground that the R. Company was "able and willing" to supply the parish with water:**Held, on motion for injunction, that the R. Company could not delegate its powers to the S. Company, and was still a legally existing company, though not both "able and willing" to supply; that the S. Company was not authorised to supply, and that, therefore, there was no company who could assert a monopoly against the vestry. Injunction refused.**The object of this action was to obtain an injunction restraining the defendants (acting as the urban sanitary authority for the parish of Richmond, and in that character assuming to exercise the powers vested in such authorities under the Public Health Act 1875) from proceeding to con-**struct waterworks for the supply of the parish of Richmond, unless and until they should have complied with and performed the preliminary requirements or conditions in that behalf imposed by the 52nd section of the Act.**The Richmond Waterworks Company was incorporated by Act of Parliament, passed in 1835, for the purpose of supplying water to the parish of Richmond, taken from a certain point in the river Thames, and in pursuance of the powers of their Act the Richmond Company continued until the year 1861, to supply water to the parish by means of a tunnel or aqueduct made from the river Thames to certain premises which had been purchased for the purposes of the company, but in course of time the water in that district having become defiled with sewage matter, the Richmond Company determined to procure water of a superior quality from another source, and accordingly, in the month of Aug. 1860, an arrangement was made between the Richmond Company, and the Southwark and Vauxhall Water Company, by which the Southwark Company undertook either themselves to supply the parish of Richmond with water, in case they should be able to procure an Act of Parliament enabling them so to do, or otherwise to do so in co-operation with the Richmond Company in case they should be able to effect such an arrangement with them in that behalf.**Accordingly by memorandum of agreement between the Richmond Company and the Southwark Company it was agreed that (subject to the sanction of Parliament being obtained) the Southwark Company should purchase the undertaking of the Richmond Company for the sum of 16,500*l.*, and in the ensuing session the Southwark Company applied to Parliament to confirm the agreement, and to vest in them the undertaking of the Richmond Company. The Bill, however, was opposed, and in consequence of some requirement by the Committee of the House of Lords, to which the Southwark Company objected, the Bill was abandoned. Eventually it was arranged between the two companies that certain persons who were either shareholders or directors in the Southwark Company should purchase on behalf of their Company all the shares of the Richmond Company, which at that time consisted of only about eleven persons, together with their works, buildings, land, and property, and this was carried into effect under the terms of a deed of arrangement dated the 20th Feb. 1862, the transferees becoming, as the plaintiffs alleged, the sole shareholders in and so constituting the Richmond Company, such shares having ever since been held by them as trustees on behalf of the Southwark Company. From that time the Richmond Company ceased to take water from their former source of supply, but having connected their mains with those of the Southwark Company, they were supplied with water by the Southwark Company, and from that time the water rates payable by the inhabitants of Richmond were collected by the officers of the Southwark Company, though they were demanded sometimes in the name of the Richmond Company and sometimes in the name of the Southwark Company. In consequence of this arrangement the Richmond Company had, however, practically ceased to exist.**In the year 1873 the defendants resolved to undertake the supply of water to the parish of*

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Richmond, and accordingly, in the month of August 1873, in order to bring themselves within the provisions of the Public Health Act 1848, sect. 75 (set out below), they gave notice of their intention to the Richmond Company, having been advised that if the Richmond Company and the West Middlesex Water Company, who were also served, were not "able and willing" to supply the district with water, the defendants might themselves proceed to do so under the powers of the Act of 1848.

By sect. 75 of the Public Health Act 1848, it is provided as follows:

That the Local Board of Health may provide their district with such a supply of water as may be proper and sufficient for the purposes of this Act, and for private use to the extent required by this Act.

And for those purposes, or any of them, the said local board may from time to time, with the approval of the General Board of Health, contract with any person whomsoever, or purchase, take upon lease, hire, construct, lay down, and maintain such waterworks, and do and execute all such works, matters, and things, as shall be necessary and proper.

And any waterworks company may contract with the local board of health to supply water for the purposes of this Act in any manner whatsoever, or may sell and dispose of or lease their waterworks to any local board of health willing to take the same.

And the said local board may provide and keep in any waterworks constructed or laid down by them under the powers of this Act, a supply of pure and wholesome water, and the water so supplied may be constantly laid on at such pressure as will carry the same to the top story of the highest dwellinghouse within the district supplied:

Provided always, that before constructing or laying down any waterworks under the powers of this Act, within any limits within, for, or in respect of which any waterworks company shall have been established for supplying water, the said local board shall give notice in writing to every waterworks company within whose limits the said local board may be desirous of laying on or supplying water, stating the purpose for and (as far as may be practicable) the extent to which water is required by the said local board.

And it shall not be lawful for the said local board to construct or lay down any waterworks within such limits, if and so long as any such company shall be able and willing to lay on water proper and sufficient for all reasonable purposes for which it is required by the said local board, and upon such terms as shall be certified to be reasonable by the general board of health, after inquiry and report by a superintending inspector in this behalf, or (in case such company shall be dissatisfied with such certificate) upon such terms as shall be settled by arbitration in the manner provided by this Act.

And in case any difference shall arise as to whether the water which any such company is able and willing to supply or lay on is proper and sufficient for the purposes for which it is required by the said local board, or whether the purposes for which it is required are reasonable, the same shall be settled by arbitration in the manner provided by this Act.

By the interpretation clause of the Act the expression "waterworks company" is defined to mean "any corporation, person, or company of persons supplying, or who may hereafter supply, water for their own profit."

In or about the month of Jan. 1874, the defendants made application to the Local Government Board under the Local Government Act 1858, to sanction the borrowing by the defendants of 28,000*l.* for the construction of waterworks to supply the parish, and to recommend a loan to be made to them by the Public Works Loan Commissioners. The Southwark Company thereupon represented to the Local Board that the defendants by their resolution and proceedings were acting in excess of their powers, and also that proper notices

had not been given to the plaintiffs by the defendants according to the provisions of the Public Health Act 1848, sect. 75. Ultimately the board, without assuming to decide the question as to the legal position or powers of the defendants, decided to accede to their application, and to sanction the borrowing by the defendants of the sum of 28,000*l.*, and to recommend the Public Works Loan Commissioners to make the advance.

Before, however, this decision of the Board was made, the Public Health Act 1875 had been passed, sect. 52 of which contained provisions somewhat similar to those of the Act of 1848, sect. 75.

Under the provisions of the Public Health Act 1875, sect. 51, the defendants, as urban sanitary authority, were invested with effectual powers to provide their district with a supply of water proper for "all public and private purposes," and for those purposes to construct and maintain waterworks. Sect. 52 of the Act is as follows:

Before commencing to construct waterworks within the limits of supply of any water company empowered by Act of Parliament, or any order confirmed by Parliament to supply water, the local authority shall give written notice to every water company within whose limits of supply the local authority are desirous of supplying water, stating the purposes for which, and (as far as may be practicable) the extent to which water is required by the local authority. It shall not be lawful for the local authority to construct any waterworks within such limits if and so long as any such company are able and willing to supply water proper and sufficient for all reasonable purposes for which it is required by the local authority; and any difference as to whether the water which any such company are able and willing to lay on is proper and sufficient for the purposes for which it is required, or whether the purposes for which it is required are reasonable, or (if and so far as the charges of the company are not regulated by Parliament) as to the terms of supply, shall be settled by arbitration in manner provided by this Act.

On receiving the decision of the Local Government Board, the defendants proceeded to advertise for tenders for the construction of their works, on which the plaintiffs applied to them, requesting them not to proceed further with their works until the requirements as to notice and arbitration contained in the 52nd section of the Act of 1875 had been complied with. On the defendants refusing to discontinue, this action was brought, the plaintiffs charging that they, and in particular the Richmond Company, were entitled to the benefit and protection of the provisions of the Public Health Act 1875, and alleging that the Richmond Company were empowered and were "able and willing" to supply water throughout the parish for all reasonable purposes for which the defendants, as the local authority, were entitled to require the supply of water; they charged also that unless and until the defendants should have proceeded, in compliance with the requirements of the said Act, to give to the Richmond Company such notice as was required by the Act, and in case of difference to proceed to arbitration, they were not entitled to construct their intended waterworks, and prayed an injunction against the defendants, restraining them from commencing or proceeding with their waterworks, or at all events, until they should have given the plaintiffs a written notice of the purposes for which, and, so far as practicable, the extent to which, under the provisions of the Public Health Act 1875, water was required by them as the urban sanitary authority for the parish, and unless and until in case of dif-

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ference as to whether the water which the Richmond Company was able and willing to lay on was proper and sufficient for all reasonable purposes, or whether the purposes were reasonable, or (so far as the charges of the company were not regulated by Parliament) as to the terms of supply, such difference should have been settled by arbitration in manner provided by the said Act.

The defendants, by their statement of defence, denied that the plaintiffs were entitled to any benefit under the Public Health Act 1875. They contended that since the Richmond Company had ceased to take their water from their old source, in the year 1862, there had not been any company or person acting, or capable of acting, as or for the Richmond Company; that the Southwark Company never had any legal powers of water supply in the district, and had no *locus standi* in the action; that the defendants had duly complied with the Public Health Act 1848, by giving notice to the Richmond Company and the West Middlesex Company.

The writ was issued on the 30th Nov. 1875, and a motion for injunction was made on the 10th Feb. 1876, and it then appearing that the Southwark Company were about to apply to Parliament for an Act to give them further powers, the motion stood over until the result of that application should be known. That application, however, having been withdrawn the motion now came on again.

J. Pearson, Q.C., Michael, and J. Beaumont for the motion.—The whole question is whether the defendants have complied with the Act of 1875. Under the Act of 1848 they had very limited powers for supplying water, and the Act of 1875, which enlarges those powers, contains careful provisions in favour of existing companies. Both the Acts render it necessary for the defendants, before undertaking the supply of water to the parish, to apply to the existing company to ascertain whether they are able and willing to supply. We contend that the Richmond Company is the company "able and willing" to supply the parish with water, and to whom the defendants were bound, therefore, to give notice under the Act of 1875. The defendants recognised the right of the Richmond Company in 1873, when they served them with notice. We contend also that the defendants have not power under either Act to do what they propose. It will be said that the Richmond Company has ceased to exist, by virtue of the transfer of the shares in the company to the Southwark Company, but a company created by an Act of Parliament cannot cease to exist by any act of its own. We submit, therefore, that the Richmond Company is still in existence, and that it is, by means of the Southwark Company, as its agent, a company "able and willing" to supply the parish of Richmond with water. They cited

Scadding v. Lorant, 3 H. of L. Cas. 418;

County Life Assurance Company, 22 L. T. Rep. N. S. 537; L. Rep. 5 Ch. 288;

Stace and Worth's case, L. Rep. 4 Ch. 682;

Shrewsbury, &c., Railway Company v. Stour Valley Railway Company, 2 De G. M. & G. 866;

Goode v. Howells, 4 M. & W. 202.

Glaspe, Q.C., Meadows White, and Glen, for the defendants.—There is not now any company legally qualified and at the same time "able and willing" to supply the parish. The Richmond Company have not acted as a water company since the time when they transferred their shares to the Southwark Company. The Richmond Company

is practically defunct, and the Southwark Company, who have actually supplied the water, cannot have done so as their agents, because the Richmond Company could not delegate their powers. As, therefore, the Richmond Company is not a working company, and the Southwark Company have no legal powers to enable them to act, we submit that there is no company "able and willing" to supply the parish to whom we are bound to give notice or to recognise. They cited

Beman v. Rufford, 1 Sim. N. S. 550;

Great Northern Railway Company v. Eastern Counties Railway Company, 9 Ha. 306;

Hare v. London and North Western Railway Company, 3 L. T. Rep. N. S. 289; a. c. 2 Joh. & Ham. 80;

Midland Railway Company v. Great Western Railway Company, 28 L. T. Rep. N. S. 718; L. Rep. 8 Ch. 841.

J. Pearson, Q.C., in reply, submitted that after the lapse of time during which the arrangement between the plaintiff companies had been acquiesced in, it was too late for the defendants to dispute their position. He also cited

Shrewsbury and Birmingham Railway Company v. London and North Western Railway Company and others, 29 L. T. Rep. O. S. 186; 7 Railway Cases, 581.

The VICE-CHANCELLOR.—This is a motion by the Richmond Waterworks Company and the Southwark and Vauxhall Water Company against the Vestry of the Parish of Richmond, in Surrey, asking for an injunction to restrain the vestry from erecting waterworks in opposition to those of the plaintiffs. The parish of Richmond has for many years been supplied with water by virtue of an Act passed in the year 1835. By that Act the plaintiffs, the Richmond Company, were incorporated with the power of making, completing, and maintaining the works thereby authorised. [His Lordship then referred to the provisions of the Richmond Company's Act, and continued:] Therefore the Richmond Company has all these privileges conferred upon it of taking water at a place they should fix upon in the river Thames, in the parish of Richmond, and constructing the necessary works, and the inhabitants have the protection that they shall have a sufficient supply of water, and if not that the company shall be liable to the penalties I have mentioned. In pursuance of the powers of that Act of Parliament the works were constructed, and down to the year 1861, that is a period of twenty-six years, the parish of Richmond uninterruptedly, and, as far as I know, satisfactorily were supplied with water drawn from the river Thames, in the parish of Richmond. In the year 1861 it seems to have become the object of the proprietors of the Richmond Company to amalgamate with the Southwark and Vauxhall Water Company, and, accordingly, an application was made to Parliament for power to amalgamate the two companies, and to transfer to the Southwark Company all the powers of the Richmond Company. The application to Parliament was unsuccessful; they did not obtain from Parliament the powers they sought for, and, therefore, the Richmond Company was left in its former condition, namely, clothed with the obligations imposed upon it by the Act of 1835, and the inhabitants had the protection which that Act also afforded them. The result of this being unsatisfactory to the proprietors of the Richmond Company, they proceeded to do in-

directly that which Parliament had refused to authorize them to do directly. Finding that Parliament would not give them this power, all the shareholders in the Richmond Company (they were only eleven in number, I think,) agreed to sell their shares to the Southwark Company, and accordingly, by a deed dated in 1862, stated by the plaintiffs themselves in their statement of claim, the shares were transferred to the Southwark Company, and powers were given to them of a very extensive nature. I am far from thinking it in itself an unreasonable thing or disadvantageous to the inhabitants of Richmond that the Richmond Company, either because the source of the supply of water was unsatisfactory, or because the water was not sufficiently pure, or because of some inconvenience arising from taking it at that particular place, should have made this arrangement with the Southwark Company, a more powerful company, taking its water much higher up in the river Thames, so that instead of taking the impure water at Richmond, they should take the comparatively pure water at Hampton. I say I do not at all see that there was anything unreasonable or to blame in that, but I still adhere to what I have said, that a company constituted by Act of Parliament can cease only by virtue of another Act of Parliament, and that until that has been brought about it is still legally an existing company. Now the Richmond Company having agreed to transfer all their powers to the Southwark Company, agreed also to sell the property in the place where they took the water from the river Thames. Then having handed over all their powers and all their property as far as they could, although legally continuing to exist, practically I take it they ceased to exist from that time, 1862, and from that time down to Nov. 1875, there are no directors, the minute book is a complete blank. It has been proved distinctly that whereas up to 1862, the demands for water rates were made in the name of the Richmond Company, from that time the demands were made in the name of the Southwark Company, and the Southwark Company, when they proceeded to exercise the power of opening streets and so forth, were the parties who gave the notices. No doubt they professed on some occasions to give the notices on behalf of the Richmond Company, but it was the officers of the Southwark Company who did those things, and the Richmond Company had, in point of fact, practically ceased to have any existence. I say practically as distinguished from legally, because as I have already said, legally, no doubt they had and still have an existence. From this time, 1862, down towards the end of 1873, as far as I know, things went on satisfactorily, though I have been told great complaints were made on the part of the inhabitants of Richmond, first on account of the great increase in the rates charged for the water, and on other grounds, namely, insufficient supply, and the unsatisfactory quality of the water. The result of the evidence given before the special commissioner appointed by the Government was a report against the Southwark Company, and in favour of the vestry's right to construct independent works. Application was made to the Public Loan Commissioners, when the matter was again investigated, and they having been satisfied that the construction of these works was proper, having due regard to the

interests of the inhabitants of Richmond, authorised a loan of 28,000*l.* for the construction of these new works. These circumstances are very strong in favour of the right of the vestry to construct their own water works, but this is a motion for an injunction to prevent their doing so. Apart from the provisions of the Act of Parliament to which I am about to refer, here is a parish which is already supplied with water, but yet there is nothing in the original Act of Parliament to say that other waterworks may not be established by another Act, or in any other way whatever. The Richmond company have certain privileges, but nothing more than a railway company running over a certain district who cannot claim the right to prevent any other railway from running from the same point. Independently of the other Acts to which I am about to refer, there is no monopoly, but the Richmond Company and the Southwark Company claim by virtue of these Acts of Parliament a monopoly in the supply of water for Richmond. The right to that monopoly first of all depends upon the Act which was in force at the time when the vestry first proceeded to give the necessary notices, as they were bound to do, and which they did, as I understand, by a notice dated the 22nd, and served on the 23rd Aug. 1873. At that time the Act which was then in force was the Public Health Act 1848. [His Lordship read the 75th section of the Act.] Mr. Pearson referred to the Act of last year, 1875, in which I do not find any very material difference. The Act of 1875 may be considered as laying down the law to the same effect, that any urban authority, that is, such as the vestry of Richmond, may provide that district or any part thereof, and any rural district may provide their district with a supply of water, proper and sufficient for public and private purposes, and for those purposes may construct and maintain waterworks, dig wells, and so on, and that is what the Richmond vestry propose doing. Then they may take on lease or hire any waterworks, or purchase any waterworks, or any water, or right to take or convey water, either within or without their district, and any rights, powers and privileges of any water company. [His Lordship then read the 52nd section of the Public Health Act 1875.] Now, on the 10th Feb. last, it turned out that the Richmond and Southwark companies were at that time promoting a Bill in Parliament which, if passed into law, would remove all these difficulties, and would transfer to the Southwark Company all the powers of the Richmond Company. Under those circumstances I ordered the motion to stand over until the result of the application to Parliament was known, because if it had been successful Parliament would have defined the rights of these parties, and probably it would have been unnecessary to renew this motion. Since that the Bill has been withdrawn, and I am now in the same situation, except that the arguments have been completed, as I was upon the 10th Feb. last. I have already said two things must concur in order to secure to the water company this monopoly. If there is an existing company, as there is here, and that company is able and willing to give a good supply of water, as is required by the Legislature, then in that concurrence of circumstances the company is entitled to the monopoly; but if it has merely a legal existence, and is not able and

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willing to give that supply, then the two conditions do not concur, and the mere legal existence will not entitle the company to that monopoly claimed by the Richmond Company. It is as plain as anything can be that the Richmond Company, by the sale of their pipes, mains, land, and so forth, have absolutely disabled themselves from supplying the town of Richmond with water. They, therefore, *quâ* the Richmond Company, are not able, they may be willing, but they are not able, and they must be "able and willing." But then they say (intending, I suppose, to adopt the legal maxim, "*Qui facit per alium facit per se*"), "Although we do not do it we have done it by our agents." Their agents are the Southwark Company. The answer to that is, the Southwark Company is a distinct company, created by different Acts of Parliament, having limited powers unquestionably, and no powers at Richmond. I have already intimated my opinion that there was nothing unreasonable, though it might not be legal, when the Richmond Company found themselves unable to do this, in their applying to an adjoining company whose pipes were laid through or near Richmond, to turn the pipes into Richmond so as to give a better supply than the Richmond Company could. Then comes this question, can one company delegate to another its powers, and can it arm that company with the powers which itself relinquishes? Upon the last occasion the decision of Sir Geo. Turner, V.C., in *The Great Northern Railway Company v. The Great Eastern Railway Company* was appealed to, and Mr. Pearson this morning referred to other authorities, for instance, *Shrewsbury and Birmingham Railway Company v. London and North-Western Railway Company* and others, which he so much relied upon; but it appears to me to be a totally distinct case. That was a case in which certain railway companies had the power of running over amongst them a large tract of country, and the consequence of their running in opposition to each other was to destroy each other; thereupon they came to an arrangement that they would throw the common earnings into one purse, and divide them in certain defined proportions. What is there illegal in that? Nothing at all, and it was decided by the Court of Queen's Bench not to be an illegal contract. But where one company attempts to transfer all its powers, its privileges, and authorities to another company, then I apprehend it does fall within the rule laid down by Sir Geo. Turner, V.C., in the case of *The Great Northern Railway Company v. The Great Eastern Railway Company*, which I have heard no authority dispute, and in which I entirely agree. In that case it was decided, as appears by the marginal note, "An agreement between two railway companies, made without the authority of the Legislature, whereby one company delegates to another all the powers which have been conferred upon it by Parliament, is an unlawful attempt to effect that which Parliament alone can authorise, and is against public policy; and in such a case the court will not interfere to assist either of the parties in obtaining a collateral benefit, which the agreement would give, or aid them in any manner which would promote the object of the agreement." The rule is laid down by Sir Geo. Turner, V.C., (9 Hs. 310) as follows: "If, therefore, this case had rested wholly upon the construction of the agreement between the plain-

tiffs and the defendants, I should have thought it the duty of this court to interfere to some extent by injunction; but I think there lies at the root of this case a question of public policy, which precludes the interference of the court. It is impossible to read the agreement between the plaintiffs and the East Anglian Railways Company without being satisfied that it amounts to an entire delegation to the plaintiffs of all the powers conferred by Parliament upon the East Anglian Railway Company. All the stock of that company is to be taken by the plaintiffs without any obligation to restore it. The plaintiffs are to manage and regulate the railways of the East Anglian Company for the purposes of the agreement; and, although in form it is declared that the instrument shall not operate as a lease or agreement for a lease, it amounts in substance either to one or the other. It is framed in total disregard of the obligations and duties which attach upon these companies; and is an attempt to carry into effect, without the intervention of Parliament, what cannot lawfully be done except by Parliament in the exercise of its discretion with reference to the interests of the public." In the present case the Richmond Company attempted to transfer every power that they had, and, as I have already said, when the streets were opened, the notices were served by the Southwark Company, and when the rates were levied they were levied by the Southwark Company, and it is the Southwark Company who demand the payment of the rates and give the receipts for them. I would say here it is extremely remarkable that for thirteen years this state of things should have gone on without any legal proceedings being instituted, because it does seem to me perfectly plain that the Southwark Company, when they made out their charges, could not have enforced them, because any ratepayer might have said, "You have no power to come against me; you must not come into the parish of Richmond, and I do not submit to your jurisdiction." On the other hand, if the Southwark Company do not supply the water, there are powers which enable the inhabitants to proceed against the Richmond Company; therefore, that these defects of power should not have been the subject of litigation is somewhat remarkable. I have already said that the case lies in a very narrow compass, and it all depends upon the question whether, there being admittedly a legally existing company, it is a company "able and willing" to supply the district. How can they be able to supply the district when the only means they had of supplying it was from the River Thames, at a particular place, and that is now closed against them by their own act? How can they be able to do this when they have no power whatever of getting water anywhere except they buy it, because that is the effect of it, from the Southwark Company? The Legislature having, by an Act of Parliament, secured to an existing water company in the district in which the proposed works had to be erected, a monopoly on certain conditions, I think upon general principles the persons who are claiming that monopoly are imperatively bound to show that they have performed every part of the conditions in such a manner as shall leave no doubt in the mind of the court, and it seems to me, on the principle laid down by Sir Geo. Turner, V.C., that the plaintiffs have deprived themselves of the

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right to this monopoly by attempting illegally, not unreasonably to my mind, to transfer their powers to an existing company, which company cannot exercise the powers attempted to be conferred upon them by the original company, and, in my opinion, the original company, for the reasons I have stated, have entirely lost the power of exercising these privileges themselves. Upon these grounds, therefore, I come to the conclusion that the case made by the plaintiffs to prevent the vestry from constructing waterworks for the supply, or better supply, of the neighbourhood has failed. Being dissatisfied with the supply, in my opinion, the vestry have the right to proceed to erect new works, unless the Richmond company can distinctly establish a state of things which entitles them to say, "We have the monopoly and no man shall interfere with us," but that, in my opinion, they have failed to do, and, consequently, the motion must be dismissed with costs.

Solicitors: *Bircham and Co.; Montagu Scott.*

EXCHEQUER DIVISION.

Reported by H. LEIGH and A. PAWSON, Esqrs., Barristers-at-Law.

Friday, Jan. 28, 1876.

JEPSON v. GRIBBLE.

Inhabited house duty—Exemption of hospital, charity school, or house provided for reception or relief of poor persons—14 & 15 Vict. c. 36, sect. 2—48 Geo. 3, c. 55, schedule B, case 4—Lunatic asylum—Residence of medical superintendent, detached from but within boundary of the asylum—Garden communicating with asylum.

The committee of visitors of the City of London Lunatic Asylum, established under the 16 & 17 Vict. c. 97, appointed the appellant to be the medical resident superintendent of such asylum in accordance with sect. 55 of that Act, which contained a provision that he should be resident in such asylum. He lived in a separate and detached house, built upon ground within the boundary of the asylum (as the servant of the committee), and which was allotted to him as his residence, having been specially built for and occupied by the medical resident superintendents of the asylum, and not containing more accommodation than is reasonably necessary for the appellant and his family. From the rear of the house the appellant had ready and convenient access to the main buildings of the asylum by passing through a portion of the grounds of the asylum through a door or gate in the wall, which inclosed his garden on that side. The front part of the appellant's house abutted immediately upon the public road, thereby affording direct communication with the lane without passing through the asylum. On the right and left side the garden was inclosed by brick walls, in each of which was a door or gate leading into the asylum grounds. 48 Geo. 3, c. 55, schedule B, case 4, of the exemptions, provides for the exemption from the payment of inhabited house duties "any hospital, charity school, or house provided for the reception or relief of poor persons." The appellant having been assessed

in respect of such house under 14 & 15 Vict. c. 36,

Held, upon appeal, that the house formed part and parcel of the asylum, and was therefore within the exemption.

THIS was a case stated by the commissioners for executing the Acts relating to the inhabited house duties under and in pursuance of the Customs and Inland Revenue Acts 1874 (37 & 38 Vict. c. 16), s. 9.

The appellant is the medical resident superintendent of the City of London County Lunatic Asylum, situated at Stone, near Dartford, in the county of Kent.

The respondent is the surveyor of taxes for the district in which the said asylum is situated.

The said City of London Lunatic Asylum is a lunatic asylum established under 16 & 17 Vict. c. 97, and is a hospital and house provided for the reception and relief of poor persons—that is to say, "for the lodging, maintenance, medicine, clothing, care, and treatment of pauper lunatics."

The committee of visitors of the asylum duly appointed the appellant to be the medical resident superintendent of such asylum under sect. 55 of the last-mentioned Act, by which he is compelled to reside in the asylum. His duties are defined by the Act.

The appellant lives in a separate and detached house built upon ground within the boundary of the asylum, as the servant of the committee, and which house is suitable and convenient for the performance of his duties, and is allotted to him for that purpose.

From the rear of the house the appellant has ready and convenient access to the main buildings of the asylum by passing through a door or gate in the wall which incloses the garden on that side.

The front part of the garden of the appellant's house abuts immediately upon the public lane, so that he has direct communication with such lane without passing through the asylum. The garden is inclosed on the right and left by brick walls, and in each of these walls is a door or gate leading into the asylum grounds.

The house is occupied by and was specially built as the residence of the medical superintendent of the asylum, and does not contain more accommodation than is reasonably necessary for himself and family.

In respect of this house the appellant was assessed for the year 1874 ending the 5th of April 1875 (under 14 & 15 Vict. c. 36) to the inhabited house duty, upon 50l. at 9d. in the pound, making 11. 17s. 6d.

The appellant contended before the commissioners that his residence formed part of the asylum, and was therefore part of a hospital and house provided for the reception and relief of poor persons, and was exempt from the payment of house duty under case 4 of the exemptions contained in 48 Geo. 3, c. 55, schedule B, which exempts "any hospital, charity school, or house provided for the reception or relief of poor persons."

The respondent Gribble, the surveyor of taxes for that district, contended that the residence of the appellant was a separate and distinct house from the asylum, although it was situate and built upon the asylum land, and therefore did not fall within the exemption.

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The commissioners decided that the appellant was not entitled to the exemption, but was liable to pay the 1*l*. 17*s*. 6*d*. as inhabited house duty.

The question for the opinion of the court is whether the appellant is liable, with respect to his said residence, to be assessed to the inhabited house duty. The court to draw inferences of fact.

Poland, for the appellant. — The appellant's house falls within the exemptions contained in 48 Geo. 3, c. 55, and is therefore exempt from assessment; it is as much within the exemption as if it were physically a part of the main buildings of the asylum. By 16 & 17 Vict. c. 97, which regulates "lunatic asylums for the maintenance and care of pauper lunatics," it is enacted by sect. 55 that the committee of visitors of every asylum shall appoint a medical officer, "who shall be resident in such asylum;" and by sect. 132 the word "asylum" is defined as meaning "any asylum, house, building, or place already erected or provided, or to be erected or provided under the provisions of this Act." Under these provisions the land was bought, the plans settled, and this house built upon the ground and within the walls of the asylum, and the appellant occupies the house not as tenant but as the servant of the committee, merely having the permissive use of the premises, and being obliged to reside within the asylum, and is liable to be turned out of his residence without notice. In *Congreve v. The Overseers of Upton* (19 L. T. Rep. 384; 4 B. & S. 857; 33 L. J. N. S. 83, M. C.), it was held that a medical superintendent whose house was situated with reference to the asylum very much as is the case here was not liable to be rated to the poor rate because he was resident in such asylum, and thus came within the exemptions above mentioned.

The *Attorney-General* (Sir John Holker, Q.C.), and *Pinder*, for the respondent. — This house forms no part of the asylum, and therefore does not fall within the exemption. The main buildings of the asylum are no doubt exempt, but the appellant's residence is neither in letter nor spirit "a hospital, charity school, or house provided for the reception or relief of poor persons." The effect of holding that such residence is within the exemption would be to hold that one entirely detached and separate house complete in itself is part of another building. The case of *Congreve v. The Overseers of Upton*, cited by the other side, is not an authority on the present point. That was a question not of house duties or exemptions, but of rateability to the poor under a special clause, the facts being quite different to the present case. The observations of Blackburn, J., as to the residence in the asylum only establish that the medical officer complied with sect. 55 of the 16 & 17 Vict. c. 97, which requires him to be resident in the asylum, and they must be read with reference to the subject matter and the decision, was that the building in which the medical officer resided was acquired for the "purposes of the asylum." Formerly, under 43 Geo. 3, c. 161, s. 73 (since repealed), these cases were heard before the judges sitting in Serjeants' Inn, the case on both sides having been impartially stated by the Commissioners of the Inland Revenue; the present point has been decided in favour of the Crown in three cases thus heard, as appears from the records of those cases and the decisions

which are kept in the archives of the Inland Revenue. In the first (*McCulloch's* case) the medical superintendent was held not to be within the exemption; the house was in the asylum grounds, and separated from the asylum by a turnpike road, which ran through the grounds of the asylum; the only distinction between that case and the present is, there the house was built on grounds of the asylum, but upon the other side of a turnpike road, here the appellant's house is separated from the asylum by a wall. [KELLY, C.B. — That is the distinction; the wall is the property of the asylum.] Yes, but so was the turnpike road the property of the asylum, as it owned the land on each side, the public having only an easement over the road. In the second case, the judges held that the chaplain's house, which, as in the present case, was in the grounds of the asylum, was not exempt. [AMPHELETT, B. — But 16 & 17 Vict. c. 97, s. 55, does not require the chaplain to be resident in the asylum.] The construction of an exemption cannot depend upon whether another statute requires residence within the asylum, nor on whether that requirement is obeyed. It may be that the present appellant has disobeyed the provisions of sect. 55, or even that his appointment is not valid within that section. In the third case (*Gibb's* case) the governor and the chaplain of Kirkdale Gaol each resided in a house separated from the gaol itself, but within the grounds of the gaol, the governor's house forming part of the boundary of the gaol, with two fronts, one towards a public road and the other towards the gaol yard; he lived in the house rent free; there was a door leading into the street, and another into the prison; and it was held that the governor's and chaplain's houses were not exempt from the payment of house duty. That case certainly was not a decision upon the exemption in favour of "a house for the reception or relief of poor persons," but came under another Act of Parliament, but the position was analogous.

Poland replied.

KELLY, C.B. — I think that in this case the appellant is entitled to our judgment. It is perfectly clear that this lunatic asylum is within the words of the Act, "any hospital charity school, or house provided for the reception or relief of poor persons;" and the only question is, whether the house in which the appellant, the medical superintendent, lives, and which is the subject of this assessment, is part and parcel of the asylum, so as to come within the exemption contained in case 4. I think it is. It is within the curtilage, and is provided for the residence of a person whose attendance may at any moment be required for the inmates of the asylum, and who ought, therefore, to be always at hand. Under these circumstances I hold, without any doubt, that the Legislature intended that what is substantially part and parcel of the asylum shall be exempt, unless there be some recognised decision given by a Superior Court to the contrary effect. Of the cases cited by the *Attorney-General* only one resembles the present, and that one was not decided in the courts of law. There is this broad distinction between it and the present: there the medical superintendent's house was separated from the asylum, and was on the other side of a public road, and it is therefore clear it formed no part of the asylum. Here it must be taken actually to form part and parcel of the asylum, so as

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to exempt it from assessment within the meaning of the Legislature.

AMPHLETT, B.—I am of the same opinion, and for the same reasons, and I should have had no doubt even were there no authority on the question; but the case of *Congreve v. The Overseers of Upton*, though a case of a poor rate, has a strong bearing on the present point, because the question there was, whether the medical officer's residence was within the asylum, and was therefore very much the same as in the present case. I observe in that case there were two appeals, one by the chaplain and one by the medical superintendent, who had each been rated for their respective houses. With regard to the chaplain, the court held that, inasmuch as it was not necessary that he should always be present or resident, and since his house was not used "for the purposes of the asylum" within the meaning of the statute, he must be rated for his house at the actual value. But with regard to the medical superintendent, Mr. Justice Blackburn says, "This statute expressly directs by sect. 55 that he shall be resident in the asylum." Mr. Welsby argued that the words "in such asylum" must be construed to mean strictly within the curtilage of the building where the patients sleep at night, a place which might be so laid in an indictment for burglary. But that is not a reasonable meaning of those words. They mean that his residence must be in grounds appropriated to the asylum, so as to be reasonably within it. Now, looking at the position of the building as described in this case, we cannot say that it was not in the asylum, if we once assume that it need not be under the actual roof. The position of the medical superintendent's house was much the same as in the present case; and since it is necessary that there should be a resident medical officer, and that he should be accommodated with a proper house, whether it be actually part of the main building of the asylum or not, it is a necessary adjunct, and is therefore part of the asylum. As to the cases cited from the Revenue Office books, there are none of them which exactly agree with the present. The nearest, perhaps, is that of the Governor of Kirkdale Gaol; but there there was no such exemption as in the present case, nor any exemption on the ground that the house was in the occupation of the Crown, and the judges thought it was not. It has therefore no direct bearing on the present case; and our judgment therefore be for the appellant.

HUDDLESTON, B.—I am of the same opinion. Even without any interpretation clause, it is clear that the asylum itself would be within the exemption, because it is expressly found in the case that the asylum "is a hospital and house provided for the reception and relief of poor persons." I agree with my Lord and my brother Amphlett, that the whole of the grounds form part of the asylum, and it is found in the case that the medical superintendent's house is built on part of the grounds of the asylum. According to the modern method of treating lunatics, the gardens and grounds are almost as necessary as the dormitories or any other part of the building. I think, therefore, that the medical superintendent's house is part of the asylum. Now, with regard to the cases that were quoted by the Attorney-General as having been decided by the judges in *Serjeants' Inn*, I have no doubt that the records existing in

the Inland Revenue Office have been correctly drawn up; but I must enter my protest against these being cited as in any way binding upon us. The reasons for the decisions are not given, the records have not the guarantee of a reporter known to the public, and they have never been properly laid before the public so as to be discussed, and to enable any defects which there may be in the reports to be detected. I do not feel inclined to look at them; moreover, none of the cases cited are conclusive of the present point.

Judgment for the appellant.

Solicitor for the appellant, *The City Solicitor* (T. J. Nelson).

Solicitor for the respondent, *The Solicitor to the Inland Revenue*.

Judicial Committee of the Privy Council.

Reported by C. E. MALDEN, Esq., Barrister at-Law.

Tuesday, March 14, 1876.

(Present: the Right Hons. the LORD CHANCELLOR (Cairns), LORD HATHERLEY, SIR ROBERT J. PHILLIMORE, SIR BARNES PEACOCK, and SIR MONTAGUE SMITH.)

RIDSDALE v. CLIFTON AND OTHERS.

MOTION IN AN APPEAL FROM THE ARCHES COURT OF CANTERBURY.

Ecclesiastical law—Public Worship Regulation Act 1874 (37 & 38 Vict. c. 85, s. 9)—Practice—Inhibition—Discretion.

The issuing of an inhibition pending an appeal, though almost a matter of course before the passing of the Public Worship Regulation Act 1874, was still a matter for the discretion of the court; and the power given to the judge by the 9th section of that Act to suspend the execution of a monition pending an appeal must be taken as an indication that, looking at the balance of convenience in each particular case, it ought to be considered whether the decree should be executed or stayed.

It will not be stayed with regard to matters only affecting the manner of performing the service, in which no inconvenience or irreparable injury will arise from its being obeyed pending an appeal; secus, with regard to matters such as the removal of a figure, which might involve more serious consequences. Judgment of the court below affirmed with a variation.

THE appellant in this case was the incumbent of St. Peter's Church, Folkestone, in the Diocese of Canterbury.

In 1875 the respondents, who were parishioners of the parish, commenced proceedings against him under "The Public Worship Regulation Act 1874 (37 & 38 Vict. c. 85)." The representation contained twelve charges, as follows: (1) the use of altar-lights; (2) wearing unlawful vestments; (3) using wine at the Communion with which water had been mixed; (4) using wafer bread at the Communion; (5) standing on the west side of the Communion table with his back to the people during the prayer of consecration; (6) kneeling during that prayer; (7) causing a hymn called the "Agnus" to be sung immediately after that prayer; (8) celebrating the Communion when only one person

communicated with him; (9) and (10) taking part in processions round the interior of the church with a cross and banners; (11) the erection of a chancel screen with a metal crucifix and candles upon it; (12) the erection of figures in relief in the interior of the church representing scenes called the "Stations of the Cross."

Upon this last point there had been previous litigation in the year 1873. (See the case of *Les v. Fagg*, 30 L. T. Rep. N. S. 801; L. Rep. 4 A. & E. 135, and 6 P. O. 38).

The defendant (the present appellant), by his answer admitted the unlawfulness of the act charged in the sixth head of the representation, and discontinued the same. The case was heard upon the other heads before the Dean of Arches (Lord Penzance), sitting at Lambeth Palace, on Jan. 4th, 5th, and 6th, 1876, when the learned judge held that as to the 1st, 2nd, 3rd, 4th, 5th, 7th, 9th, and 10th charges he was bound by the former decisions of the Court of Arches in the cases of *Martin v. Mackonochie* (1) (L. Rep. 2 A. & E. 116; 18 L. T. Rep. N. S. 245), *Elphinstone v. Purchas* (L. Rep. 3 A. & E. 66; 23 L. T. Rep. N. S. 446), and *Martin v. Mackonochie* (2) (L. Rep. 4 A. & E. 279; 32 L. T. Rep. N. S. 568) and of the Privy Council in the cases of *Martin v. Mackonochie* (1) L. Rep. 2 P. C. 365; 19 L. T. Rep. N. S. 503) and *Hibbert v. Purchas* (L. Rep. 3 P. C. 605), and the argument was confined to the 8th, 11th, and 12th charges. The learned judge took time to consider his judgment, and on the 3rd Feb. decided against the defendant on all points.

From this judgment notice of an appeal to the Privy Council on the 2nd, 4th, 5th, and 11th charges, was given.

By the order of the court below the appellant was admonished to abstain from the practices, matters, acts, and things therein set forth, and on the 26th Feb. he moved the court to suspend the execution of the motion on the points appealed against, under the power conferred by sect. 9 of the Act, pending the determination of the appeal; but the motion was refused with costs. The judgment of the court (Lord Penzance) in so refusing the motion was as follows: I must say I think it would be a great misfortune if I were bound by any view of the justice of this case to concede this application. One of the evils that existed before the late Act was the grievance that, when the Court of Arches had decided the thing to be lawful or unlawful, appeal was had to the Queen in Council; and the immediate effect of that appeal was to stay the hand of the inferior court, so that the decisions of the court never could have any effect until a great length of time had elapsed, and until very great expense had been incurred. Reference has been had to what happens in other courts. It is now under the Judicature Act the universal practice in all the courts that the court appealed from should be able to hold its hand over the circumstances under which the appeal should go on, and that it should have the discretion to suspend the operation of its own judgment or decree in proper cases, but that where such circumstances do not exist as to render it a proper case for that suspension, the rule should be that the decree of the Inferior Court should go forward. That was the practice in the Probate Court under the Probate Act, it was the practice of the Courts of Equity, and in some cases it was the practice of the Courts of Law, but now by the Judicature Acts

it is the practice of all the courts in Westminster Hall. To that extent the analogy of other courts is a thing to look to. But the circumstances under which other courts think it right to stay the execution of the decree of the inferior court will be of very little assistance to this court, owing to the very different nature of the matters involved. Therefore I do not hold with the proposition that because courts of equity lay down the rule—if they do lay it down—that irreparable injury must be done before they will stay the decree, this court should take the same principle as its guide. I think that the principle, and the only principle, if it can be called a principle, which is to be adopted is that the court in each case should consider the whole of the circumstances, the amount of actual injury, the amount of grievance to people's feelings, the circumstances under which the alleged offence has been committed, the state of the law in previous cases, and a variety of other circumstances, in fact every circumstance that could bear upon the matter, that the court should take all that into its consideration and then, if special grounds are shown to exist, that it should hold its hand until the Superior Court has had cognizance of the case. That I believe is the only principle which can be laid down for the exercise of the power confided to this court by the late Act of Parliament. Then the question is whether in this case any special grounds have been shown. The respondent in the present case has been in the habit of conducting the services of his church in direct contravention of the law as settled by the Supreme Tribunal in the last case that came before it. I do not know whether I may assume, from his appealing only in respect to certain points, that he is prepared to yield obedience to the law upon those points as to which he has not appealed. I hope I may; but in the cases in which he has appealed he now asks upon no special grounds,—except that he still maintains that these matters are not illegal, which is a proposition that everybody maintains in such cases,—upon no special grounds he asks that he should be allowed to continue the services in a way which the Supreme Court of Appeal has declared to be illegal, until he can have the opportunity, if the court permits him that opportunity, of questioning again in that court its own decision, and inducing it to revoke the conclusion at which it previously arrived. Now that seems to me a very unreasonable thing to ask. I think he should obey the law as it stands. I think he should perform his services as the Supreme Court of Appeal has declared they ought to be performed, and then he will come with clean hands at least to the Superior Court, saying, I have been obedient to the law up to the present time and I ask you to allow me to open the question again which you have previously decided, and to endeavour to persuade you if I can that you on a former occasion came to a wrong decision. That applies to three of the four points upon which alone an appeal is granted. The fourth point is as to a decision of this court of a novel character—the point has not been decided before. Now upon that matter I will say this, that I think this court, like all inferior courts, ought not by any means to assume that its own judgment will ultimately be affirmed, and therefore if any decision is given in this court upon which an order issued which may be very painful to the consciences of those against whom it is directed, I can

conceive cases in which it would be very proper indeed that that order should be withheld, or its operation suspended until the Superior Court had had an opportunity of declaring whether it was justified or not; but in this case I can conceive no difficulty of that kind, because the order here is to take off from the crucifix the figure which, as the learned Counsel has very properly pointed out, was proved in the case not to be a part of the same structure as the cross, but to have been distinct from it, and screwed upon the cross; it, therefore, can be detached without the slightest difficulty, it also can be detached and removed without doing injury to the religious feelings, scruples, or consciences of anybody; because we must always recollect that the respondent maintains that this figure is a mere architectural decoration; and if it is only a decoration of the church, the loss of that decoration for the period during which this case is under appeal is not a matter that really could wound the most sensitive conscience. Viewing this figure, therefore, in the light in which the respondent views it, it seems to me that there is no pretence for applying to the court on any special ground as to the injury that would be done to people's feelings, or to the structure of the church, by the removal of the figure, until the Court of Appeal shall have determined, if it does determine, that it may lawfully be put up again. Therefore, going through the items of the respondent's appeal, looking at the circumstances in which they stand, looking particularly to the state of the law as it now is settled by the supreme tribunal in these matters, and not throwing aside or being unaware of the strong feeling that exists upon many of these subjects, I still think it plain that the respondent ought to obey the law as he now finds it, and that until he can succeed in reversing it he ought to be content to conduct the service of the church in accordance with the judgment that the Privy Council have already delivered. The power confided to this court under the section of the Act to which allusion has been made is one that ought to be sparingly applied—it is one that ought to be applied only where very special circumstances exist, and as in my opinion no such circumstances exist in this case I must reject the application, with costs.

From this judgment the present appeal was brought.

W. G. F. Phillimore appeared for the appellant.
B. Shaw for the respondents.

Their Lordships' judgment was delivered by the LORD CHANCELLOR (Cairns).—In the case in which their Lordships have now to express their opinion an appeal has been instituted against the decision of Lord Penzance, as Judge of the Arches Court, dated 3rd Feb. 1876, and the matters complained of, with regard to that decision, are these: First, that it pronounces unlawful the wearing of certain vestments; secondly, that it pronounces as unlawful the use in the Holy Communion of wafer bread or wafers; thirdly, that it pronounces unlawful the standing by the minister while saying the Prayer of Consecration in the Communion Service at the middle of the west side of the Communion Table, in such wise that during the whole time of the saying of the Prayer he was between the people and the Communion Table, with his back to the people, so that people could not see him break the bread or take the cup into his hand; and, fourthly, that it

pronounces as unlawful the setting up and placing on the top of the screen separating the chancel of the church from the body of the church, and still retaining thereon, a crucifix. The decree which is thus complained of and appealed against in its form admonishes the present appellant, the Rev. Charles Joseph Ridsdale, to abstain for the future from the practices and acts set forth in the decree, and from sanctioning and permitting the same; and it also further goes on to direct, affirmatively, the Rev. Charles Joseph Ridsdale to remove or cause to be removed from the top of the screen the figure on the cross fixed thereon. Now that decree having been made, and notice of appeal having been given, an application was made, as is usual in such cases, for the process which is called inhibition, and citation and monition for process—monition for documents; and against the issuing of that process a caveat has been lodged, which has made it necessary for the Rev. Mr. Ridsdale, the appellant, to come before their Lordships, and to ask that the process which he seeks should issue. If the process issues in the triplicate form to which I have referred, of inhibition, citation, and monition, the inhibition will restrain the execution of the decree, to which I have referred, pending the appeal; and therefore, in substance, the motion now before their Lordships raises the question whether proceedings in this case under the decree should or should not be stayed pending the appeal. Now it has been contended, on behalf of Mr. Ridsdale, here, in the very able argument which we have heard, that the issuing of an inhibition, in cases like the present, has always been a matter of course, and is still a matter of course, notwithstanding the provisions of the Public Worship Regulation Act of 1874, and that therefore the caveat against the issuing of the inhibition ought to be removed, and the inhibition ought to issue as a matter of course, as part of the process. That makes it necessary for their Lordships to consider what the nature and character of the part of the process termed the inhibition, upon the occasion of an appeal, was before the passing of the Act of Parliament to which I have referred. There is no doubt that in every appeal in ecclesiastical cases it was very much a matter of course to issue an inhibition. It was in fact so much a matter of course that it was permitted to the officer of the court to issue the inhibition as part of the process, whenever it was applied for. But their Lordships cannot arrive at the conclusion that because in every case where there was, or appeared to be, a probable cause for litigation, evidenced by the appeal being brought, the issue of this process was so common as to be left as a ministerial act to the officer of the court; they cannot from this arrive at the conclusion that the discretion of the court as to issuing an inhibition was taken away, or that this tribunal or the supreme tribunal for the time being in ecclesiastical cases, where a case was brought pointedly before its notice, would not have it in its power to exercise its discretion as to whether an inhibition staying proceedings should or should not issue. If their Lordships look to authority upon the subject they cannot but think that the expressions of Sir John Nichols, in the case of *Herbert v. Herbert* (2 Phil. 430), show very clearly that in his opinion in a proper case the discretion rested with the tribunal to issue, or not to issue, an inhibition; and the authorities which

are referred to in the argument, in that case, go very strongly to the same point, especially the passage cited from Ayliffe's *Parergon*, which is printed at length in a note to the case at p. 441. Moreover, upon the reason of the thing, their Lordships also are of opinion that a court which has the right to entertain an appeal must of necessity have this discretion with regard to the issuing of a process, such as inhibition. The inhibition is only a collateral and incidental part of the process. The main process is that of citation, calling upon the party in possession of the decree to appear before this tribunal, and to defend the decree which he has obtained. It would be a strange thing indeed if that which is ancillary and incidental to the main jurisdiction of the appellate tribunal could not be moulded, issued, or refused to be issued, as the tribunal should think best under the circumstances of the particular case. I have only to add to this, with regard to the position of matters before the passing of the Public Worship Regulation Act, the circumstance that certain rules were issued by this board in pursuance of the stat. 6 & 7 Vict. c. 28, and that it is necessary to refer to an argument which has been urged with regard to these rules, that they in some way have made the issuing of an inhibition in this case absolutely necessary. Now the rules which are material upon this point are the fourth and fifth. The fourth is in this form: "When the registrar has ascertained that the petition of appeal has been referred to the Judicial Committee, he may, on the application of the solicitor, issue the usual inhibition and citation and monition for process." He may do this, on the application of the solicitor—issue the triplicate form of process, inhibition, and citation, and monition for process; but if their Lordships are right in considering, as they do consider, that the issue or non-issue of the inhibition was a matter of discretion, of course this reference in the rules to the usual inhibition, citation, and monition for process must mean triplicate process when it was to be in triplicate; and where, if ever, the court should hold that the inhibition should not issue, then the process is confined and limited to the citation and monition for process. This fifth rule is to this effect: "If within one month from the date of the petition of appeal being referred to the Judicial Committee the solicitor for an appellant shall not take out the inhibition and citation and monition for process, the appeal shall stand dismissed." Upon that it was argued, that, unless the threefold process were to issue, Mr. Ridsdale would be deprived of his appeal, and it would be absolutely dismissed in consequence of this Order. Their Lordships cannot adopt that construction of the rule. In their opinion, if it is in their discretion, as they think it is, to say, on a proper case being presented to them, whether the inhibition shall or shall not issue, the Order that it shall not issue will render the taking out the other two parts of the process, the citation and monition for process, sufficient to save the appeal under this Order. In point of fact, the description of the triplicate process is description only, and does not raise the necessity, as an absolute necessity, that the process should be in that triplicate form. Now, that being the state of the law, as their Lordships understand it, before the Act for the Regulation of Public Worship passed, their Lordships have to consider the

effect of that statute. Their Lordships approach the consideration of the statute, bearing in mind therefore that before it passed the issue of an inhibition, although so common as to be almost matter of course, was still matter of discretion, if the discretion of this board were called upon to be exercised upon it. The statute of 1874 provides, by the ninth section, what shall be the form of proceedings before the judge under the Act, or the Judge of the Court of Arches, as the case may be, and it provides that the judge shall pronounce judgment on the matter of the representation, and shall deliver to the parties on application, and to the bishop, a copy of the special case, if any, and judgment. It provides further that the judge shall issue such monition, if any, and make such order as to costs as the judgment shall require. It provides then, further, that upon any judgment of the judge, or monition issued in accordance therewith, an appeal shall lie in the form prescribed by rules and orders to Her Majesty in Council; and then comes this final sentence in the clause, "The judge may, on application, in any case suspend the execution of such monition, pending an appeal, if he shall think fit." We find, therefore, in this Act of Parliament, that which certainly did not exist as a power in the ecclesiastical judge before the Act passed. Before this Act passed there was no power whatever in the ecclesiastical judge to suspend proceedings under his decree pending an appeal. There was, as has been pointed out at the bar, a power somewhat, perhaps, arbitrary in the judge to keep possession of his decree in the office of the court until an opportunity were given for the dissatisfied party to present a petition of appeal to Her Majesty in Council, and to obtain an inhibition, which, if obtained, would prevent the execution of the decree. But power in the judge himself to restrain proceedings under the decree during the whole of the appeal did not exist. That was given for the first time by this statute. Now their Lordships cannot look at this provision in the statute as otherwise than an indication that in the opinion of the Legislature it ought to be considered in each particular case whether the decree made in that case should be executed pending an appeal, or should be stayed pending an appeal. The intimation of the Legislature is distinct, that that is a matter which ought to be entertained as a question of discretion, and brought, at all events in the first instance, for the decision of the judge himself who has made the decree. That has been done in the present case, and the decision of the judge in the present case is, for reasons which he has stated, that the execution of no part of his decree should be suspended pending the appeal. Their Lordships are not sitting upon appeal from that order of the learned judge, because no appeal from that order appears to be given by the Act of Parliament; but they are sitting here considering the application which is now made to them, that in their discretion the inhibition in the present case should not issue restraining the execution of this decree, either in whole or in part, and they are unable to treat the Act of Parliament as doing otherwise than introducing a new element for them to consider in exercising their discretion as to whether the inhibition ought to issue. Now, therefore, applying those principles to the case which their Lordships have to decide, in their

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opinion, the mode in which they have to look at a case like the present is this: to consider the balance of convenience or inconvenience with regard to the execution of the decree; that is to say, looking at the facts of the particular case, looking at what is ordered by the court to be done, whether upon the whole it would be better that the decree of the judge should be allowed to take its course, or whether the things which it orders to be done are in their nature such as that the doing of them would produce so much injury that it would be more desirable that the decree should be stayed until the decision of the final tribunal is known. That is a practice which is well known in other courts. It is well known, for example, in the Court of Chancery, where, upon an application to stay the execution of a decree, it has always been considered to be the question for the court whether the balance of convenience was more in favour of restraining the execution of the decree in the particular case, or more in favour of letting the decree take its course. Now in the present case, their Lordships do not desire to express, and it would not be proper for them to express, any opinion whatever as to the merits of the appeal which ultimately will have to be heard from this decree. They give credit for the present purpose to the decree as the decree of the learned judge by whom it has been made. On the other hand, they give credit to the sincerity of those who have considered that there is ground for impeaching that decree, and who wish to have their case against the decree heard at the proper time. But, on the other hand, treating the decree as at present, until reversed, the order of the court, and on the other hand treating the appeal as evidence that in the opinion, at all events, of the appellant there is *probabilis causa litigandi*, they have to look at what are the things which the decree orders to be done or to be left undone. Now in that respect they find a very marked difference between different parts of the decree. With regard to the vestments pronounced unlawful, and which therefore are directed not to be worn; with regard to the use of the wafer bread, which is also pronounced to be unlawful, and which is therefore directed not to be used; with regard to the posture of standing during the Prayer of Consecration at the west side of the Communion Table, which is also pronounced unlawful, and where therefore the minister is directed not to stand at that time; with regard to all these things, their Lordships consider that no inconvenience and no injury which would be irremediable will arise from the decree being obeyed in those matters pending the appeal. The other point is different. I refer to the part of the decree which pronounces unlawful the setting up and placing on the top of the screen separating the chancel of the church and retaining there a crucifix; and as to this the decree directs the Rev. Charles Joseph Ridsdale to remove or cause to be removed this crucifix from the screen. Their Lordships do not desire to make any difference between this and the other parts of the decree as to what may be termed the merits; that is to say, they do not, by what they are going to order, wish to place that part of the decree in any different position from the other parts of the decree as regards the correctness of the decree itself. They give credit on that part of the decree as they do to the other parts of the

decree, to that which is for the present the decision of the court below, but they see that different consequences may arise, as to this part of the decree, from executing it pending the decree. It is unnecessary to go into what those consequences are, beyond saying that it is, obviously from the nature of the case, at least possible that a subject which ought to be treated with the greatest reverence might be accompanied with feelings of a different kind if the decree were in this respect in the first instance to be executed, and afterwards upon a reversal of that decree the process had to be repeated of making another change. For those reasons, and for those only, their Lordships desire to make a difference between this last part of the decree and the parts which precede it. And as to this latter part of the decree, they desire that by the inhibition the execution of that part of the decree should be suspended pending the appeal. The inhibition therefore will go limited in the manner which has been indicated to the last part of the decree, but not so as to restrain the execution of any of the other parts of the decree. With regard to costs, their Lordships do not think it fit to give any costs of this appeal to either side.

Proctor for the appellant, *G. H. Brooks*.

Proctors for the respondents, *Moore and Currey*.

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

(Before Vice-Chancellor MALINS.)

Reported by F. GOULD and JAMES E. HORN, Esqrs.,
Barristers-at-Law.

March 11, 18, and 25, 1876.

ATTORNEY-GENERAL v. ST. JOHN'S HOSPITAL, BATH.

Charity—Eleemosynary charity—Religious opinions of trustees.

St. John's Hospital, Bath, was founded in the year 1174 by the then Bishop of Bath and Wells, and consisted of a master and certain almshouse; a chapel was annexed to the hospital.

In 1853 an order was made, under the provisions of the Municipal Corporations Act (5 & 6 Will. 4, c. 76), appointing the then trustees of the municipal charities of the City of Bath to be the trustees of the right of presentation to the mastership of the hospital.

A scheme, recently framed by the Attorney-General for the management of the charity property, provided (1) that the trustees thereof should be such of the municipal trustees as were members of the Church of England; (2) that the municipal trustees should appoint the master, who must be a clergyman in priest's orders; (3) that the trustees should keep the chapel in repair out of the income of the charity; and (4) should elect the almshouse (who need not be members of the Church of England).

Held that, as the principal object of the charity was eleemosynary, the trustees of the charity property need not be exclusively members of the Church of England.

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The hospital was founded in the year 1174 by the then bishop of Bath and Wells (although the particular foundation did not appear), and consisted originally of a master, six brethren and sisters.

There was a chapel, called St. Michael's, which was annexed to the mastership of the hospital, and was a living presentable with cure of souls.

On the 21st Nov. 1573, Queen Elizabeth, by letters patent, granted "theadvowson, donation, free disposition, and right of presentation of the hospital of St. John Baptist, with the chapel of St. Michael, to the same annexed," to the mayor and citizens of Bath.

There having been great abuses in the management of the charity, in 1716 the matter came before Sir John Trevor, the then Master of the Rolls, and on the 13th Feb. 1716, he, acting as arbitrator for settling all disputes concerning the management of the hospital and its revenues, "and for the better and more orderly government of the said hospital, and for a better provision for the poor thereof, and for the rebuilding of the said chapel, and for the more due and decent daily service to Almighty God, to be performed daily in the chapel of the said hospital, and for repairing the said hospital, and for establishing rules and orders for the management of the same," made an award, which was afterwards confirmed by the court.

By clause 10 of the award it was declared that the right of presentation of the master belonged to the Corporation of Bath by the grant of the fifteenth of Elizabeth . . . and that the government of the hospital should be in the master for the time being, according to such rules and orders as were thereunto annexed, and that the brethren and sisters should be obedient to him, and that the master should take care that prayers were duly read in the chapel morning and evening every day, as well on Sundays as week days, according to the Liturgy of the Church of England.

By clause 11 of the award it was provided that brethren and sisters, as vacancies should happen, should be nominated and put in by the master of the hospital, but such brethren and sisters were to be such as had been settled inhabitants of the city of Bath for at least ten years before such admission into the hospital, and persons really poor and unmarried, and to be qualified according to the rules and orders annexed to the award. Rule 1 of the rules and orders established by the award provided that every person to be admitted into the said hospital should be such as had been known to be of a sober and civil conversation, and conformable to the established government in church and state, and should be most in want and best deserved; and rule 3 provided that every person admitted should duly resort, in his or her livery gown, to morning and evening prayers in the chapel belonging to the said hospital, unless detained by sickness, or some other urgent occasion.

From the date of the award the master of the hospital had been nominated by the Corporation of Bath, and the hospital had been governed, and the brethren and sisters appointed, in the manner directed by the award.

The Municipal Corporations Act (5 & 6 Will. 4, c. 76, s. 71) provides that where bodies corporate

stand seised or possessed of any hereditaments or personal estate in trust in whole or in part for charitable trusts, all the estate and interest, and all the powers of such body corporate in respect of the said trusts, shall as from the 1st Aug. 1836, cease and determine; and the Lord Chancellor shall make such order as he shall see fit for the administration of such trust estates.

By an order dated the 3rd Nov. 1836, the Lord Chancellor appointed certain persons to be trustees of the municipal charities of the City of Bath. This order, however, did not affect the property belonging to the hospital.

In 1851 a petition was presented to determine the rights of the Corporation of Bath in the property in question; and in Feb. 1851 Lord Chancellor Truro decided that the right of presentation of the master was a right vested in the corporation as charitable trustees within the meaning of 6 & 7 Will. 4, c. 76, s. 71, and directed a reference to chambers to appoint new trustees (*Re St. John's Hospital*, 3 M. & G. 235); and by an order dated the 12th Nov. 1853, his Lordship appointed the several persons then being trustees of the municipal charities of the City of Bath to be trustees of the right of presentation to the mastership of the hospital.

In 1864, an information was filed by the Attorney-General against the Master, co-Brethren, and Sisters of the Hospital of St. John the Baptist, with the Chapel of St. Michael annexed, in the City of Bath, and William Thomas Blair, and others (the then survivors of the persons appointed, by the Order of the Court of the 12th Nov. 1853, to be trustees of the right of presentation to the mastership of the hospital), praying (*inter alia*) that a scheme might be settled for the administration of the charity.

By the decree made in Dec. 1865, the court directed a scheme to be settled. The scheme of the Attorney-General, made pursuant to the decree, was (so far as material), as follows:

Clause 1. The charity and the property thereof shall be under the management and control of trustees. The trustees of the charity shall consist of such of the trustees for the time being appointed, pursuant to the provisions of the Act of Parliament 5 & 6 Will. 4, c. 76, to be trustees of the municipal charities formerly vested in the Corporation of the City of Bath, as shall be members of the Church of England, who shall be *ex officio* trustees of the charity. No trustee shall act in the administration of the charity until he shall have signed a memorandum to the effect that he is a member of the Church of England, and is willing to undertake the trust as regulated by this scheme.

Clause 18. The master of the hospital shall be a clergyman of the Church of England in priests' orders. The right of presentation of the master is vested in the trustees for the time being appointed in pursuance of the Act of Parliament 5 & 6 Will. 4, c. 76, to exercise the power in that behalf formerly vested in the Corporation of the City of Bath.

Clause 22. The master shall read prayers every morning, and perform two full services every Sunday in the chapel of the hospital, according to the ritual of the Church of England.

Clause 24. The number of almspeople in the hospital shall be twelve, subject to be increased as hereinafter mentioned; and any vacancy in such number shall be filled up by the trustees in manner hereinafter mentioned.

Clause 25. The persons elected to be almspeople in the hospital shall be poor persons of either sex, who shall have been resident in or ratepayers of the municipal borough of Bath for at least three years preceding the date of election, and who shall have attained the age of fifty-five years at the least: Provided always, that no person shall be elected who shall have been in the

receipt of parochial relief within twelve months next preceding the time of election.

Clause 26. On the occasion of any vacancy among the almspeople, the trustees shall elect a person duly qualified as aforesaid.

Clause 28. Accommodation for all the almspeople shall be provided in the chapel of the hospital; but it shall not be obligatory on the almspeople to attend the services performed therein.

Clause 35. The trustees shall provide and expend the moneys required for the necessary expenses connected with the chapel, and the performance of divine worship therein, out of the income of the charity.

Clause 37. The trustees shall keep all the hospital buildings and premises, including the chapel, in good and sufficient repair . . . and the expenses thereof shall be paid out of the income of the charity.

It appeared from the evidence that there were thirteen trustees of the municipal charities of the City of Bath, of whom ten were members of the Church of England, and three were dissenters.

The main question in argument was, whether the trustees of the charity property, appointed by the scheme, must be exclusively members of the Church of England.

Cotton, Q.C. and Vaughan Hawkins for the Attorney-General.—This is not an ordinary lay hospital, but an ecclesiastical hospital, with a cure of souls annexed:

Rolle's Abridgment, p. 811;

Phillimore's Ecclesiastical Law, p. 1932.

It was founded by a Bishop of Bath and Wells in the reign of Henry II. Clause 22 of the scheme provides that there shall be daily service in the chapel according to the ritual of the Church of England; and clause 37 provides that the trustees are to keep the chapel in repair out of the income of the charity. The trustees of the charity ought, therefore, to be exclusively members of the Church of England, as provided by clause 1 of the scheme:

Shore v. Wilson (Lady Hewley's case) 9 Cl. & Fin. 355;

Scarborough Charity Petitions, 1 Jur. 36.

The fact that this charity is partly eleemosynary, does not make it the less an ecclesiastical charity. They also referred to

Attorney-General v. Pearson, 3 Mer. 353; s. c. (at another stage) 7 Sim. 290;

Attorney-General v. St. John's Hospital, Bedford, 2 D. J. & S. 621;

Valor Ecclesiasticus, vol. 1, p. 128.

Davey, Q.C. for certain inhabitants of the city of Bath, having liberty to attend.—With the exception of the right of presenting the master (which, by clause 18 of the scheme, is vested in the municipal trustees of the city of Bath, some of whom are Nonconformists), and the duty of repairing the chapel, the charity is purely eleemosynary. By clause 25 of the scheme, the objects of the charity need not be members of the Church of England, and they need not attend the chapel services (clause 28). There is, therefore, no reason why the trustees of the charity property should be exclusively members of the Church of England: *Attorney-General v. Calvert* (23 Beav. 243). That case shows the distinction between religious and eleemosynary charities. The cases cited on the other side, of *Attorney-General v. Pearson*, *Shore v. Wilson*, and *Scarborough Charity Petitions*, have no application to the present case, because they were, all of them, cases of purely religious charities. A charity is none the less eleemosynary because it has a chapel annexed in which service

is to be performed at the expense of the charity funds. He also referred to

Attorney-General v. Clifton, 32 Beav. 400; 3 & 4 Vict. c. 113, s. 65.

Bristowe, Q.C. and Jolliffe, for W. T. Blair and others, the surviving trustees of the right of presentation to the mastership of the hospital under the order of 12th Nov. 1853.—The evidence shows that those of the trustees who are members of the Church of England do not wish to exclude their Nonconformist co-trustees from the management of the charity property. It will be very inconvenient to have two sets of trustees, one to appoint the master, and the other to manage the charity property. Where, as here, the charity is mainly eleemosynary, and not ecclesiastical, the court will appoint trustees without regard to their religious opinions: (*Baker v. Lee*, 8 H. L. 495, 513.) The almspeople, the objects of the charity, need not be members of the Church of England; and, therefore, there can be no good reason why they should be appointed solely by members of the Church of England. They also referred to

32 & 33 Vict. c. 56, s. 17.

Cotton, Q.C. in reply.—Under Sir John Trevor's scheme (clause 2) the master of the hospital, who must be a clergyman in priest's orders, had the power of nominating the almspeople; and the new trustees proposed by the scheme are now to perform that duty. The case of *Attorney-General v. Calvert* merely decides that the objects of the charity need not be exclusively members of the Church of England; it does not at all deal with the question who the trustees are to be. This is an ecclesiastical trust, with certain eleemosynary duties annexed to it, "and members of the Church of England are the best trustees for one trust, and equally good for both" (per Lord Wensleydale, *Baker v. Lee*, 8 H. L. 519).

The VICE-CHANCELLOR [after stating the origin of the charity, and the award of Sir John Trevor, as set forth above, and reading clauses 25 and 28 of the Attorney-General's scheme, continued:] It is plain, therefore, from the scheme proposed by the Attorney-General, that Protestant dissenters, or even Roman Catholics (as far as I can see), are just as eligible to be objects of this charity as members of the Church of England. The objects of the charity need not attend the chapel in which the liturgy of the Church of England is to be read. I find that, according to the scheme, they may totally absent themselves from the services performed in the chapel, yet they would remain inmates of these almshouses. Clause 18 of the scheme is as follows: "The master of the hospital shall be a clergyman of the Church of England in priest's orders. The right of presentation of the master is vested in the trustees for the time being appointed in pursuance of the Act of Parliament 5 & 6 Will. 4, c. 76, to exercise the power in that behalf formerly vested in the Corporation of the city of Bath." The proposal, as I read it, is that the right of presentation is to be in the trustees of the charity property of the city of Bath. That is a body which, as the evidence shows, at present consists of thirteen persons, ten of whom are members of the Church of England, and three are Nonconformists or Protestant dissenters. Now what are the duties that the trustees have to perform connected with any particular religious tenets? First, they are to select a master. He must be a clergyman of the

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Church of England in priests' orders. He has, therefore, received the necessary qualification. There can be no miscarriage in that respect, because it is impossible for them to select any other person than a person who has the necessary qualification. The only other duty they have to perform, in any way connected with any particular religious tenets, is to keep the chapel in repair. Therefore they have one duty to perform, in which no dissenter can possibly miscarry, because he must select a member of the Church of England in priests' orders; and they have also to see that the chapel is kept in repair. Now, it appears that great abuses have been practised as regards the leasing of the charity property. The property is at present let on leases for lives, producing about 900*l.* a year. Under the new scheme these leases will not be renewable, as they have been (in practice) for the last century or two; and I am told that, when these leases expire, the charity property will ultimately produce about 10,000*l.* a year. Therefore, at some future time, it will be a very rich charity. Now the master is to have a stipend of 150*l.* a year; and the chapel is to be kept in repair. What are the objects of the charity beyond these two things? Purely eleemosynary. Now it is agreed on all hands that the property is to be under the control of trustees. The only question I have to consider is, who are these trustees to be? Clause 1 of the scheme provides that, "the trustees of the charity shall consist of such of the trustees for the time being appointed pursuant to the provisions of the Act of Parliament (5 & 6 Will. 4 c. 76), to be trustees of the municipal charities formerly vested in the Corporation of the city of Bath, as shall be members of the Church of England." So that the whole thing I have to consider is, whether those words, "as shall be members of the Church of England," shall be retained. Now the general principles applicable to cases of this kind are not in dispute. The principle established by Lord Eldon in *Attorney-General v. Pearson*, acted upon and settled in *Shore v. Wilson* (the great case with regard to Lady Hewley's Charities) is, that where there is a charity for the purposes of education in particular religious tenets, or where there is a charity the objects whereof must be persons holding particular religious tenets, it must be governed by trustees whose opinions are in conformity with those objects. If, therefore, a charity is founded, where the recipients must be members of the Church of England, or where no other tenets than those of the Church of England are to be inculcated, none but members of the Church of England will be permitted to be trustees of such a charity. In *Lady Hewley's* case it was decided that she was not a member of the Church of England, or a Unitarian. That at once excluded from the administration of the charity all members of the Church of England, and all Unitarians. That case decided that, as the charity was founded for the purpose of religious education, and the objects of the charity were to be persons who entertained the same opinions as the founder—that is to say, Protestant Nonconformists—no person could have any voice in the government of the charity who was not a Protestant Nonconformist. The real difficulty in the case was to decide of what religious body Lady Hewley was a member. If the Bishop of Bath and Wells, who in 1174 founded this charity, had founded it for

purely religious objects, and had made it a condition that none but those who entertained the opinions of the Established Church—that is, the Established Church as it was in that day, reformed at the time of the Reformation, and now called the Church of England—should be recipients of the charity, it would have followed, as a matter of course, that the charity could only be governed by members of the Church of England. But he has not laid down any such rule. Beyond the objects to which I have already referred—namely, the appointment of the master, and the keeping the chapel in repair—this is a purely eleemosynary charity. The whole of the funds, after paying the master, and keeping the chapel in repair, are devoted to purely eleemosynary purposes, namely, to maintain poor brethren and sisters of the hospital. I think, therefore, that the cases, to which I have already adverted, of *Attorney-General v. Pearson*, and *Shore v. Wilson* (Lady Hewley's case), and also the case of the *Scarborough Charity Petitions*, are to be excluded from the consideration of this case, because this is a charity of a totally different character to what those were. The *Scarborough Charity Petitions* was a case in which the sole object of the trust was to keep the parish church in repair. That being the sole object, it appears to me to be perfectly right that none but members of the Church of England should be trustees. Rule 1 of Sir John Trevor's scheme provides that the objects of the charity must be "conformable to the established Government in Church and State." It might have been contended, on that rule alone, that none but members of the Church of England could be objects of the charity, because none others would come within the definition there given. But in this scheme it is deliberately proposed by the Attorney-General himself that the objects of the charity may be dissenters of any description whatsoever, provided they are persons of orderly lives, and in other respects qualified; and, as far as I can see, Roman Catholics may be objects of the charity. *Baker v. Lee* (the Ilminster School case) has been very much referred to. That was a charity where the object was to educate children in the tenets of the Church of England. Ultra that, there was a trust for repairing roads, so that it was a mixed object. Lord Romilly, the then Master of the Rolls, had decided that, as it was a mixed object, there was no necessity for the trustees being exclusively members of the Church of England. The case then went before the Lords Justices, who decided that as religious education in the school was the primary object of the charity, and the repairing of roads was entirely a subsidiary object, the primary object ought to govern, and therefore the trustees must be exclusively members of the Church of England. The case then went to the House of Lords; and the four learned Lords being equally divided, the decision of the Lords Justices was affirmed. Lord Cranworth, in that case, lays down rules which, I think, are entirely applicable to this case. He there says: "Whenever the Court of Chancery is called on to appoint trustees of a charity, its duty obviously is to select those who are likely best to discharge the duties imposed on them by the trust; and where the trust is confined to the duty of selecting proper persons to teach or expound the doctrines of the Church of England, or to instruct children in any branches of learning of which the

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tenets and doctrines of the Church of England are necessarily to form part, and to apply funds for the promotion of that object, it can hardly be doubted that, in the exercise of a sound discretion, the court will take care that none but members of the Church of England shall be appointed trustees. They will, *primâ facie*, be the persons best qualified to judge of the fitness of those who are to be called on to give the necessary instruction. At the same time I know of no law making such a selection imperative on the court; and I desire not to be taken to assent, without further argument, to the proposition stated at the bar, that in such a trust as I have suggested, where there has been no breach of trust, a trustee, otherwise unexceptionable, can be removed merely because he has ceased to be, or was not at the time of his appointment, a member of the Church of England. The principle which, in such a trust as I have referred to, would induce the court to appoint as trustees none but members of the Church of England, would in like manner guide it in the appointment of corresponding trusts, established for the benefit of any religious sect or denomination of dissenters from the Church of England. But where the trust embraces other objects"—this is the rule specially applicable to the present case—"besides those connected in the manner I have mentioned with the Church of England, or with any religious sect or class dissenting from the Church of England, then the principle on which the court proceeds in selecting as trustees none but members of the Church of England, or of the religious sect or denomination whose principle it is the object of the trust to enforce, is no longer applicable." [His Lordship referred to the case of *Re St. John's Hospital* (3 M. & G. 235), and to the appointment of the trustees of the municipal charities of the City of Bath to be trustees of the right of presentation to the mastership of the hospital, and continued]: I am bound to look to the objects of the charity to see how it is likely to be administered to the satisfaction of those for whose benefit it exists. It is a charity founded for the benefit of the inhabitants of the City of Bath, and its neighbourhood. The *Ilminster School case* must be taken as a decision that the qualification of trustees will depend upon what are the main objects of the charity. Here the principal and paramount object of the charity is merely eleemosynary. Bearing in mind that the principal object of the trust is to regulate who are to be the managers of it, I entirely agree with the decision of Lord Romilly in *Attorney-General v. Calvert*, and I intend to follow it. In that case the charity was altogether eleemosynary. There, as in the present case, the persons to be selected were not necessarily to be of any particular religious class. The Master of the Rolls there says: "In eleemosynary charities the religious opinions and tenets of the founder are wholly to be disregarded, and are to be treated as forming no indication of his intention on which this court can act. The presumption is that he included all, and the burden of proof lies on those who seek to exclude." In a later case of *Attorney-General v. Clifton*, he did not follow that decision, because he found (adhering to the general principle he there laid down), that, it being a Church of England charity, the trustees were necessarily persons holding particular religious tenets. Therefore, although he adhered to the rule which he

had laid down in *Attorney-General v. Calvert*, it was inapplicable to the later case. Then what have I to decide? There are only two objects in this charity in any way connected with religious doctrines. First, the selection of a master, whose qualification is so defined that there can be no miscarriage. He must be a clergyman of the Church of England in priest's orders. That, therefore, does not, in my opinion, require that Protestant dissenters should be excluded from the governing body. The only other object is keeping the chapel in repair, and am I to come to the conclusion that a body of twelve or fifteen trustees, of whom a third or fourth (probably) are Protestant dissenters, will so disregard their duty as to allow the chapel to go into decay? Beyond these two objects, the trustees have the duty of distributing this charity, and beyond that there is no duty to be performed. Therefore the primary and paramount object of this charity is eleemosynary; and, it being so, I can see no reason whatever why Protestant dissenters, having the qualification which these trustees must have, should be excluded. I therefore come to the conclusion that there is no occasion whatever for introducing this restriction, which, I am satisfied, would be most unpalatable to the inhabitants of the district who are to have the benefits of the charity. I shall refer the scheme back to chambers, with the declaration that the trustees to be appointed by the scheme need not be exclusively members of the Church of England.

Solicitors: Olabon; G. Fred. Cooke.

(Before Vice-Chancellor BACON.)

Reported by F. GOULD and H. L. FRASER, Esqrs.,
Barristers-at-Law.

Feb. 26 and March 30, 1876.

Re THE WEST HARTLEPOOL IRON COMPANY (LIMITED);
Ex parte THE WEST HARTLEPOOL IMPROVEMENT
COMMISSIONERS.

Company—Winding-up—Rate assessed before winding-up—Proof—The Companies Act 1862 (ss. 110, 144, 158)—The West Hartlepool Improvement Act (33 & 34 Vict. c. 113) 1870, ss. 368, 377, 380, 384, 386, 387.

On the 1st June 1875, the Improvement Commissioners for H. made a highway and improvement rate for their district for the six months ending the 31st Dec. 1875, and assessed the property in the occupation of a company at 375l. On the 8th July 1875, the company went into liquidation, and thereupon ceased to carry on business, and the liquidators of the company entered into possession of the property solely for the purposes of the winding-up. The commissioners having claimed payment in full of the rate from the liquidators, as the persons in the occupation of the property for the time being:

Held, that the liquidators were not bound to pay the rate in full, and that the commissioners must prove in the winding-up for such sum as they might be entitled to.

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On the 1st June 1875, the West Hartlepool Improvement Commissioners, pursuant to the West Hartlepool Extension and Improvement Act 1870, duly made an improvement and a highway rate for the period of the six months ending the 31st

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Dec. 1875. Under such rate the premises in the occupation of the West Hartlepool Iron Company were assessed at the sum of 375*l.* 2*s.* 11*d.*, and such assessment was duly served upon the company.

On the 8th July a resolution was passed for the voluntary winding-up of the company, and liquidators were appointed; but, inasmuch as an order was made on the 10th July for the compulsory winding-up of the company, which was in force until the 30th July, when an order was made for continuing the voluntary winding-up under supervision, the liquidators did not in any way interfere with or enter into possession of the works until after the 30th July.

The works of the company consisted of rolling mills and blast furnaces. At the rolling mills the company employed upwards of 1500 men. All these men were paid off on the 12th June 1875. At the blast furnaces the company employed about 300 men. The bulk of these men were paid off on the 5th June 1875, on which date the furnaces were damped down. After that time a sufficient number of men were kept on to blow out the furnaces. The blowing out of the furnaces commenced on the 7th July 1875, and was completed on the 24th July.

When the liquidators came into possession the works were completely idle, and no iron had been manufactured at the mills or produced at the blast furnaces since the 8th July 1875. The liquidators employed two watchmen on the works, and occasionally such labourers as had been required for the purpose of loading up iron, and old materials.

Nothing had been done by the liquidators at the works since they entered into possession, except to realise and despatch the iron and old material; and the machinery had been greased and turned once a fortnight, for the purpose of keeping it in order.

For the purpose of poor-rates, the rating had been reduced according to the principle adopted in the case of works lying idle. The liquidators refused to pay the rate in full, alleging that the commissioners ought to prove for the amount under the winding-up. On the other hand, the commissioners contended that the rate was a continuing liability, and that the liquidators, as the present occupiers of the works, were bound to pay the rate in full, and on the 3rd Dec. they took out a summons to enforce their claim. The summons was now adjourned into court.

It was admitted that such part of the rate as was payable for the period from the 1st to the 8th of July must be proved for in the winding-up.

Rigby, in support of the summons.—This rate accrues *de die in diem*. On the 8th of July a change of occupation occurred, and the liquidators as the persons in occupation of the premises from that date must, from the time of their taking possession, pay the rate in full. He referred to

The Companies Act, 1862 ss. 110, 144;
West Hartlepool Improvement Act, 1870, ss. 368, 377, 387, 384; (a)
Ex parte Heaven, L. Rep. 6 Ch. App. 462.

H. Burton Buckley, for the liquidators.—This is a new point, but in principle is covered by authority. Although a winding-up order has been made the company still exists for all practical purposes until a dissolution order has been made. The company is still in possession by its officers, the liquidators, but simply for the purposes of the

winding-up. There has, therefore, been no change of occupation, and the liquidators cannot be made responsible for a debt due from the company. Further, the rate is a debt due and demandable at the time it was made, and might have been levied by distress. It is, therefore, a debt provable in the winding-up. He referred to

The Companies Act, 1862, s. 153;
West Hartlepool Improvement Act, 1870, ss. 374, 380, 384, 386; (a)
Lloyd v. Heathcole, 2 B. & B. 388;
Re Weatherell, 19 L. J. 115, M. C.

(a) The material sections of the West Hartlepool Improvement Act 1870, were the following:

Sect. 368 empowered the commissioners to make, assess, and levy an improvement rate, such rate to be made, assessed, and levied "on the occupiers of all such kinds of property as by the laws in force for the time being are assessable to the rate for the relief of the poor, according to the rateable value of such property."

Sect. 377. If at the time of the making of any improvement or highway rate, any premises in respect of which the rate is made are unoccupied, such premises shall be included in the rate, but the rate shall not be charged on any person in respect of the same whilst they continued to be unoccupied, and if any such premises are afterwards occupied during any part of the period for which the rate was made and before the same has been fully paid, the name of the incoming tenant shall be inserted in the rate, and thereupon so much of the rate as at the commencement of his tenancy is in proportion to the remainder of the said period, shall be collected, recovered, and paid in the same manner in all respects as if the premises had been occupied at the time when the rate was made; and if any owner or occupier assessed or liable to any such rate, ceases to be owner or occupier of the premises in respect whereof which he is so assessed or liable before the end of the period for which the rate was made, and before the same is fully paid, he shall be liable to pay only such part of the rate as in proportion to the time during which he continues to be such owner or occupier, and in every such case, if any person afterwards becomes owner or occupier of the premises during part of the said period, he shall pay such part of the rate as is in proportion to the time during which he continues to be such owner or occupier, and the same shall be recovered from him in the same manner as if he had been originally assessed or liable.

Sect. 380. Every improvement, highway, or other rate made under the authority of this Act shall be fairly transcribed in a book and shall be sealed with the common seal of the commissioners; and no allowance, publication, or other formality whatever other than such as is expressly prescribed by this Act shall be requisite to the validity of any such rate.

Sect. 384. The commissioners may from time to time amend any rate by inserting therein the name of any person who ought to have been rated or who since the making thereof has become liable to be rated, or by striking out the name of any person who ought not to have been rated, or by increasing or reducing the sum at which any person is rated, or by making such other alterations therein as will make such rate conformable to this Act, and no such alteration shall be held to vitiate the rate or render it less operative; but any person shall have the same right to appeal from any such amendment as he would have had if the matter of amendment had appeared in the rate originally made, and with respect to him the amended rate shall be considered to have been made at the time when he received notice of the amendment; and in the case of any person, the amount of whose rate is increased by the amendment or whose name is newly inserted as aforesaid, the rate shall not be payable by him until seven days after notice of the amendment given to him.

Sect. 386. If any person fails to pay the amount due by him in respect of any rate, the commissioners may recover the amount with the costs by proceeding in any court of competent jurisdiction; or any justice may, on the application of the commissioners, summon each person to appear before him, or any other justice, at the time to be mentioned in the summons, to show cause why the rate due from him should not be paid, and in case sufficient cause for the non-payment of such rate is not

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The VICE-CHANCELLOR.—You say, Mr. Buckley, that this is a case of first impression. Winding-up cases have been very numerous, and claims for rates and taxes must have frequently occurred in them. I should like to know what has been the practice. I am a little struck by the observation that the liquidators should stay in the occupation of rateable property without paying the rates. There is a clause giving the commissioners a right to distrain for their rates. What the court has done with reference to the right of distress has been to exercise a sort of discretion upon it, always preserving the lawful right of a landlord to distrain. One cannot find it in the Act, or within the limits of common sense, that because the company is wound-up, therefore the liquidators can remain in occupation without payment of rates, perhaps without payment of rent. The question ought to be considered and settled. I wish that on both sides you would inquire a little about it, and let me know the result of your inquiries some other day.

March 30.—Buckley stated that they had been unable to find any authority on the point. He further contended that as the rate was a debt for which the commissioners could have distrained before the winding-up, and that as they had not then exercised that right, the court would not grant them leave to distrain after the winding-up order had been made: (*Re Traders North Staffordshire Carrying Company*, L. Rep. 19 Eq. 60). The summons for payment in full could not therefore succeed, and what amount the commissioners were entitled to would be decided when they came in to prove.

Rigby, *contra*.—The rate is not only made a debt recoverable by distress, but it is also made a charge on the property in the possession of the occupier. It is, therefore, a charge on the property of the company in the possession of the liquidators, and they, as the persons for the time being in the occupation of the property, must pay it in full. If they are relieved an additional charge will have to be made on their neighbours.

The VICE-CHANCELLOR.—Common sense and common honesty ought to help me to decide this question. I hope it will be taken elsewhere. It seems that the possession of the liquidators is merely possession and occupation, but not enjoyment, and that, I think, is not the occupation intended by the Act. All I can do is to dismiss this summons without costs, leaving it to the commissioners to carry in such proof in the winding-up as they may be entitled to.

Solicitors for the commissioners, *J. Crowley and Son*, agents for *W. W. and P. Brunton*, West Hartlepool.

Solicitor for liquidator, *B. T. Jarvis*, agent for *Hutchinson and Lucas*, Darlington.

shown, the same, with such costs as to the justice seems reasonable, may be levied by distress, and such justice may issue his judgment accordingly:

Sect. 387. When any rate is made for a particular period, and the owner or occupier rated ceases to be the owner or occupier of the property in respect whereof he is rated before the end of such period, he shall only be liable to pay the proportion of the rate for the time which he continued owner or occupier; and if any other person becomes the owner or occupier of the property during any part of such period, such person shall only be liable to pay the proportion of the rate for the time during which he holds or occupies the property, and the same may be recovered from him as if he had been originally rated.

DIVISIONAL COURT FOR APPEALS FROM INFERIOR COURTS.

Reported by M. W. McKELLAR, J. M. LELY, and R. H. ANSELL, Esqrs., Barristers-at-Law.

May 11 and 12, 1876.

PERCY (app.) v. ASHFORD UNION (resp.)

Poor rate—Market tolls—Occupation of soil.

The appellant was rated as the occupier of tolls, lands, and buildings situated in the Ashford cattle market; and among the gross receipts upon which the valuation was estimated, were items for the sheep, cattle, pigs, and horses admitted into the market during the year at a fixed sum per head.

In 1671 Charles II. granted by charter to Lord Strangford, his heirs and assigns, a market to be holden every alternate Tuesday within or near to the town of Ashford, together with the tolls and profits thereof. No evidence is to be found of the actual establishment of a market under this charter; but in 1784 a stockmarket was established, and for some time afterwards held upon every fourth Tuesday. From 1793 to 1856 a stock and cattle market was held on every alternate Tuesday in the main street of Ashford, the lord of the manor and the inhabitants receiving certain payments for the use of such pens as either of them supplied respectively, but no tolls appeared to have been levied upon animals sold at the market. After many meane assignments, in 1856 the appellant's lessors, incorporated as a limited company, obtained a conveyance in fee of a piece of land in the manor, and "all the tolls, stallagen, dues, profits, or emoluments whatsoever arising from all markets and fairs held in the said town of Ashford," except the meat, fish, and vegetable market. In 1874 the appellant hired from the company, at a fixed annual rent, certain fixed tolls of the cattle market, the lands belonging thereto, and the fairs and other perquisites. The land occupied by the market is fenced in, and kept locked when not used for market or other purposes. Some pens in the market are appropriated to particular owners and salesmen, and others are free for any animals in the market. All animals, however, pay toll for admittance to the market.

Held, upon a case stated, that the tolls for admittance to the market were incident to the soil so as to be taken into consideration as increasing the value of the occupation, and were not mere market tolls which could not be rated.

THIS was a case stated for the opinion of the High Court of Justice under the provisions of the statute 12 & 13 Vic. c. 45, s. 11, by consent of the parties, and by order of Quain, J. after notice given of appeal to the court of quarter session for the Eastern division of the county of Kent against two several rates for the relief of the poor of the said parish, dated respectively the 10th March, and the 24th Aug. 1874, which were as far as is necessary for this case, as follows:—

Occupier, James Percy; owner, Cattle Market Company; description, tolls, land, and buildings; name or situation, Cattle Market; extent, 4a. 2r. 8p.; gross estimated rental, 440l.; net rateable value, 400l.

The rate of 24th Aug. 1874 was exactly the same except the word "tolls" in the description, which was left out.

1. The appellant is the lessee of the Ashford

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cattle market, and the respondents are the churchwardens and overseers of the parish of Ashford, and the assessment committee of the West Ashford Union in the county of Kent.

2. The valuation list on which the above rates are founded contains the same values as in the rates, and the question which arises in the case is whether the respondents have adopted the correct principle in calculating these values.

3. The appellant contends that the correct mode of ascertaining the values in the valuation list is by ascertaining the rent which a tenant from year to year might reasonably be expected to give upon the statutable terms, and that this rent in every year is to be calculated by reference to the last available statement of receipts and expenditure in the manner now well established and adopted in the case of railway, gas, and water works, and other undertakings of a similar description.

4. The following are the particulars of the receipts and expenditure of the year ending the 20th March 1875, which are sufficiently approximate to the receipts and expenditure of the previous year, and may in point of fact be used for the settlement of the list, if the appellant be right in his contention in point of law.

GROSS RECEIPTS FOR YEAR ENDING 25TH MARCH 1875.

	£	s.	d.
1. 60,186 fat sheep, at 1s. 6d. per score	225	14	0
2. 51,765 store sheep, at 1s. per score	129	8	3
3. 6710 fat beasts, at 3d. each	83	17	6
4. 4106 store beasts and calves, at 2d. each	34	4	4
5. 135 bulls, 1s. each	6	15	0
6. Pigs in pens, carts, and waggons	26	7	6
7. Horses, asses, and mules	38	5	6
8. Monthly auction sales	41	3	9
9. Lairs, stables, &c.	42	6	0
10. Meadows, keep, lodging cattle, &c.	35	18	11
11. Circuses and other exhibitions	25	10	6
12. Machinery and casual goods	40	2	10
13. Manure	30	0	0
14. Sundries	14	15	11

5. It will be seen that the first seven of these items amount to 544l. 12s. 1d., and the last seven to 229l. 17s. 11d.; making together a total of 774l. 10s.

6. Against this total of receipts the expenditure for wages, rates, taxes, water, gas, and repairs was 193l. 12s. 4d., leaving a balance of 580l. 17s. 8d. to be divided between landlord and tenant, and since the tenant's capital required to work such a business would manifestly be very small, this result is sufficient in fact to support the valuation list.

7. But the appellant admitting that the last seven items would be correctly brought into the calculation, contends that, under the circumstances explained in the subsequent paragraphs of this case, the whole of the first seven items consist of tolls in gross which are not taken by reason of any occupation of lands or buildings, and that therefore they ought to be excluded from the estimate of rateable value upon the authority of the case *B-g. v. Caswell* (L. Rep. 7 Q. B. 328).

8. The following are the facts material to the determination of this contention:

9. Appended to this case was a copy marked A of the translation of an inquisition taken on the 4th Aug. (23 Car. II.) by virtue of a writ of *ad quod damnum*; and also a copy of a charter marked B dated 23rd Nov. in the same year, by which a market at Ashford was granted to Philip Viscount Strangford as by the said inquisition and charter more fully appeared.

10. In the year 1710, by indenture of lease and release bearing date the 28th and 29th July respectively, the manor of Ashford was conveyed to George Sayer together with all its appurtenances among which markets and fairs (but not tolls) are specially mentioned; and after several mesne assignments the manor with its appurtenances was on the 21st Feb. 1803 conveyed to Thomas Dawes and William Whitfield in trust for George Elwick Jemmett, and included in the conveyance were all tolls or dues arising and to be collected at the market and fair to the said manor belonging and of right appendant.

11. George Elwick Jemmett died in 1831, and was succeeded in his estates by his son George Elwick Jemmett, jun., to whom in 1845 the representatives of Thomas Dawes, who was then dead, conveyed all their testator's title in the manor.

12. It is impossible in the present day to say whether any market was actually established by Philip Lord Strangford at or near the date of the original charter; but if any such market ever was established, it is clear that it must have fallen into disuse some years before the year 1784; but whether because the charter had become forfeited or had reverted to the Crown, or whether simply because there was no attendance of dealers, there is no evidence now obtainable to show.

13. On the 7th Jan. 1784 an advertisement appeared in the *Kentish Gazette*, a local paper having very considerable circulation in that part of the county as follows:

Ashford Monthly Stock Market,
The 4th Tuesday in every month,
For all sorts of fat and lean stock.

It having been for many years the general wish of the inhabitants of this part of the county that a stock market should be established at Ashford, a plan is now on foot for that purpose to commence on Tuesday the 27th Jan. next 1784, and to be continued on the fourth Tuesday in every month.

It is requested that all gentlemen, graziers, farmers, and others will give every encouragement to the undertaking by sending their stock to this market, there being proper pens provided at 6d. each, and careful drovers to forward such part of the stock as shall be unsold to Smithfield market for the following Monday. The market ends at half-past 12 o'clock.

By whose authority this advertisement was inserted, and whether the lord of the manor for the time being was a party to it, there is no evidence to show.

14. From and for sometime after the 27th Jan. 1784, a stock market was held at Ashford on the fourth Tuesday in every month. This day was afterwards altered to the first Tuesday in every month, and subsequently in June 1793, from the first Tuesday only to the first and third Tuesdays in every month. By whose authority these alterations were made, and whether the lord of the manor for the time being was a party to either of them, there is no evidence to show.

15. In modern times, as far back as living memory can go, and down to the year 1856, there has unquestionably been a stock and cattle market held on every alternate Tuesday throughout the year in the main street of the town of Ashford, in which pens were provided for sheep. In the year 1854 rails were put up on moveable posts to which beasts could be tied by halters. These pens and rails were provided by the lord of the manor in that part of the street where his own buildings,

the market and court house were situate, and in other parts of the street by the inhabitants who used to place such pens and rails, each one in front of his own house, and a toll of 9d. used to be paid for each lot of sheep penned, and 2d. for each beast tied up. These tolls were paid to the lord, if the pens or rails used were provided by him, otherwise to the particular inhabitant whose pens or rails were used.

16. Sometime before his death in 1831, but when precisely does not appear, George Elwick Jemmett, the then lord, caused to be printed and circulated a notice of certain tolls which would for the future be charged to persons frequenting the market. It does not, however, appear affirmatively that the tolls therein mentioned were actually levied, or that any further or different payments were made than those mentioned in the last paragraph, and nothing ever was paid for either horses or pigs.

17. In the year 1856, the market as held in the main street had become so great a nuisance that it was determined to remove it, and accordingly a company was incorporated on the 25th Sept. in that year under the provisions of the statute 19 & 20 Vict. c. 47, under the title of "The Ashford Cattle Market Company Limited," to whom George Elwick Jemmett, jun., the then lord of the manor, granted a lease of a piece of land within the manor for a term of ninety-nine years, together with "all the tolls and stallages, dues, profits, and emoluments whatsoever arising from all markets and fairs held in the said town of Ashford, now or hereafter payable to the said George Elwick Jemmett, his heirs and assigns, as lord or lords of the manor of Ashford, and which he and they can lawfully claim or demand, with their rights, members, and appurtenances, save and except the tolls which may arise from any such meat, fish, vegetable, or fruit market, which is now or may hereafter be established in the said town of Ashford."

18. There was also contained in this lease a provision for the subsequent purchase of the land by the said company, which purchase was carried out, and the land in fee, together with the tolls, &c., as described in the last paragraph, was conveyed to the company on the 13th Oct. 1868.

19. By an agreement dated 19th March 1874, the said directors agreed to let, and the appellant agreed to hire, for a term of three years from the 20th March 1874, at a rent of 571*l.* per annum, "All those the tolls, profits, and emoluments arising and to be received in and by reason of the cattle market established within the said town of Ashford, and set forth in the schedule at the foot of these presents, together with all the buildings and grazing lands belonging thereto and now used therewith. . . . And also the right of holding the fairs and other exhibitions heretofore held in such market, and the perquisites arising therefrom."

20. The land, the subject of the lease and conveyance mentioned in paragraphs 17 and 18, and of the lease mentioned in the last paragraph, was and is the land mentioned in the rate. The whole of it has been fenced in and is entered by one entrance only, which the company or their lessee keep locked whenever no market, or fair, or other exhibition is being held. The area within the fence is provided with pens for cattle and sheep, many of which pens are marked with the names

of particular salesmen who attend the market, and each of whom, when instructed by any owner of cattle to sell for them, has the cattle or sheep to be sold driven into one of the pens so marked with his own name. There are other pens and rails marked "private," and these are reserved for owners of stock who manage their own sales without the intervention of salesmen.

21. At the entrance of the market tolls are taken upon all stock that is driven inside the gates, whether penned or tied up, or not, and whether sold or not; and these are the tolls mentioned above in paragraph 4, as included in the gross receipts; and when these payments are once made, the animals can be tied up or penned, and so kept during market hours without further payment. These payments, however, only entitle the owner to keep the stock in the market during the market hours. If the owner allows the stock to remain beyond the time for closing the market, the animals are then put into lairs, for the use of which extra charge is made. Sometimes animals are taken into a portion of the market known as the new buildings, and in this case also an extra charge is made. The items Nos. 9 and 10 respectively of the gross receipts in paragraph 4 are the receipts in the year ending 20th March 1875, in respect of such extra charges.

22. Upon these facts the appellant contends that the market originally granted to Philip, Viscount Strangford, continues to the present day, and is now vested in the Cattle Market Company; and that all such tolls as are paid and payable in respect of animals on their entrance into the market are levied only as the tolls in gross which the original grantee might have levied by virtue of the charter of 23 Charles II.; and that it makes no difference in this respect that the owner or salesman is afterwards allowed to have them penned or tied up without further payment.

23. The respondents contend—first, that the rent reserved of £571 is of itself sufficient to show that the gross estimated rental and net rateable values are not over estimated; secondly, that the charter to Lord Strangford was a grant of a market to him personally and not as lord of the manor, and that consequently the market never was appurtenant to the manor, and so never passed to the George Elwick Jemmett estate; thirdly, even if it did, they contend that from the long period during which the market fell into disuse prior to 1784 (the precise length of which is, however, quite unknown), the presumption arises that the charter had reverted to the Crown by forfeiture or otherwise; fourthly, they contend that the circumstances under which the market is now held differ so widely from the terms of the grant in the particulars hereinbefore mentioned, that it is impossible that the present market should be held in law to be a continuation of the old one; lastly, they contend that since the toll now paid at the entrance to the market gives the payer the right to have the animals tied up or penned without further payment, the tolls so paid cannot be said to be mere market tolls not incident to the soil.

24. The questions for the opinion of the court are—first, is the reserved rent conclusive evidence that the rateable values are not over estimated; secondly, whether or not the tolls mentioned in the first seven items of paragraph 4 are or are not incident to the soil, so as to be taken into consi-

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deration as increasing the value of the occupation. If either of these questions be answered in the affirmative, the rate is to be confirmed. If both in the negative, the rate is to be amended by inserting the sum of 150*l.* as the gross estimated rental, and 115*l.* as the net rateable value. The court is to have power to draw inferences of fact, and to give any direction as to the costs incident to preparing this case, and in this court, as the court may deem proper.

The charter marked B. in the appendix to the case, and referred to in paragraph 9, recited the inquisition marked A. and proceeded, "Now know ye that we for divers good causes and considerations as thereunto specially moving of our especial grace and of our certain knowledge and mere motion have given and granted and by these presents for us our heirs and successors do give and grant unto the said Philip Viscount Strangford, his heirs and assigns, that the same Philip, his heirs and assigns, shall have and hold and shall be entitled and empowered to have and hold a market upon every second Tuesday in the year, that is to say upon every Tuesday in every alternate week within or near to the town of Ashford, in our said county of Kent, for ever to be held for the buying and selling of all and all manner of cattle and sheep, goods and merchandises whatsoever. And further that he, the said Philip Viscount Strangford, his heirs and assigns, shall have hold and receive and to his own proper use shall be entitled and empowered to have hold and receive and enjoy all and singular the tolls, profits, advantages, and emoluments whatsoever to the same market in any manner belonging, or thereout arising, coming, or proceeding, or in or with the same usually held or enjoyed, to have hold and enjoy the said market tolls and profits and other the premises to the said Philip Viscount Strangford, his heirs and assigns, to the only proper use and behoof of the same, Philip, his heirs and assigns, for ever without any account or any other thing therefrom to us our heirs or successors rendering, paying, or making, we, willing and by these presents for us our heirs and successors firmly enjoining and commanding that the said Philip Viscount Strangford, his heirs and assigns by virtue and force of these presents well freely, lawfully, and quietly shall have hold and enjoy and shall be entitled and empowered to have hold and enjoy within or near to the town of Ashford aforesaid, twenty-six markets in every year for ever, that is to say upon every Tuesday in every alternate week together with the tolls and profits thereto belong, and therefrom from time to time arising or proceeding, according to the tenor and true intent of these our letters patent without any molestation, interruption, disturbance, or contradiction of us our heirs or successors, or of any of the sheriffs, escheators, bailiffs, officers, or ministers of us our heirs and successors or any other persons whomsoever, and this without any warrant, writ, or process from us our heirs and successors in that behalf, procuring or obtaining, notwithstanding non recital or bad or untrue recital of the said inquisition or of any writ of *ad quod damnum* for or concerning the premises in that behalf, issuing, and notwithstanding any other default, imperfection, or inconsistency in these presents contained, or any Law, Statute, Act, ordinance, provision, proclamation, or restriction, or any other thing cause, or matter whatsoever to the contrary thereof in

any manner notwithstanding so far as express, mention, &c." This inquisition was witnessed in the name of the King by writ of Privy Seal on the 23rd Nov. 1671.

Manisty, Q.C. (with him *Biron*) argued for the appellant.—The first question cannot be supported by the respondents. [*F. M. White*, for respondents, admitted this.] The second question is whether these seven items come within the application of *Reg. v. Casswell* (L. Rep. 7 Q. B. 328) which decided that tolls authorised to be taken by an Act of Parliament in respect of cattle brought into a market for sale, which become due as soon as the cattle are brought into the market place and before the cattle are put into a pen or tied up, are mere market tolls, and not in the nature of stallage or tolls taken in respect of the use of the soil; and in assessing the lessee of the market and tolls to the poor rate in respect of his occupation of the market place, such tolls cannot be taken into account as enhancing the value of the occupation. Cockburn, C.J. distinguished in his judgment between market tolls and stallage, and said p. 331, "But we must abide by the distinction founded on this principle of ancient law, and take it as established that tolls payable merely as market tolls for the use of the market are not rateable, whereas the toll paid for the use of a stall which occupies the soil is rateable. The present toll is payable not for the use of any shed or other thing erected or maintained upon the soil, but independently of anything in the shape of stalls or sheds, simply for admission to the market place; and it is, therefore a market toll, and comes within the distinction, and is not rateable." The validity of the tolls in the present case is not questioned. [*Field*, J.—But you must show that a franchise exists.] It is found as a fact that a market was granted by Charles II.; and its existence is proved at various periods since. The market could not have existed as proved without grant, and this is the only grant to be found. A charter is not lost by disuse, at all events not by precarious user for an uncertain interval of time.

F. M. White (with him *Kingsford*) for the respondents.—These are not tolls in the sense of the Wolverhampton Market tolls, authorised by Act of Parliament, as treated of in *Reg. v. Casswell*. These are mere payments for the user of the land occupied by the appellant. They are not traced in any way to the charter granted by Charles II., and cannot be attributed to any authorised levy of market tolls. Where no tolls are fixed by the charter under which a market is held, the grantee can only recover such tolls as have been uniformly collected; (see *Gunning on Tolls*, p. 57, citing 2 Inst. 222; and *Duke of Bedford v. Emmett*, 3 B. & Ald. 366). There is nothing here to show that these tolls have been uniform since the charter; on the contrary, they do not appear to have been levied at all for a long period. [Stopped by the court.]

Manisty, Q.C. in reply.

CLEASBY, B.—We think that the rate is right. It is necessary to show that the tolls are payable for entering the market, and not for the use of the soil of the market. It is contended for the appellant that all such tolls as are paid and payable in respect of animals on their entrance into the market are levied only as the tolls in gross which the original grantee might have levied by virtue of the charter of the 23rd Charles II. and that it

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makes no difference in this respect that the owner or salesman is afterwards allowed to have them penned or tied up without further payments. Now, that is out of the question, because there could not be, by virtue of the charter of Charles II., tolls of the description now levied in this market. Therefore there is an end at once of any claim to the tolls as tolls leviable under that charter. But it appears to me that the case wholly fails to show any right having existed by virtue of this franchise to take tolls for cattle upon their entering the market (not tolls for the use of the market, which is another affair altogether). Now, if there had been anything like a user shown after the granting of this charter, we might have assumed that such tolls had been payable. I am quite aware of the difficulty there is in proving what took place so long ago as the reign of Charles II., but here is a total failure of any evidence whatever to show that within a hundred years of the granting of this charter tolls of this description were taken under it. Now, when we refer to the charter itself, and to the writ which preceded it, it appears the tolls there mentioned have reference to the tolls usually taken in the like market. We have no evidence whatever as to what these tolls were that were usually taken in these markets. We have no evidence whatever as to whether they were payable by the buyer or the seller. And when you find that the market is to be not only for cattle and sheep, but for goods and merchandise, you would think it more probable that the toll that had been taken was taken upon the sale of things of this description than upon their entry into the market. This is not a charter in which the nature of the toll is specified, and which may therefore be construed as a charter with a right to take reasonable toll; the tolls are limited to the tolls in or with the same market usually held or enjoyed. There is nothing to show, in point of fact, that tolls ever were taken by the lord of the manor under his grant, or that such tolls were ever sought to be taken until we get the notice of some date before 1831. There is nothing, therefore, to show that the tolls in question are not incident to the soil, and ought not to be taken into consideration as increasing the value of the occupation.

GROVE, J.—I am of the same opinion. Upon looking at the question which is left to us to decide, it appears that the point really contended for on behalf of the appellant is this: that there is an ancient charter granting a market and granting tolls, and that the tolls now sought to be rated are the tolls which were granted to the lord of the manor under that charter, and that, although that charter has not been regularly acted upon, yet there is nothing to show that it has been forfeited, and that, therefore, these tolls are franchises or market tolls, and that they are incorporeal hereditaments, and cannot be rated. And so far I confess I was rather taken by the argument of Mr. Manisty, that although invariability of user may be necessary in prescription, yet where there is a grant a certain amount of variability of user may be taken to show that the grant has been acted upon. But then Mr. Manisty did not touch upon another point upon which Mr. White has founded his argument. Mr. White takes a point which seems to me to override the question of grant. He says that the grant is not a grant giving tolls at all but only giving tolls for tying

up and penning the beasts and sheep. It is, he says, a grant which could give no right to take tolls beyond such tolls as were usually held and enjoyed with the market, whether you take the words of the charter or of the inquisition which preceded it, where this view is very strongly put; "the tolls and profits used in the like market." Therefore, either there were no tolls, and it was merely a grant giving leave to take reasonable tolls, or if there were any, it was granting only such as were used. Now there is nothing to show that the tolls now sought to be rated were the tolls so granted. If one were to draw an inference one would rather infer they were not. I think there is very strong evidence on the face of the case that if ever tolls had been paid they were not only very different in amount but very different in character. Even assuming that the charter is existent, and that it would give the right to take tolls, I think there is a total want of proof that these tolls are such tolls as were granted by the charter.

FIELD, J.—I am of the same opinion. I think the appellant has failed to show that the tolls mentioned in the first seven items of paragraph 4 of the case are not incidental to the soil, so as not to be taken into consideration as increasing the value of the occupation. Now the facts are that the appellant is occupier of this land, and that the appellant being occupier of the land does levy from year to year upon an average a certain sum in respect of what are called tolls for the use of the land or the entry of the stock which the farmers are anxious to bring there. And he makes of that money so levied an account of which we have fourteen various items respectively specifying under different headings in paragraph 4 the way in which that sum is made up. With regard to the last seven of these items, it is admitted that they are incidental to the occupation of the soil and therefore rateable. With regard to the first seven items Mr. Manisty asserts that they are due to a franchise or incorporeal hereditament, and so not rateable. But I take it that it is for him to make out that they are due to a franchise. But under these circumstances it is established that they are an incorporeal hereditament, whichever way the onus may be? First of all what is there to show that these payments are to be referred to a franchise? As pointed out by my learned brothers the sums which the appellant says ought to be so regarded are in no wise shown to be sums leviable under the charter of Charles II. at all. There is no such toll as that now claimed that can be shown ever to have been received under the charter. And I go further than that, because it seems to me that there is no evidence to show that there is any right in any individual body or company to claim the tolls under the charter. We have nothing produced before us to show such right except the inquisition and the charter. From that moment the case is a dead blank until we get to the year 1784. There is no proof that any market was held under the charter or that any tolls were received under it. It is certain that for some period before 1784 the market, if it ever had been established, had become entirely disused; so much so that persons living in Ashford and its neighbourhood who were wanting a market did take steps and establish a market. Now from 1784 down to 1856 we have got the incidents of

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that market very clearly defined. It was held in the streets of Ashford, and so far from being a market vested in the lord, the inhabitants of the streets provided rails and received tolls for the beasts, and the lord only received tolls where he himself found the rails. The days were altogether different from those specified in the charter, and it is not shown that the lord had any part in naming the days or in altering them. In 1856 a company was incorporated and the market was removed to another and more convenient spot. The appellant in 1874 became the lessee of this ground. Under these circumstances I draw the conclusion that these present tolls as now received, or what are called tolls by the charter, are not leviable under the franchise, and therefore I take it they must be incidental to the soil.

Judgment for the respondents.

Solicitors for appellant, *Duncan, Murton, Warren, and Gardner.*

Solicitor for respondents, *G. Cheesman*, for *Edward Norwood, Charing*, and *J. D. Norwood, Ashford.*

CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, May 20, 1876.

(Before KELLY, C.B., LUSH, J., POLLOCK, B., FIELD, J., and LINDLEY, J.)

REG. v. JAMES BERRY.

Practice—Prisoner mute by visitation of God—Incapable of understanding the proceedings—Discharge of jury—Detainer of prisoner under 39 & 40 Geo. 3, c. 94, s. 2.

After a prisoner had been found by a jury "mute by the visitation of God," a plea of not guilty was ordered to be entered for him, and the trial proceeded. A relative of the prisoner, who deposed that he could in some degree communicate with him by signs, was sworn as interpreter. In his summing up the judge left it to the jury to say whether the prisoner was guilty or not guilty on the indictment; and, secondly, whether the prisoner was capable of understanding, and had understood the nature of the proceedings. The jury found the prisoner guilty on the evidence, but that he was not capable of understanding, and as a fact, had not understood the nature of the proceedings:

Held, that the conviction could not be sustained, and this court ordered the prisoner to be detained under the 39 & 40 Geo. 3, c. 94, s. 2, during Her Majesty's pleasure.

If at any stage of the trial it is found that the prisoner has not sufficient intellect to understand the nature of the proceedings the jury should be discharged, and the prisoner detained under 39 & 40 Geo. 3, c. 94, s. 2.

CASE stated by the Chairman of the Worcester-shire Quarter Sessions.

At the Worcestershire adjourned Quarter Sessions, held on the 23rd Feb. 1876, the above named prisoner, James Berry, was arraigned before me for stealing a watch and certain other articles from the person of one Benjamin Smith.

On being called upon to plead to the indictment

in the usual manner the prisoner made no reply, and gave no sign of consciousness that he heard or understood the question put to him.

The counsel for the prosecution asked that I should order a plea of not guilty to be entered, and should proceed to try the prisoner. I did not consider that I had any power to adopt this course, and I ordered, on the authority of *Rea v. Thomas Jones*, and *Rea v. Elizabeth Steel*, both reported in the first volume of Leach's Crown Law, that the jury who had been impanelled to try the case should be sworn to try whether the prisoner stood mute of malice, or by the visitation of God.

After hearing the evidence of one Robert Knight, who is the brother-in-law of the prisoner, and had known him well from infancy, and who deposed that the prisoner had been deaf and dumb since the age of four years, the jury returned a verdict "mute by the visitation of God."

I then ordered that the plea of not guilty should be entered, and that the trial should proceed.

As the said Robert Knight had deposed that he could in some degree communicate with the prisoner by means of signs, I ordered that Robert Knight should be sworn as interpreter in order to convey to the prisoner as far as possible the nature of the proceedings and the evidence against him.

Observing the opinion expressed by Mr. Justice Gould in *Rea v. Elizabeth Steel*, "that great diligence and circumspection ought to be exercised in so critical a case," and that "it becomes the duty of the court to inquire touching all those points of which the prisoner might take advantage himself, to examine all the proceedings against her with a critical eye and to render her every possible service consistent with the rules of law," and conceiving that my duty in this respect would be best performed by giving the prisoner the assistance of counsel, I accordingly assigned him counsel at the expense of the court.

After summing up the evidence for the prosecution, which was very clear, I put two questions to the jury,

First, whether they found the prisoner guilty or not guilty on the indictment.

Secondly, whether in their opinion the prisoner was capable of understanding, and had understood, the nature of the proceedings.

The verdict of the jury was,

"We find the prisoner guilty on the evidence; and we also find that he is not capable of understanding, and, as a fact, has not understood the nature of the proceedings."

On this verdict, looking to the language used by the judges as reported in *Steel's* case, and the doubt expressed by Lord Hale, I thought it right to postpone judgment till a case had been submitted to this court.

I offered to take bail for the appearance of the prisoner, but it was not forthcoming and he has been since the trial, and is now, in Worcester prison.

I respectfully request the opinion of this court First, whether under the circumstances stated above the prisoner was properly convicted of felony.

Secondly, if so, whether the Court of Quarter Sessions ought to have passed sentence on the prisoner, or whether it should have ordered him to be detained until Her Majesty's pleasure had

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been known, or what other, if any, course it ought to have followed.

GEORGE WOODYATT HASTINGS,
Chairman of the above Court
of Quarter Sessions.

Streeten, for the prisoner, was stopped by the court.

Jelf, for the prosecution.—The conviction was right. The case of *Reg. v. Steel* is conclusive. In that case the facts were these: the prisoner refused to plead, and the jury were sworn to inquire whether she stood mute by malice or by the visitation of God. The jury returned a verdict, "Mute by the visitation of God;" and it was referred to the consideration of the judges "whether, under these circumstances, she could be tried upon the indictment." The judges were of opinion "That a verdict finding the prisoner to be mute by the visitation of God was not an absolute bar to her being tried upon the indictment; for, although a person *surdus et mutus a nativitate* is in contemplation of law incapable of guilt, upon a presumption of idiotism, yet that presumption may be repelled by evidence of that capacity to understand by signs and tokens, which it is known that persons thus afflicted frequently possess to a very great extent. Great diligence and circumspection, however, ought to be exercised in so critical a case; but if all means to convey intelligence to the mind of such a prisoner respecting the nature of his arraignment should prove ineffectual, the clerk of the arraigns may enter the plea of not guilty; and then it is incumbent on the court to inquire touching all those points of which the prisoner might take advantage himself; to examine all the proceedings against him with a critical eye, and to render him every possible service consistent with the rules of law." [LUSH, J.—In this case the jury have found that the prisoner was incapable of understanding, and as a fact had not understood the nature of the proceedings. In 1 Hale's P.C. cap. 4, there is this passage, "If a man in his sound memory commits a capital offence, and before his arraignment he becomes absolutely mad, he ought not by law to be arraigned during such his phrenzy, but he remitted to prison until that incapacity be removed. The reason is because he cannot advisedly plead to the indictment; and this holds as well in cases of treason as felony, even though the delinquent in his sound mind were examined and confessed to the offence before his arraignment. . . . If a person of non-sane memory commit homicide during such his insanity, and continue so till the time of his arraignment, such person shall neither be arraigned nor tried, but remitted to gaol, there to remain in expectation of the king's grace to pardon him."'] In this case the prisoner had counsel assigned to him, and there was no necessity to interpret the proceedings to him.

KELLY, C.B.—It appears to me, both upon authority and principle, that the conviction ought to be quashed. The case of *Reg. v. Pritchard* (7 Car. & P. 303) is an authority in point, and has never been overruled. There a person deaf and dumb was to be tried for a capital felony, and the judge ordered a jury to be impanelled to try whether he was mute by the visitation of God. The jury found that he was so; they were then sworn to try whether he was able to plead, which they found in the affirmative, and the prisoner by a

sign pleaded "Not guilty." The jury was then sworn to try whether the prisoner was then sane or not, and on that question the judge (Alderson, B.) directed the jury to consider whether the prisoner had sufficient intellect to comprehend the course of the proceedings so as to make a proper defence, to challenge any jurors he might wish to object to, and to comprehend the evidence; and if they thought he had not they should find him not of sane mind. The jury found him not of sane mind, and the prisoner was ordered to be detained under the 39 & 40 Geo. 3, c. 94, s. 2, until his Majesty's pleasure should be known. There is another case of *Reg. v. Dyson* (7 Car. & P. 305) where Parke, J. cited the passage from Hale, P.C., Book 4, and told the jury that if they were satisfied that the prisoner had not then from the defect of her faculties intelligence enough to understand the nature of the proceedings against her, they ought to find her not sane; and the jury, having found her not sane, the judge ordered her to be detained under the 39 & 40 Geo. 3, c. 94, s. 2, during Her Majesty's pleasure. That occurred a year after, and affirmed the doctrine laid down in *Reg. v. Pritchard*. Here the jury have found that the prisoner was incapable of understanding the proceedings, and as a fact had not understood them. There were no means of making the prisoner acquainted with a single word that had been spoken or any act that had been done. And where that clearly appears in the course of the trial it is the duty of the judge to discharge the jury or to direct an acquittal. I am therefore of opinion that the conviction should be quashed, and that the prisoner should be detained, under the 39 & 40 Geo. 3, c. 94, s. 2, until Her Majesty's pleasure is known.

LUSH, J.—I also think that the conviction should be quashed. If at any time during the trial it is found that the prisoner is of unsound mind and incapable of understanding the proceedings, the trial ought to be stopped. Understanding the finding of the jury in that sense in this case, I think the conviction cannot be sustained. The judge who tried this case reports that he left the question to the jury whether the prisoner stood mute by the visitation of God, and the jury found in the affirmative; and he then directed a plea of not guilty to be entered for the prisoner, and directed the trial to proceed; and on the intimation of the prisoner's brother-in-law that he could in some degree communicate with the prisoner by means of signs, the brother-in-law was sworn as interpreter and the trial proceeded. The judge summed up the case and asked the jury whether they found the prisoner guilty or not guilty on the indictment, and whether in their opinion the prisoner was capable of understanding and had understood the nature of the proceedings. The jury found the prisoner guilty on the evidence, but they also found that the prisoner was not capable of understanding, and as a fact had not understood, the nature of the proceedings. On the finding that the prisoner had not sufficient intellect to understand the nature of the proceedings I am of opinion that it was the duty of the judge to discharge the jury, and to order the prisoner to be detained, under the 39 & 40 Geo. 3, c. 94, s. 2, during Her Majesty's pleasure.

The other Judges were of the same opinion.

Conviction quashed.

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REG. v. BEARDSALL.

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Saturday, May 20, 1876.(Before KELLY, C.B., LUSH, J., POLLOCK, B.,
FIELD, J., and LINDLEY, J.).

REG. v. BEARDSALL.

*Ballot Act 35 & 36 Vict. c. 33—Prosecution under
sect. 3—Opening sealed packets of ballot papers
—Counterfoils, &c.**In a case of a municipal election, a County Court
having jurisdiction in the borough, has power to
make an order directing the town clerk to produce
and show for inspection the rejected ballot papers,
the marked counterfoils of the ballot papers, and
the counted ballot papers relating to the election,
when required under summons or subpoena, as
evidence in proof of an offence created by the
Ballot Act.*CASE stated for the opinion of this court by
Blackburn, J., at the Manchester Spring Assizes
1876.The prisoner was tried before me at Manchester
on an indictment charging him in thirty-seven
counts with having at a municipal election frau-
dulently placed seventeen different papers pur-
porting to be, but to his knowledge not being,
ballot papers in the ballot box.Evidence was given that on the 1st Nov. 1875,
there was an election for three councillors for the
ward of Heaton Norris, in the borough of Stock-
port, and that there were six candidates; three of
the blue party, and three of the red party.The prisoner was appointed presiding officer at
one of the booths, and acted as such, and had the
custody of the ballot papers and box. A return
from him showing that he had used 402 ballot
papers was proved. At the close of the day he
delivered over the ballot box and a sealed packet
containing the marked copy of the register of
voters and the counterfoils of the ballot papers.
After the votes were counted, the ballot papers
were put in a packet and sealed.An order of the County Court of Cheshire,
holden at Stockport was then proved. A copy of
it accompanies this case and forms part of it.

COPY ORDER.

The Ballot Act 1872. The Corrupt Practices
(Municipal Elections) Act 1872. In the County
Court of Cheshire, holden at Stockport the
25th Feb. 1876.In the matter of prosecutions against Joseph
Beardsall for personation and other offences
against the Ballot Act alleged to have been com-
mitted by him as presiding officer at the election
of town councillors for Heaton Norris ward, in the
borough of Stockport held on the 1st Nov. 1875.Upon hearing Mr. Francis Newton, solicitor, on
behalf of George Massey, the prosecutor, and the
said Joseph Beardsall, and being satisfied by evi-
dence on oath that the inspection and production
of the undermentioned election documents are
required for the purpose of instituting or main-
taining a prosecution against the said Joseph
Beardsall for an offence or offences in relation to
ballot papers.It is ordered that Mr. Walter Hyde, the town
clerk for the said borough of Stockport, do produce
and show for inspection to the said George Massey
and his solicitor or agent, on Thursday the 2nd
March 1876, at such hours as the said town clerk shall
appoint, and such other days and hours as may be
convenient to the said town clerk, at the Court Housein Vernon-street, in the said borough, the under-
mentioned documents and papers, and also after
being served with a summons or subpoena for that
purpose to produce and show the same for inspec-
tion at any time or times as may be required under
summons or subpoena in any court as evidence for
the purpose of maintaining the said prosecutions
against the said Joseph Beardsall for the offences
aforesaid: first, the rejected ballot papers relating
to the said election for Heaton Norris ward;
secondly, the counterfoils of the ballot papers
marked by the presiding officer in Booth A to B
relating to the said election; thirdly, the counted
ballot papers relating to the said election, particu-
larly the ballot papers corresponding to the
following numbers written on the said counterfoils:
20, 70, 94, 102, 116, 218, 251, 255, 295, 298, 324,
334, 369, 383, 385, and 406; fourthly, the spoilt
ballot papers relating to the same polling sta-
tion.And it is further ordered for the purposes afore-
said, that the said town clerk do cause to be
opened the sealed packets containing the said
rejected ballot papers, the counterfoils of the
ballot papers used at polling stations A to B
relating to the said election, the marked copy of
the register used in the same polling stations, the
counted ballot papers, the spoilt ballot papers
relating to the same polling stations at the said
election, and to break any other seal or seals which
may be necessary for the purposes aforesaid, and
that the said town clerk do by himself or by some
person or persons to be by him appointed for that
purpose attend on such production and inspec-
tion during the whole time thereof. And further,
that the said town clerk and such other persons
shall take and use all such proper means and pre-
cautions as he shall deem necessary in order that
the mode in which any particular elector has
voted shall not be discovered; and in order that no
person see the face of any counted ballot paper,
and in order that the said documents and papers
so to be produced and inspected shall be safely
kept from loss, damage, or other matter or thing,
whereby the same or any of them shall be injured,
prejudiced, or altered in any way.It is further ordered that the town clerk shall
immediately, after each such production and in-
spection, return the said documents to their
packets and reseat the same.It is further ordered that the persons entitled
to be present at the said inspection are the town
clerk and his assistants, the said George Massey
and his solicitor or agent, the said J. Beardsall
and his solicitor or agent, and the worshipful the
Mayor of Stockport, or in his absence the Deputy
Mayor of Stockport.It is lastly ordered that no person shall be
allowed to see the face of any counted ballot paper.A copy of this order shall be served on the said
J. Beardsall or his solicitor and on the town clerk.

(By the Court.)

WALTER HYDE, Registrar. (L.S.)

A sealed packet was produced before me, and
evidence was given that in obedience to that
order the original seals had been broken, and the
counterfoils and marked register, and the back of
the ballot papers, had been inspected, and had
been again inspected by the magistrates before
whom the charge was investigated, and before the
grand jury. On each occasion the packets were
sealed up again.

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It was then proposed to open the packet for the purpose of giving the contents in evidence before me.

The counsel for the prisoner objected to this, relying on rules 40, 41, and 64 in the first schedule to the 35 & 36 Vict. c. 36, as enacting that these documents should not be examined, except on a contested election, and by order of an election tribunal; and that the County Court was not acting as an election tribunal when making this order.

I doubted whether this objection was not well founded; but the mischief, if any, having been already done, I resolved to receive the evidence reserving the point. I requested the counsel for the prosecution to begin with any one case, and the counsel for the defence to raise their objections on it, after which the other cases could be dealt with subject to the rulings on the first. This was acceded to.

The counterfoil numbered 105 was then examined, and appeared on it to have in pencil the number 116. On reference to the register, 116 was found to be the number of James Bancroft, 95, Great Egerton-street, Heaton Norris.

It was then proved that James Bancroft died in September 1875, before this election, and that the deceased was the person on the register.

The voting paper bearing the number 105 printed on it, and marked with the official mark on each side, was then produced out of the heap. It was folded up, and the counsel for the prosecution requested that it might be opened so as to ascertain for what candidates the votes on this paper were given. To this the counsel for the prisoner objected, relying on the latter part of rule 41.

I thought that it being proved to my satisfaction that the voter 116 on the registry did not vote at all, and that the voting paper was a fabrication, the paper might be opened.

It was so, and it proved that the three votes were given for the three blue candidates. The prosecution then in similar manner proved that fifteen of the other papers were in respect of counterfoils, on three of which were the number in the registry 334, on two the number 102, and on ten different other numbers.

No one of the twelve persons registered voted at this booth, and the votes purporting to be given on these papers were in each case for the three blue candidates.

The marked register had the names of all these persons scored through as if each of the voters (or some one believed to be the man), had applied for and obtained the paper.

The prosecution were unable to prove that the person entitled to vote by the 17th paper in the indictment did not vote, so sixteen cases only were proved.

Evidence was then given by the red personating agent who produced his copy of the register on which he had marked the names as they were called over.

He had marked in all 382, instead of, as the prisoner's return showed, 402, and no one of the names of the fourteen names of the voters whose numbers were on the seventeen counterfoils, was on his list struck through; and no one had in his presence asked in the name of anyone of them for a voting paper.

He was absent for a few minutes once or twice, and it was admitted that the three persons who,

in addition to the seventeen, made the twenty whose names were marked on the defendant's register, and not on his, had in fact voted; but it was very improbable that as many as sixteen votes could have escaped his notice.

The blue personating agent was not called on either side.

Some evidence was given that the prisoner was a blue.

On this evidence the jury found that the prisoner had guilty knowledge that the papers were not asked for by the voters, and that he fraudulently issued them with the intent that they should be placed in the ballot-box as they were.

On this I entered the verdict of guilty on thirty-two of the thirty-five counts, but respited sentence and admitted the prisoner to bail.

The verdict was in my opinion right on the evidence admitted. But if the counterfoils had not been inspected there would not have been any evidence against the prisoner. And if the ballot papers had not been opened so as to show that all the false votes were on one side, the evidence would not have been so strong and the verdict might have been different.

The questions for the court are: First, Was it wrong, under the circumstances, to allow the counterfoils and marked register to be given in evidence? Secondly, Was it wrong, under the circumstances, to allow the face of the voting papers to be inspected, so as to show how the votes purported to be given? Thirdly, Ought the conviction to be quashed on both or either ground? COLIN BLACKBURN.

Ambrose, Q.C. for the prisoner.—The indictment was framed upon sect. 3 of the Ballot Act (35 & 36 Vict. c. 33), which makes it a misdemeanor if any person shall (*inter alia*) fraudulently put into any ballot box any paper other than the ballot paper which he is authorised by law to put in. The object of the Ballot Act was to insure secrecy, and by rule 39, in the first schedule to the Ballot Act, the returning officer is required, as soon as practicable after the close of the poll, among other things, to seal up in a packet the counterfoils of the ballot papers, and by rule 37, upon the completion of the counting of the votes, to seal up in separate packets the counted and rejected ballot papers; and by rule 38 he is to forward the sealed packets, in the case of a municipal election, to the town clerk of the borough. Then by rules 41 and 63 "No person shall, except by order of the House of Commons or any tribunal having cognizance of petitions complaining of undue returns or undue elections, or in the case of a municipal election of an order of a county court, open the sealed packet of counterfoils after the same has been once sealed up, or be allowed to inspect any counter ballot papers in the custody of the Clerk of the Crown in Chancery." Under the above rules the sealed packets can only be opened and inspected in the case of inquiries respecting undue returns or undue elections. And the County Court Judge had no jurisdiction to make the order, a copy of which is set out in the case on an intended prosecution for an offence under sect. 3. Rule 41 expressly prohibits the opening thereof except by order of the House of Commons or any tribunal having cognizance of petitions complaining of undue returns or undue elections. [LUSH, J.—If the argument is cor-

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rect, Parliament has created an offence, and at the same time has taken care to prevent the possibility of proving it. The offence, from its very nature, could only be proved by an examination of the sealed packets. KELLY, C.B.—Could not the House of Commons in the case of a Parliamentary election order the sealed packets to be opened for the purposes of a prosecution? The whole object of the Act is to secure secrecy, and its provisions and rules have only been framed for the purposes of election petitions. The ballot papers are to be kept sealed and secret. [LUSH, J.—These are not "ballot papers," for no one had voted in respect of them.]

C. Russell, Q.C. (R. S. Wright with him) for the prosecution, were not called upon to argue.

KELLY, C.B.—I am clearly of opinion that the conviction was right. There is no doubt that the provisions in the Ballot Act as to secrecy were intended to secure the secrecy of votes really given, but not to protect fraud, or to prevent the proof of fictitious votes given by means of fraudulent ballot papers. Besides, in this case there was an order of the County Court legally made for the production and inspection of the ballot papers and counterfoils at any time or times, and in any court, as evidence for the purpose of a prosecution.

LUSH, J.—I am of the same opinion. I do not assent to the argument that secrecy was the only object of the Ballot Act. Purity of election was also an important object of it, and various kinds of fraud were made criminal offences, which offences cannot be proved without the production and inspection of the sealed packets. There is express power given to the House of Commons or any tribunal having cognizance of election petitions, by rule 41, to order the opening and inspection of the sealed packet of counterfoils and counted ballot papers; and by rule 64 an order of the County Court is substituted in the case of municipal elections for an order of the House of Commons, or of one of Her Majesty's Superior Courts. I think the order was legally made.

POLLOCK, B., FIELD, J., and LINDLEY, J., concurred.

Conviction affirmed.

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

DIVISIONAL COURT FOR APPEALS FROM INFERIOR COURTS.

Reported by M. W. McKELLAR, J. M. LELY, and R. H. AMFLETT, Esqrs., Barristers-at-Law.

Thursday, April 27, 1876.

ROBINSON (app.) v. CLIFF (resp.)

Bakers—Carrying out or delivering bread—Scales and weights—6 & 7 Will. 4, c. 37, s. 7.

The appellant, a baker, out of the London district, drove his cart to a customer's door, asked how much bread was wanted, and delivered the quantity required from his cart. The customer had given the appellant a general order to supply bread in the usual course of trading, but the daily quantity was determined only when the appellant called

with his cart. He carried in his cart no beam, scales, nor weights, and justices convicted him under 6 & 7 Will. 4, c. 37, s. 7.

Held, upon a case stated, that the appellant was carrying out or delivering bread within the terms of the section, and that the conviction was right.

This was a case stated by two justices of the peace for the town of Nottingham, under the statute 20 & 21 Vict. c. 43, on the application in writing of the appellant, who was dissatisfied with their determination upon the question of law which arose before them as hereinafter stated, on the 20th Nov. 1875, at Nottingham; the hearing of the case having been adjourned from the 23rd July 1875 until the 20th Nov. aforesaid, and the appellant having duly entered into a recognizance to prosecute the appeal.

Upon the hearing of a certain information, preferred by the respondent against the appellant under 6 & 7 Will. 4, c. 37, s. 7, of which the following is a copy:—

Town of Nottingham and county of the same town to wit. The information of Wm. Henry Cliff, assistant inspector of weights and measures for the said town, taken upon his oath this 19th July 1875, before one of Her Majesty's justices of the peace for the said town of Nottingham and county of the same town, at the Guildhall in the said town of Nottingham, who saith that on the 16th July 1875, John Robinson, 16, Pelican-street, Radford, Notts, in the said town of Nottingham, being then a baker, and then and there conveying and carrying out and delivering bread for sale in a certain cart drawn by one horse, unlawfully did not carry or provide, and was not then provided, in such cart, with a beam and scales with proper weights, in order that the bread sold might be weighed by the purchaser thereof.

Sworn before me.

(Signed) DAVID NEW.

(Signed) HENRY CLIFF.

it was proved that the appellant, being a baker and seller of bread living at Pelican-street, Radford, Notts, did on the 16th July last take and deliver bread from a cart (not at the time being provided with proper weights and scales required by the 6th section of the said Act), outside the shop of a customer of appellant's in a certain street called Russell-street, in Nottingham. When appellant came out of such shop after delivering the bread, respondent said to appellant, "I shall want to weigh your bread, have you got your scales and weights with you? I want to weigh the bread." Appellant said, "I haven't scales to weigh it with." Respondent said, "I shall weigh it in my own scales, and I shall want you to see it weighed." The bread in the shop was weighed in the presence of appellant. There were eleven loaves deficient in weight. Respondent told appellant he should lay the facts of the case before Mr. Radford, the inspector of weights and measures. Respondent applied the following (Saturday) morning for a summons. On cross-examination by the appellant's solicitor, it came out that the information was laid on the following Monday (the 19th July). Appellant is a wholesale baker, selling also at his shop by retail. The appellant called Mary Morris, the wife of Henry Morris, a provision dealer and bread seller (the customer above referred to), living in Russell-street aforesaid; and she stated that on the 16th July last the appellant came to her shop and asked her "How much bread?" She said "Two stones." Appellant left the shop, and immediately after returned, bringing the bread into the shop from a cart standing in the street. Such bread was weighed by the respondent, and it was

deficient in weight. She also stated that the appellant allowed her half a quarter to every ten stones for any deficiency in weight. She further stated that she took about ten stones of bread weekly from appellant, with whom she had dealt two years. Appellant came to her at the commencement of her trading with him, and asked for her orders, and if he could supply her. She had a pass book. Appellant entered the bread in his book. When appellant came to the shop he said, "How much?" She never sent to appellant's shop to order the bread; he always came to her.

On the part of the appellant it was contended that the appellant went round to supply bread to her, having a general order given two years ago; and that it was not necessary that the appellant should be provided with weights and scales when he went to deliver the bread for which he had a general order. It was further contended on the part of the appellant that the information ought to have been laid within forty-eight hours after the offence in pursuance of sect. 31 of the said Act.

The said justices held that the information was laid within a reasonable time as required by the Act, Sunday the 18th July last having intervened, and convicted the appellant in the mitigated penalty of 1l., including costs. They found as a fact that the delivery of the bread by the appellant to Mrs. Morris was in compliance with a general order, and in the usual course of trading; but the quantity of bread to be delivered at each time the appellant called was ascertained only at the time of his calling between the parties, believing the statement of the said Mary Morris.

If the court should be of opinion that the said conviction was legally and properly made, the said conviction to stand; but if the court should think otherwise the conviction to be quashed.

Horace Smith argued for the appellant.—It is enacted by 6 & 7 Will. 4, c. 37, s. 7, "That every baker or seller of bread beyond the limits aforesaid (*i.e.*, the metropolitan district), and every journeyman, servant, or other person employed by such baker or seller of bread, who shall convey or carry out bread for sale in and from any cart or other carriage, shall be provided with and shall constantly carry in such cart or other carriage, a correct beam and scales, with proper weights, or other sufficient balance, in order that all bread sold by every such baker or seller of bread, or by his or her journeyman, servant, or other person, may from time to time be weighed in the presence of the purchaser or purchasers thereof, except as aforesaid (*i.e.*, French or fancy bread or rolls, as excepted in sect. 4); and in case any such baker or seller of bread, or his or her journeyman, servant, or other person, shall at any time carry out or deliver any bread without being provided with such beam and scales with proper weights, or other sufficient balance, or whose weights shall be deficient in their due weight, according to the standard in the Exchequer, or shall at any time refuse to weigh any bread purchased of him, her, or them, or delivered by his, her, or their journeyman, servant, or other person, in the presence of the person or persons purchasing or receiving the same, then and in every such case every such baker or seller of bread shall for every such offence forfeit and pay any sum, not exceeding five pounds, which the magistrate or magistrates, justice or justices, before whom such offender or offenders

shall be convicted, shall order and direct." The effect of this section is only in respect of persons hawking bread in carts for sale. It does not appear that the question raised in this case has ever been judicially decided, but there is in favour of the appellant's contention a note to Stone's Justices' Manual (14th edit., p. 127, note e) citing the authority of Mr. Justice Field's opinion. The words of the note are: "The first part of this section requires every baker, &c., carrying out bread 'for sale' to have proper weights and scales in his cart or carriage; but in the penal part the words 'for sale' are omitted. If the bread carried out had been previously purchased or ordered at the shop of the baker, will an offence be committed?" On this point the opinion of Mr. W. Field, Q.C., was taken in Sept. 1867, for the guidance of the Leicester magistrates; and he advised that it is not an offence to carry bread without scales when such bread has been previously purchased at the shop, or is delivered in pursuance of a previous order, whether general or particular, and is not sent out 'for sale'; that the 6th section protects all bread sold at the shop, under which category he considered that the bread in question falls, the 7th section applying to carts which hawk bread for sale. He also advised that the master, and not the servant, is the person liable to conviction for any offence under the 7th section. It may also be observed that the words 'in the presence of the person purchasing or receiving the same,' at the latter end of the 7th section, appear from the context to apply only to a refusal to weigh."

Kingsford appeared for the respondent, but was not heard.

BRAMWELL, B.—We need not trouble the counsel for the respondent. I think this conviction must be affirmed. The statute is peculiar, and it provides minute regulation on points concerning which I think persons might do better themselves for their own protection than this paternal kind of legislation is likely to do for them. I think Mr. Smith is right in contending that the earlier part of sect. 7 applies only to the hawkers of bread from carts, and does not allude to the bakers' boys who carry out to the customers the bread previously sold or ordered. Sect. 6 regulates the means for weighing bread in the shops, and protects all persons who there make their purchases; and I think the penal provisions at the end of sect. 7 must have been intended to apply equally to transgressions of the 6th and the 7th sections, and to bakers of both classes. Sect. 7 begins by enacting that every baker, "who shall convey or carry out bread for sale in and from any cart or other carriage shall be provided with and shall constantly carry in such cart or carriage" weighing facilities, in order that all bread sold by such baker may be weighed in the presence of the purchaser. Then the section proceeds to enact that in case any such baker or his servant, meaning I think to include both shop-keeper and hawker, "shall at any time carry out or deliver any bread without being provided with such" weighing facilities, he shall be liable to conviction. The contention for the appellant is that the customer in this case might have weighed her bread at the appellant's shop, where it is alleged the bread was sold. But even assuming that there was under the circumstances a previous sale of this bread, there is nothing in

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the section to exempt the person who delivered the bread from the duty to have a weighing machine with him. The consequence to my mind is that under this section no baker can safely deliver an individual loaf, even although that particular loaf has been bought and weighed in his shop, without carrying his scales to the house where he delivers it. The appellant here has carried out and delivered bread without being provided with beam and scales and proper weights, and, therefore, is liable to conviction under the words of the statute, and I also think in accordance with its intention. The magistrates were right, and the conviction must be affirmed.

MELLOR, J.—I also think this conviction was right. It appears to me that the Act contemplated three kinds of opportunity by which a customer may obtain bread. In the first place, under the 6th section, he may buy bread at a baker's shop and take it away with him; in the second, he may buy it from a baker who hawks bread in a cart; this is dealt with by the early part of the 7th section; and thirdly, he may obtain bread as the customer in the case is stated to have done, by means of its being carried out and delivered by the baker or his servant, either upon a general order as this was, or upon a purchase at the shop. The object throughout is to compel bakers to afford their customers facilities for seeing that their bread is of proper weight, and I do not see why they should not be equally protected, whatever mode of purchase they may adopt. The result in some cases apparently may be ridiculous; but, as far as I know, it may be necessary, and at all events I think it was intended to be the law.

DENMAN, J.—I think this conviction was right, but the ground upon which I base my conclusion differs materially from that of the other members of the court. I think that under the circumstances this course of business comes within the first part of sect. 7, and the appellant here conveyed or carried out bread for sale in and from a cart or other carriage. The interpretation I put upon the words "for sale" includes this distribution of bread upon the previous general orders of customers. The application of the penal clause is I apprehend limited to the two cases previously mentioned—the shop-keeping baker, and the baker who sells from a cart or carriage. This interpretation does not necessarily carry the inconvenient construction put upon these provisions by my learned brethren. The object, no doubt, was that all breads should be sold for weight, and that all customers should have an opportunity of testing it. This, in my opinion, was bread for sale, and it was conveyed or carried out in a cart. If purchased in a shop and afterwards delivered by the baker or his boy from a basket, I think no weights or scales would be necessary. But as this was bread carried out in a cart for sale, the cart ought to have carried the beam and scales required.

Judgment for respondent.

Solicitors for appellant, *Rogerson and Ford*.

Solicitors for respondent, *Hughes, Hooker, Buttanshaw, and Murlton*.

Friday, May 19, 1876.

(Before CLEASBY, B., and GROVE, J.)

LANGRIDGE v. LYNCH.

Solicitor and client—Fees for entering appeal at sessions—Liability of solicitor.

The solicitor, and not the client, is liable to the clerk of the peace for fees connected with the entering, &c. of an appeal at the sessions.

THIS was an action brought by the Clerk of the Peace for Sussex to recover the sum of 5*l.* 19*s.* 5*d.*, alleged to be due for fees, and was tried before the deputy County Court judge without a jury, when the judge gave a verdict for the amount claimed.

The following is a copy of the particulars annexed to the plaint note:—

Henry Foulkes Lynch, Esq.

To W. B. J. Langridge,
Clerk of the Peace, Lewes.

Re Chantrell's Appeal.

Michaelmas Sessions 1874—		£.	s.	d.
Entering appeal ... ..	...	0	2	0
Filing notice, &c. ... ..	...	0	2	0
Trying appeal ... ..	...	0	13	4
Respite appellant's recognisances ... ..	...	0	4	6
Order for special case ... ..	...	0	10	6
1875.				
April 19. Fee on return to <i>certiorari</i> , attending on justice, &c. ... ..	...	2	5	0
„ 21. Copy conviction ... ..	...	0	2	6
Transmitting same and letter ... ..	...	0	3	7
Respite recognisances for three different sessions ... ..	...	1	7	0
Discharging recognisances ... ..	...	0	9	0
		5	19	5

The fees are regulated by 11 & 12 Vict. c. 43, and, it was admitted, were properly payable by somebody. Evidence of a custom for the solicitor and not the client to pay was given at the trial. Three letters, also written by the defendant, were tendered, in one of which he acknowledged the receipt of the above memorandum of charges, and in another asked for the copy of a conviction, adding, "I shall be happy to pay your charges."

A rule *nisi* was afterwards granted, on the ground that there was no evidence of liability on the part of the defendant to pay these charges.

A. L. Smith showed cause.—The solicitor is the person who is liable to pay these fees. In *Newton v. Chambers* (1 Dowl. & L. Rep. 869; 13 L. J. 141, Q.B.) it was held that a sheriff's officer might maintain an action against the attorney of the plaintiff in the original suit for caption fees and conduct money. So, too, an attorney and not his client is liable to a bailiff for his fees in issuing execution against a defendant: (*Maile v. Mann* 2 Ex. 608; 6 D. & L. 42; 17 L. J. 336, Ex.; *Brewer v. Jones*, 10 Ex. 655; and *Wallbank v. Quartermann*, 3 O. B. 94.) In the latter case Maile, J. observed that "the inconvenience would be prodigious if it were held that the officer must look to the client for his fees." He also referred to *Batt v. Price* (33 L. T. Rep. N.S. 808; L. Rep. 1 Q. B. 264).

Harmsworth in support of the rule.—*Prima facie* the solicitor is not the party liable: (*Hart v. White*, Holt N. P. C. 376.) The solicitor is known to be an agent only, and to act for others, and by a personal undertaking he makes himself liable or derives some benefit, he cannot be sued. There is here neither a personal undertaking, nor does

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the solicitor derive any benefit. *Brewer v. Jones* (*ubi sup.*), and the others cited by the other side, are distinguishable, inasmuch as there was a service to the attorney issuing the writ. In *Merriman v. Newman* (20 W. R. 369) it was held that an attorney who issues a writ of *fi. fa.* is not bound to pay the costs incurred by a sheriff's officer who makes an unsuccessful levy under the writ, on the ground that the latter had not done anything which proved beneficial to the attorney. He also cited:

Maybery v. Mansfield, 9 Q. B. 754.

CLEASBY, B.—It appears to me that the decision arrived at by the County Court judge in this case is correct; and, therefore, this rule must be discharged. This is a case of fees payable to a particular officer, and which he is entitled to exact at the time they become due. There is both reason and authority for holding here that the plaintiff may recover these fees from the defendant, for he could not bind the client. In the case of *Maile v. Mann* (*ubi sup.*), which has been referred to, Alderson, B., distinctly stated during the argument that the question was, "whether the attorney had any authority to pledge his clients credit in a matter where it is the custom for the attorney to pay the fees out of his pocket, when, in fact, it is a ready money transaction." In *Robins v. Bridge* (3 M. & W. 114; 6 Dowl. 140; M. & H. 357), the question arose as to the liability of an attorney to pay the expenses of attendance of a witness whom he had subpoenaed on behalf of his client to give evidence at a trial; and Lord Abinger, in the course of a considered judgment, says, "If, therefore, an attorney employs a stationer to do anything for which he makes a charge, he is liable, as he is for the fees of the officers of the court; for these are ready money transactions, for which the person engaged in the business of the court is liable; for it cannot be presumed that the client would authorise him to pledge his credit when no credit is given." That is the very case here, and this being a transaction in which the respondent had a right to be paid at the time, it is clear the solicitor is responsible. We have here evidence as to the usage, and admission of facts in the correspondence in which the debt is recognised by the defendant. In *Batt v. Price* (*ubi sup.*), it was recently decided by the Court of Queen's Bench that the solicitor is the party liable. This rule must, therefore, be discharged.

GROVE, J.—I agree with what has fallen from my brother Cleasby. There is ample evidence to fix the solicitor here independently of there being a *prima facie* liability. There is distinct evidence of the custom of the office, and knowledge of such custom by the defendant. The decision of the County Court judge was quite correct.

Rule discharged.

Solicitor for plaintiffs, *Langridge*.

Solicitor for defendant, *Foulkes Lynch*.

Thursday, June 1, 1876.

(Before BRAMWELL, B. and GROVE, J.)

WREN (app.) v. Pocock (resp.).

Dogs Act 1871 (34 & 35 Vict. c. 56), s. 3.—Dog "under control"—Evidence of ownership.

An order was made in pursuance of 34 & 35 Vict. c. 56, s. 3, on owners to keep their dogs under the control of some person for a fixed period. A dog

was seen in the road with the appellant's governess and children, rushing backwards and forwards to them, sometimes being as much as twenty yards away. A constable swore the dog belonged to the appellant, and that he had seen it in the appellant's yard within the previous fortnight. The appellant, however, called evidence to contradict this. The justices convicted, but stated a case for the opinion of the court as to whether there was sufficient evidence of ownership, and whether the dog was under control.

Held, that there was reasonable evidence that the dog belonged to the appellant, and was not under control, to support the conclusion arrived at by the justices.

Per Bramwell, B.—The question whether or not a dog is under control within sect. 3 is one of fact and not of law.

CASE stated under 20 & 21 Vict. c. 43.

The following is a copy of an order made by the justices under 34 & 35 Vict. c. 56, s. 3:

To Adam Blandy, Chief Constable of the County of Berks.

Whereas, you the said Adam Blandy, as such to wit, chief constable as aforesaid, have complained to us, the undersigned, two of her Majesty's justices of the peace of the said county, acting for the petty sessional division of Reading, in petty sessions this day assembled, that a mad dog has been found within our jurisdiction.

We do therefore in pursuance of sect. 3 of 34 & 35 Vict. c. 56, order that all dogs throughout the whole of the jurisdiction be confined and kept under the control of such person or persons for the space of three calendar months now next ensuing.

Given under our hands and seals this 15th day of April, 1876.

J. B. MONCK.

A. W. COEHAM.

The following is a copy of a notice published by the said Adam Blandy, in pursuance of the same Act:

Mad Dogs.—Notice.

Whereas a mad dog has been roaming about in to wit, and about certain parishes in the petty sessional division of Reading, and has bitten several dogs, I hereby give notice that, by virtue of an order made and signed this 15th day of April, 1876, by two of her Majesty's justices of the peace of the said county, acting for the petty sessional division of Reading, all dogs within their jurisdiction are to be confined and kept under the control of some person or persons, and not to be allowed to be at large for the space of three calendar months from this date.

Anybody who disobeys the above mentioned order is liable to a fine of 20s.

Dated this 15th day of April, 1876.

A. BLANDY, Chief Constable.

Police constables have power, by virtue of this order to take and detain any dog not under the control of some person, and after five days, if not previously claimed, the chief of the police may order such dog to be destroyed.

The information was preferred under 34 & 35 Vict. c. 56, s. 3 (a), charging the appellant with unlawfully suffering a dog to be at large.

It was proved at the hearing, by Hedges, police-constable, that at about one in the afternoon of Monday, 1st May 1876, he saw the appellant's

(a) By the Dogs Act 1871, s. 3, "the local authority may, if a mad dog, or a dog suspected to be mad, is found within their jurisdiction, make, and when made vary or revoke, an order placing such restrictions as they think expedient on all dogs not being under the control of any person, during such period as may be prescribed in such order, throughout the whole of their jurisdiction, or such part thereof as may be printed in their order. Any person who acts in contravention of any order made in pursuance of this section shall be liable to a penalty not exceeding 20s.

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governess and children in the road, and a dog with them. The dog was running backwards and forwards to them, and was at times 20yds. away from them. The constable knew the dog to be the appellant's, and he had seen the same dog in the appellant's yard within the previous fourteen days.

The appellant called his servant to prove that he had not seen the dog about the place from the 15th April last to the 1st May instant, and that he knew the dog had gone away, and that the appellant had not taken any trouble about it, and that the appellant had exercised no right of ownership over the dog since the 1st Jan. last. It was stated by the appellant that he was paralytic and unable to walk about, and had not seen a copy of the above notice, and that the only occasions on which he went out were to drive direct from his house to the railway, and he contended—

(1.) That the dog was not his dog, but a stray dog. (2.) That due notice had not been given of the order. (3.) That if the magistrates were against the appellant on the first two points, then that the dog was under control.

The magistrates, however, thought the case proved, and convicted the appellant.

The questions for the opinion of the court are—First, whether on the above evidence the dog belonged to the appellant; secondly, whether due notice was given of the order; thirdly, whether the dog was under control.

If the court should be of opinion that the said conviction was legally and properly made, and the appellant is liable as aforesaid, then the said conviction is to stand, otherwise the said information is to be dismissed.

Henry, for the appellant.—There was here no sufficient evidence of ownership. At all events the dog was under control, within the meaning of the section. When a dog is out with a person it is under the control of that person. He cited *Ex parte Markham* (21 L. T. Rep. N. S. 748).

H. D. Greene, for the respondents, was not called upon to argue.

BRAMWELL, B.—This conviction must be affirmed. The order of the magistrates is good, and within the Act. I doubt whether the notice is good. The notice differs from the order. The notice says that "all dogs are to be confined and kept under the control of some person." However, this point was not taken before the magistrates. I am inclined also to think that there was a defect in the information, which was for "unlawfully suffering" a dog to be at large, which was not strictly in accordance with the terms of the notice; but with that we cannot deal now. The question is, did this dog belong to the appellant? I think there was some evidence of it, and that the finding of the justices was reasonable. Lastly, was the dog under control? I rather doubt whether the magistrates have not been labouring under a mistake in thinking that the sole question was whether the dog was at large, and if I was certain that this was so, the conviction would not be proper. However, they have put the right question to us, namely, whether the dog was under control. Now it may or may not have been; either view is consistent with the evidence; and as the question is, in my judgment, one of fact and not of law, and has been decided against the appellant, we shall not interfere.

GROVE, J.—The only part I feel doubt about is as to the meaning of the words "under control." However, I think there was evidence here to show that this dog was not under control.

Judgment for respondent with costs.

Solicitor for the appellant, *Ralph Thomas*.

Solicitor for the respondent, *Sloccombe*, Reading.

(Before **BRAMWELL, B.** and **GROVE, J.**)

OVENDEN (app.) v. RAYMOND (resp.).

Gaming—Public billiard room belonging to licensed victualler—Lodgers playing after closing hours—Statutes 8 & 9 Vict. c. 109, and 37 & 38 Vict. c. 49, s. 10

By 8 & 9 Vict. c. 109, s. 13, the holder of a victualler's licence who keeps a public billiard table, and allows persons to play thereon when the premises are not allowed to be open for the sale of wine, &c., is liable to a certain penalty. By 37 & 38 Vict. c. 49, s. 10, a person licensed to sell any intoxicating liquor, to be consumed on the premises, may sell such liquor at any time to persons lodging in his house. The appellant held a victualler's licence for a certain house at H. The closing hour at H. on week days is 11 p.m., and after that time two gentlemen, lodgers in the house, were found playing billiards. The justices thought that 8 & 9 Vict. c. 109, s. 13 absolutely prohibited all persons without exception from playing at a public billiard table during closing hours, and that such prohibition was not affected by 37 & 38 Vict. c. 49, s. 10. Accordingly the appellant was convicted, but the justices stated a case.

Held, that the conviction was right.

CASE stated by justices under 20 & 21 Vict. c. 43.

At a petty sessions holden at the Town Hall, Hythe, on the 23rd March last, an information was preferred by George Raymond, superintendent of police for the said borough (hereinafter called the respondent), against George Henry Ovenden, licensed victualler (hereinafter called the appellant), under sect. 13 of the Act 8 & 9 Vict. c. 109, charging him for "that he on the 1st March last, at the parish of St. Leonard, Hythe, then holding a victualler's licence for a certain house and premises there situate, called The Swan, in which he then kept a public billiard table, unlawfully did allow certain persons to play at the said table on the said premises at a certain time when the said premises were not by law allowed to be open for the sale of wine, spirits, or beer, or other fermented or distilled liquor, to wit, at ten minutes past 12 a.m.," was heard and determined by us, the said parties respectively being then present, and upon such hearing the appellant was duly convicted before us of the said offence, and we adjudged him to pay the sum of 1s., and also to pay to the respondent the sum of 9s. for his costs in that behalf. Upon the hearing of the information it was proved on the part of the respondent, and found as a fact, that the hour of closing victualling houses in the borough of Hythe was eleven o'clock on week days. At ten minutes past 12 a.m. on the 1st March last respondent went to the appellant's house, the Swan Hotel, which was closed. Respondent knocked, and appellant opened the door, and on respondent going into the house he said to the appellant, "You have billiard playing." He said, "Yes; they have not finished their game." Respondent

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then went into the billiard room and there found two gentlemen, who were lodging in the house, playing billiards. It was contended on the part of the appellant that the gentlemen referred to were lodgers within the meaning of sect. 10 of the Licensing Act 1874, and as that Act permitted a licensed person to sell intoxicating liquor to lodgers after the prohibited hours of closing, the appellant was justified in allowing them to play at billiards after such hours. We, the said justices, were of opinion that sect 13 of the 8 & 9 Vict. c. 109, absolutely prohibited all persons without exemption from playing at a public billiard table in a house of a person holding a victualler's licence, when the premises are not allowed to be open for the sale of intoxicating liquors; and that the exception in sect. 10 of the Licensing Act 1874, allowing liquors to be supplied to *bond fide* lodgers, does not affect such prohibition. We, therefore, convicted the appellant, as above stated, and granted a case for the opinion of this court. The question for the opinion of this court is whether the appellant, under the above circumstances, was rightly convicted. If the court should be of opinion that the appellant was rightly convicted, and the appellant is liable as aforesaid, then the conviction is to stand; but if the court should be of opinion otherwise, then the said information is to be dismissed, or such order to be made as the court shall think fit.

The 8 & 9 Vict. c. 109, s. 13, enacts as follows: "Every person keeping any public billiard table, or bagatelle board, or instrument used in any game of the like kind, whether he be the holder of a victualler's licence, or licensed under this Act, who shall allow any person to play at such table, board or instrument, after one and before eight o'clock of the morning in any day, or at any time on Sunday, Christmas Day, or Good Friday, or any day appointed to be kept as a public fast or thanksgiving, and every person holding a victualler's licence, who shall allow any person to play at such table, board, or instrument, kept on the premises specified in such victualler's licence, at any time when such premises are not by law allowed to be open for the sale of wine, spirits, or beer, or other fermented or distilled liquor, shall be liable to the penalties herein provided in the case of persons keeping such public billiard table, bagatelle board, or instrument as aforesaid, for public use without licence; and during those times when play at such table, board, or instrument is not allowed by this Act, any house licensed under this Act, and any billiard room in any house specified in any victualler's licence, shall be closed, and the keeping of the same open, or allowing any person to play therein or thereat, at any of the times, or on any of the days during which such play is not allowed by this Act, shall be deemed in each case an offence against the tenor of the licence of the person so offending."

By the Licensing Act 1874 (37 & 38 Vict. c. 49), s. 10: "Nothing in this Act, or in the principal Act contained shall preclude a person licensed to sell any intoxicating liquor to be consumed on the premises, from selling such liquor at any time to *bond fide* travellers, and to persons lodging in his house, provided that no person holding a six day licence shall sell any intoxicating liquor or Sunday to any person whatever not lodging in his house."

Dering, for the appellant.—This conviction is wrong. The prohibition contained in 8 & 9 Vict. c. 109, s. 13, only applies when the premises are not allowed to be open for the sale of wine, &c. But by the Licensing Act 1874, intoxicating liquors may be sold at any time to lodgers, so that the prohibition does not attach at all.

The respondent did not appear.

Per Curiam.—The appellant is clearly wrong. It is manifestly absurd that lodgers in the house may be supplied with drink after closing hours, and yet

that they are not allowed to play an innocent game of billiards. The words of the section are, however, too plain to admit of any other interpretation. This was evidently a *casus omissus* on the part of the Legislature.

Conviction affirmed.

Solicitor for the appellant, *Steele*, agent for *Minter*, Folkstone.

EXCHEQUER DIVISION.

Reported by H. LUTEN and A. PAWSON, Esqrs., Barristers-at-Law.

Wednesday, Feb. 9, 1876.

DOVER v. CHILD.

Res judicata—*Trover of goods*—*Previous refusal of magistrate to order delivery of the goods under 2 & 3 Vict. c. 71, s. 40*—*Estoppel*—*Title to the goods*.

To a declaration in trover for the recovery of some harness, the defendant pleaded that the plaintiff had previously applied to a police magistrate within the metropolitan district under 2 & 3 Vict. c. 71, s. 40, to order the delivery up to him by the defendant of the harness alleged to be unlawfully detained. That the magistrate, after due inquiry made into the title to such harness, refused to make such order, and that thereupon the plaintiff brought this action to recover the harness.

Held, upon demurrer, that the proceedings before the magistrate did not estop the plaintiff from bringing the present action and that the plea was bad.

THE declaration was in trover for that the defendant converted to his own use, and wrongfully deprived the plaintiff of the use and possession of his goods, to wit, a set of patent joiner's cramps, a set of harness, and a goat.

To this the defendant pleaded, amongst others, the following plea:

As to so much of the declaration as relates to the set of harness therein mentioned, that the plaintiff ought not to be permitted to say that the defendant converted the same to his own use, or that the same was the plaintiff's, because the defendant says that the alleged conversion took place after the 25th Aug. 1839 (the date of the commencement of the 2 & 3 Vict. c. 71, s. 40), and consisted of the detention by the defendant within the limits of the metropolitan police district of the said goods, the value of which was not then greater than 15*l.*, whereupon, afterwards, and before this suit, the plaintiff duly made his complaint before George Chance, Esq., one of the magistrates of the police courts of the metropolis, sitting at the Lambeth police court, in the county of Surrey, for that the defendant unlawfully and without just cause detained within the said district the said goods which the plaintiff then alleged to be his property, and to the property and possession of which goods the plaintiff then claimed to be entitled, whereupon the said George Chance duly summoned the defendant to appear at a certain day and hour at the police court before him, or such other magistrate of the said police court as might then be there, to answer the said complaint, and to show cause why an order should not then and there be made upon him to deliver the said goods to the plaintiff. And the defendant, in

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obedience to the said summons, duly appeared at the time and place therein mentioned, before the said George Chance, and the said George Chance then and there heard the said case and the subject matter of the said complaint, and then and there inquired into the title to the said goods and the defendant's possession thereof. And it then appeared to the said George Chance, and he then decided and adjudged that the defendant then had title to the said goods, and to the possession thereof, and the plaintiff had then no title thereto, or to the possession thereof, and he then dismissed the said summons, and thereby adjudicated the subject matter of the said complaint in favour of the defendant, and the defendant has ever since held possession of the said goods on the said title, and the plaintiff has never since acquired any title or right to the possession of the said goods other than he had at the time of the said decision, and this the defendant is ready to verify, whereupon he prays judgment if the plaintiff ought to be permitted against the decision of the said magistrate to say that the said goods at the time of the alleged conversion were his goods.

To this the plaintiff demurred.

Prentice, Q.C., for the plaintiff, in support of the demurrer.—The dismissal of a summons is no bar to an action; it may be looked on in the nature of a nonsuit. These proceedings before the magistrate were taken under 2 & 3 Vict. c. 71, s. 40, which says: "Upon complaint made to any of the said magistrates by any person claiming to be entitled to the property or possession of any goods which are detained by any person within the limits of the metropolitan police districts, the value of which shall not be greater than 15*l.*, and not being deeds, muniments, or papers relating to any property of greater value than 15*l.*, it shall be lawful for such magistrate to summon the person complained of, and to inquire into the title thereto or to the possession thereof, and if it shall appear to the magistrate that such goods have been detained without just cause after due notice of the claim made by the person complaining, or that the person detaining such goods has a lien or right to detain the same by way of security for the payment of money, or the performance of any act by the owner thereof, it shall be lawful for such magistrate to order the goods to be delivered to the owner thereof, either absolutely or upon tender of the amount appearing to be due by such owner (which amount the magistrate is hereby authorised to determine), or upon performance, or upon tender and refusal of the performance of the act for the performance whereof such goods are detained as security; or if such act cannot be performed, then upon tender of amends for non-performance thereof (the nature and amount of which amends the magistrate is hereby authorised to determine); and any person who shall neglect or refuse to deliver up the goods according to such order, shall forfeit to the party aggrieved the full value of such goods not greater than the sum of 15*l.*, such value to be determined by the magistrate. Provided always, that no such order shall bar any person from recovering possession of the goods or money so delivered or forfeited by suit or action at law from the person to whose possession such goods or money shall come by virtue of such order, so that such action shall be commenced within six calendar months after such order shall be made."

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[*CLEASBY, B.*—The proceedings before the magistrate were merely auxiliary, and not in substitution of any proceedings the plaintiff might take in a Superior Court to recover his property; it is like the common case of a person going before a magistrate to get possession of tenements, and whether the magistrate does or does not order it to be given up, he may still bring an action of trespass.] The proviso of sect. 40 expressly declares that no order such as may be made under the section shall bar any person from recovering possession of the goods, and here the magistrate made no order. The decision of the magistrate refusing the order no more bars the plaintiff than a refusal by justices to grant an order in bastardy proceedings bars the mother from taking subsequent proceedings; it is not a final order of discharge:

Rea v. Jenkin, Ca. Temp. Hard 301;

Reg. v. Machen, 14 Q. B. 74; 18 L. J. 213, M. C.

[He was then stopped.]

A. B. Kempe, for the defendant, in support of the plea.—The question in this action is *res judicata*, for it is the same as that which was entertained and decided by the magistrate, though the form of proceeding is different, and the defendant ought not to be put to defend his title twice. There is nothing to take the case out of the general rule laid down in the *Duchess of Kingston's Case* (2 Smith's Lead. Cas. 7th edit. 761), "that the judgment of a court of concurrent jurisdiction directly upon the point is, as a plea, a bar, or as evidence conclusive between the same parties upon the same matter directly in question in another court." Here the magistrate, by the Act, has express jurisdiction to inquire into the question of title, and the plea states that he did so inquire. His decision that he would make no order is in effect an adjudication that the plaintiff had, as against the defendant, no title to the goods, and that point was the point directly in issue between the parties there, and is so now. That the form of proceeding is not the same in both cases is quite immaterial. In *Routledge v. Hislop* (2 E. & E. 549; 2 L. T. Rep. 53; 29 L. J. 90, M. C.) a servant sued her master in the County Court for discharging her, and the verdict was in favour of the defendant. She afterwards took out a summons before the magistrates against the defendant to recover her wages, and the Court of Queen's Bench held that the question to be decided was essentially the same, viz., whether the discharge was wrongful, and that the decision in the County Court was conclusive as between the parties. No distinction can be drawn between the case where the magistrate refuses to make an order and where he makes one. The plaintiff has no right to try an experiment in one court and when he has failed to repeat it in another. He has chosen his tribunal, and must abide by its decision. In *Flitters v. Alfrey* (31 L. T. Rep. 878; L. Rep. 10 C. P. 29), Grove, J. said, "It would be against principle and authority if a party, having tried an experiment in one tribunal, could, if judgment was against him, proceed again in another court, not by way of appeal, but by merely varying the form of procedure, or by forcing the opposite party to proceed for redress in respect of the same question as had been previously litigated, again harass his antagonist for the same cause and take his chance of success in another court, where he has previously failed in a court of competent juris-

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diction." The proviso at the end of sect. 40 shows that the plaintiff is bound by the decision of the magistrate, while the defendant has six months in which to question such decision, and there is no inequality in this, as the former can if he chooses commence with an action, while the latter, if it were not for the proviso, would have no opportunity of having the question tried in a superior court, and even by the proviso he must take proceedings within six months:

Cummings v. Heard, 20 L. T. Rep. 975; L. Rep. 4 Q. B. 669;

Gibbs v. Cruikshanks, 28 L. T. Rep. 740; L. Rep. 8 C. P. 454.

KELLY, C.B.—The object of this Act (2 & 3 Vict. c. 71) was to give to a magistrate power to order the delivery up of goods of small value, but I do not think that sect. 40 gives him power to determine the title to the goods. If we look at the section we see that it gives power to the magistrate, upon complaint made of the detention of goods, to summon the person complained of, and inquire into the title to the goods or to the possession thereof. He has power to inquire into the title undoubtedly; but there his power ceases. He may order the goods to be delivered up to the owner thereof, either absolutely or upon certain terms; but here no one of these orders has been made by him; he has not exercised the powers he possessed of making those orders, but has simply dismissed the summons. If he had made any of those orders wrongfully, the defendant, or anyone claiming under him, would not be without remedy, if he could prove that he was lawfully entitled to the goods; for the proviso gives him six months in which to question the magistrate's decision, by bringing an action in a superior court for the recovery of the goods. With regard to the plaintiff, there is no limitation of any common law or statutory right which he might be possessed of to try and recover his goods by other proceedings. Supposing the goods to be the plaintiff's, and the magistrate's decision erroneous, the plaintiff would, if the contention on behalf of the defendant were right, be deprived of his goods without any power whatever of appealing. I therefore think that the magistrate has power to inquire into the title to the goods to such an extent as may enable him to make any of the orders under sect. 40 of the Act, but that where he does not make any order the plaintiff is not precluded from seeking his remedy elsewhere.

CLEASBY, B.—There is no doubt that the authorities that have been cited on the part of the defendant were properly decided, but I do not see that they have any bearing on the case now before us. If the jurisdiction of the magistrate were to give judgment upon the question of title, that judgment could afterwards be questioned, but in this case the power given is to make orders on the conclusion he may form as to the title to the goods. He must therefore inquire into the title, but his decision is not like a judgment, which can only be questioned in a court of appeal, because it appears from the proviso to sect. 40 that although the magistrate may have inquired and made an order with regard to the goods, yet the defendant may afterwards bring an action. That seems to show conclusively that the magistrate has no power to determine absolutely the title to the property, and it would be monstrous that if he were to form his conclusion one way, the one party might

bring his action, and yet that the plaintiff, merely because he has taken advantage of a convenient mode of proceeding should be precluded from appealing. It has been said that by the proviso there is the limitation of six months within which the defendant must proceed, and yet the plaintiff would be at liberty to sue in any case, but the reason for the limitation in the case of the defendant is that it would be most undesirable, after the goods have been handed over by the command of a magistrate, and that state of things had continued for six months, that it should be altered; the six months is a reasonable time within which the defendant may test the correctness of the order. This is not altogether an anomalous proceeding, for it is very like the process before justices to obtain possession of small tenements. An order is made, but the person against whom the order is made is not conclusively bound by it, but may bring his action of trespass at once. I do not think the Act of Parliament gives the magistrate power to determine the title; I think he has only to form a conclusion so as to found an order, which is a convenient mode of putting an end to disputes, and therefore the plaintiff is not precluded by the magistrate's decision from bringing this action.

HUDDLESTON, B.—I am of the same opinion. Looking at the words of the statute, we see that they are limited both as to the area of jurisdiction, namely, the metropolitan district, and as to the value of the goods, namely, 15*l*. No doubt the magistrate has power to inquire into the title thereto, but such inquiry is only for the ultimate purpose of making an order either absolute or conditional. This, however, is not a final order, for, by the proviso, the person against whom the order is made may within six months bring an action. If he can do this, surely the order is not final. In *Flitters v. Alfrey* (*sup.*) the court did not decide the question of estoppel, but said that the parties having chosen a tribunal in which the matter could have been finally decided, and having gone before such tribunal, and its decision having been given, we will not allow the parties to dispute it again. I think the plea is bad, and that our judgment must be for the plaintiff.

Judgment for the plaintiff.

Solicitors for plaintiff, *Evans and Eagles*.

Solicitor for defendant, *G. H. Finch*.

CHANCERY DIVISION.

(Before Vice-Chancellor BACON.)

Reported by F. GOULD and H. L. FRASER, Esqrs.,
Barristers-at-Law.

May 26, 27, 30, and 31, 1876.

SHAW v. THOMPSON.

Advowson—Right of election vested in parishioners and ratepayers—Mode of election—Voting—Right of parishioners to vary method of—Ballot—Illegal election not set aside—Costs.

The advowson of a living was vested in trustees for the ratepayers and parishioners of the parish who had the right of electing to a vacancy and of determining the mode in which the election should be conducted. For nearly 200 years the mode of election had been by a three or four days' poll and open voting. In 1875 a vacancy

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occurred, and thereupon the churchwardens convened a meeting of the inhabitants to consider the necessary steps to be taken in the election, and to adopt such course as might be deemed most desirable. One of the churchwardens took the chair at this meeting, and resolutions were passed that the 30th Aug. following should be fixed for the nomination meeting, that there should be a three days' poll, and that all necessary arrangements for carrying out the election should be left to the churchwardens. Subsequently the churchwardens, pursuant to a numerously signed requisition, convened a meeting of the inhabitants for the 25th Aug. Neither of the churchwardens took part in this meeting, but resolutions were duly passed that in the event of a poll being demanded it should be taken by ballot, that the hours of polling should be from 9 a.m. to 9 p.m., and that the poll should take place on one day only. A copy of these resolutions was immediately forwarded to the churchwardens: At the nomination meeting of the 30th Aug. both churchwardens were present, one of them being in the chair, and a poll was demanded on behalf of one of the candidates. The chairman then announced that there would be a three days' poll, and that the poll would be open from 8 a.m. to 8 p.m. A ratepayer then came forward to move an amendment in accordance with the resolutions of the 25th Aug., whereupon the chairman immediately left the chair declaring the meeting at an end. Another person was then voted into the chair, and the amendment was carried by a large majority. The churchwardens disregarded the resolutions of the 25th Aug., and carried out the election in accordance with the former custom. An action having been brought to set aside the election.

Held, that the conduct of the churchwardens in disregarding the wishes of the inhabitants was wholly illegal and irregular; but that, inasmuch as the evidence failed to show that any one person was prevented from voting, or that, if the election had been in accordance with the wishes of the parishioners, the result would have been different, the plaintiffs were not entitled to the relief they sought.

Held, also, that as the right of determining the method in which the election should be carried out was vested in the inhabitants they were entitled, if they thought fit, to adopt the ballot.

By a deed dated the 2nd June 1656, and made between Edward Drake of the one part, and Josiah Berners, James Berners, Richard Powell, Richard Powell the younger, and Benjamin Powell, of the other part, it was witnessed that for the pecuniary considerations therein mentioned the said Edward Drake granted to the parties of the other part and their heirs all the church of Clerkenwell, rectory, and parsonage, churchyard soil and buildings, and the advowson, donation, free disposition, right of patronage, and vicarage, to hold unto and to the use of them and their heirs upon trust for the only use, benefit, and behoof of the parishioners and inhabitants of the parish of St. James, Clerkenwell, and their successors for ever.

From the date of the said deed the church and rectory of Clerkenwell have been vested in trustees upon the trusts declared by the deed, and the parishioners and inhabitants in vestry assembled or the churchwardens and inhabitants have from

time to time chosen an incumbent of the said living.

In the month of July 1681, differences arose as to the right to elect the incumbent, and the vestry professed to make rules as to voting in such election.

In 1768 a suit of *The Attorney-General v. Rutter* (2 Russ. 101 [n.]) was instituted to determine the right of election, and a decree was made in February 1769, which declared that the right of election was only in the parishioners and inhabitants paying tithes, rates, and assessments to the church and poor.

In June 1875 the benefice became vacant, and thereupon posters signed by the churchwardens were issued headed "Election of Vicar for Clerkenwell," and giving notice that a public meeting of the parishioners and inhabitants assessed to the poor rate would be held in the vestry room of the parish church on July 28th, 1875, at 7 o'clock in the evening to take into consideration the necessary steps to be taken in the election of a vicar to the living then vacant, and to adopt such course as might be deemed most desirable.

A meeting was accordingly held on the 28th July, Edward Culver, one of the churchwardens, acting as chairman. At this meeting the chairman stated that there were twenty-one candidates for the living (including the Rev. J. H. Rose and the Rev. W. Holderness), and suggested that Monday the 30th Aug. should be fixed for the election at the vestry hall with a preliminary meeting for the purposes of nomination. In answer to a question as to the system of voting to be adopted the chairman stated that the election would be conducted by open voting; that he did not consider it necessary to have a polling place in each ward of the parish, inasmuch as that was not the case on the occasion of the last election. One of the parishioners then moved that in the opinion of the meeting it was desirable that the churchwardens should convene a meeting of the inhabitants for Monday the 30th Aug. at 6 o'clock in the evening to proceed to the election of a vicar. This motion was seconded by Alfred Goad, the other churchwarden, but after some discussion it was determined that the meeting should take place at 7 o'clock instead of 6 o'clock in the evening to give a better chance to the working men of the parish to attend. Mr. Samuel Brighty, one of the parishioners, then moved that in the event of a poll being required there should be only one day's poll, which should be kept open from 8 a.m. to 8 p.m. The chairman promised to be guided by precedent, and to take a legal opinion on the subject, whereupon the motion was negatived.

Subsequently a requisition signed by thirty-four parishioners and ratepayers was prepared and forwarded to the churchwardens, stating that it had been resolved at a meeting held on the 17th Aug. that "having regard to the organic changes made in electoral law since the election of the late vicar in 1857," they desired a meeting "to decide as to the mode in which the votes should be taken at the ensuing election, and also as to the duration and hours of polling." Pursuant to this requisition the churchwardens duly convened a meeting of parishioners and ratepayers for Wednesday, the 25th Aug., at 7 o'clock in the evening "to

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consider the questions referred to in the said resolution and requisition."

A meeting was accordingly held on the 25th Aug. Edward Culver did not attend this meeting, but Alfred Goad was present, but refused to take the chair. Thereupon William Osborne, a ratepayer and parishioner, was voted into the chair, and acted as chairman throughout the meeting. At this meeting the six following resolutions were duly moved, discussed, and carried—the first four unanimously, and the remaining two by large majorities. (1.) That the churchwardens should be appointed returning officers. (2.) That in the event of a poll being demanded for the election of the vicar, it should be taken by ballot. (3.) An amendment (on a motion that the hours of polling should be from 8 a.m. to 8 p.m.) that as many of the working hands of the parish only left off work at 8 p.m., the hours of polling should be from 9 a.m. to 9 p.m. (4.) That there should be a polling place in each ward of the parish to make it as easy as possible for every parishioner and ratepayer to record his vote. (5.) That the poll should take place on one day only, and that the following Monday, the 30th Aug., should be the day of nomination. (6.) That the resolutions as passed should be forwarded to the churchwardens, and that they be requested to carry them out. On the following day these resolutions were duly forwarded to the churchwardens.

On the 30th Aug., but prior to the nomination meeting, two of the parishioners and ratepayers, in anticipation of some such announcement as was later in the day made by Edward Culver, as chairman of the nomination meeting, duly served a formal protest in writing upon the churchwardens protesting against any infraction by them of the said resolutions of the 25th Aug., and stating their intention of contesting the validity of a poll taken in any other way than in accordance with the terms of such resolutions.

The nomination meeting was held at 7 p.m. the same evening, Edward Culver presiding. The Rev. J. H. Rose and the Rev. W. Holderness were respectively duly nominated, and the show of hands was in favour of the Rev. W. Holderness. On a poll being demanded on behalf of the Rev. J. H. Rose, Edward Culver, as chairman, announced that such poll would be opened on the following day, 31st Aug., at 8 a.m. and closed at 8 p.m., that such poll would continue for three consecutive days, and that the mode of voting would be open and oral. Great dissatisfaction at this announcement was expressed by the meeting, and the said Samuel Brighty then came forward to move an amendment in accordance with the resolutions passed on the 25th Aug., but Edward Culver, the chairman, declined to put it to the meeting, and left the chair, declaring the meeting at an end. The said William Osborne was then voted into the chair, and the meeting continued, and then a resolution was carried by a large majority endorsing the resolutions passed at the meeting of the 25th Aug., and protesting against the arrangements announced by the recent chairman, Edward Culver.

The same day the churchwardens advertised that the announcement which had been made at the nomination meeting by Edward Culver as to the time and manner of the poll, had been made under the advice of counsel. The same day Samuel Brighty delivered to the churchwardens a

formal protest in writing against their decision as to the mode of voting, and stating that he (although the friends of the Rev. W. Holderness would go to the poll) thereby held himself free to take any course that he might be advised to render the election nugatory, and that, therefore, he would hold the churchwardens responsible for its irregularity and illegality.

The next day, 31st Aug., the voting commenced, and the poll was kept open also on the 1st and 2nd Sept. The mode of voting was open and oral, and only one polling place (the vestry hall) was appointed, and the polling was closed each day at 8 p.m.

At such poll, the Rev. J. H. Rose was elected by a large majority, and thereupon a protest was immediately served upon the churchwardens by certain parishioners and ratepayers, and subsequently a *caveat* was entered against the presentation and induction of the Rev. J. H. Rose.

On the 29th Nov. George Shaw (on behalf of himself and all other the parishioners and ratepayers of St. James, Clerkenwell) commenced an action against the churchwardens, the trustees of the deed, the Bishop of London, and the Rev. J. H. Rose. By his statement of claim, the plaintiff charged that the meeting of the 25th Aug. was a duly and properly convened meeting of the parishioners and ratepayers; that the sense of the said meeting was duly and properly expressed in the resolutions passed thereat; that such resolutions were accordingly valid and binding on the churchwardens and the parishioners and ratepayers of the parish generally; and that, in consequence of such resolutions having been disregarded at the election, such election was null and void. And the plaintiff asked for a declaration that the election was null and void, and for an injunction to restrain the churchwardens and trustees from presenting, and the Bishop of London from inducting, the Rev. J. H. Rose to the living or benefice of St. James, Clerkenwell.

The churchwardens, the trustee, and the Rev. J. H. Rose in their statements of defence contended that the meeting of the 28th July distinctly understood and assented to the election being conducted in accordance with the ancient usage and custom, and that the mode in which the election was to be conducted was then finally and duly settled; that the parishioners and inhabitants were bound by such ancient usage and custom, and that the same could not properly or legally be departed from without the unanimous consent of all the parishioners and inhabitants entitled to vote at the election; that the meeting of the 25th Aug., and the resolutions passed thereat were illegal and irregular; that the election had been conducted in strict accordance with the ancient custom and usage, and that the Rev. J. H. Rose had, in fact, been duly elected; and they submitted that in the absence of any special usage, custom, or Act of Parliament authorising or requiring the voting at an election of any kind to be taken by ballot the only legal and valid mode of voting was open and oral voting.

The Bishop of London did not appear. The other material facts and the arguments are sufficiently noticed in the judgment.

Kay, Q.C. and J. H. Idle, for the plaintiffs.

Sir Henry Jackson, Q.C. and D. L. Alexander, for the Rev. J. Rose.

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Everitt and Ford, for the trustees and churchwardens.

The following authorities were referred to in the course of the arguments :

Carter v. Cropley, 8 De G. M. & G. 680, 690 ; 26 L. J. N. S. 249, Ch. ;

Attorney-General v. Rutter, 2 Russ. 101 (n) ;

Edenborough v. Archbishop of Canterbury, 2 Russ. 93, 99 ;

Attorney-General v. Parker, 3 Atk. 576 ;

Attorney-General v. Foster, 10 Ves. 335, 346 ; on app. sub-nom. *Attorney-General v. Newcombe*, 14 Ves. 1, 8 ;

Faulkner v. Elger, 4 B. & C. 449, 455 ;

Ex parte Mawby, 3 Ell. & Bl. 718 ;

Reg. v. Rector of St. Mary, Lambeth, 3 Nev. & P. 416.

THE VICE-CHANCELLOR.—Having for several days listened to the evidence and the arguments I have had sufficient time to deliberate upon the case and to form the judgment which I now pronounce. The rights of the parishioners have been established long ago by judicial decision. The judgment of Lord Hardwicke pronounced in 1776 has in my opinion exhausted the subject ; and a more clear, and I need not say impartial, judgment it is impossible to conceive. The rights of the parishioners are there established, to use Lord Hardwicke's words, "upon the foot of the deed." The deed creates them the owners of the advowson. The trustees are appointed only by way of machinery with no interest, beneficial or otherwise, but with the duty only of carrying into effect the resolutions founded upon the wishes of the inhabitants and parishioners. Before Lord Hardwicke there were several questions raised, but the material questions which he did consider were "in whom the right of election is, and what are the qualifications of the electors ; and this tends to the general point of establishing the right by a decree of this court and also to the question in regard to Mr. Doughty." Then he proceeds with a definition and description of the two words "parishioner" and "inhabitant," upon which I need not now dwell, and concludes that the right is universal in the parishioners and inhabitants. As to the election of Mr. Doughty he says "If according to the right, there is no doubt of it ; but suppose it was not according to the right of election, Mr. Doughty on the poll had a majority of 286, and on the scrutiny they have gone into no proof as to the merits of the election or how the majority stood upon the right of the election ; and therefore, if it had been in the housekeepers paying church and poor, I could not set aside the election as they have not gone into the proof upon the merits, nor turn Mr. Doughty out as he is in possession." Then he declines to direct an issue for the reasons which he gives. What I have to consider in this case in the first instance is whether the proceedings at the last election are such as the law requires, and I do not hesitate to say that the conduct of the churchwardens, however well intended, or however impartial it may have been according to their notions of impartiality, has been at least erroneous. The right of the parishioners after the judgment I have referred to is not to be questioned, and the only way in which that right can be asserted, and the only way in which those wishes can be expressed, is by calling public meetings. The churchwardens are the officers upon whom the duty of calling those public meetings rests. They have endeavoured to discharge that duty, they have exercised that authority which the law vests

in them, and they have called the several meetings which have been mentioned. Now the first meeting is stated in the statement of claim, admitted by the statement of defence, and proved by the evidence, for, although great difference of opinion prevails among the witnesses who have been called, there is no substantial question of fact at issue. The question is one of law only. A meeting took place on the 28th July, when one of the churchwardens, as was right, was in the chair, and it was attended by a very considerable number of the ratepayers of the parish. Then, the churchwardens having called that meeting, the minute book containing the proceedings at that meeting is put in evidence, and it certainly presents to me a somewhat strange appearance. The notice convening the meeting is read, and then is entered a letter and opinion which had been laid before the churchwardens, but which it is admitted and proved was not communicated to the meeting. To what end that should be entered upon the minutes, unless for the purpose of communication to the persons assembled at the meeting, I have not heard a suggestion. These documents being entered upon the minutes of the meeting, any body, without explanation, would conclude that they were read to the meeting, or that the meeting was apprised of the effect and tenor of them, and it would be the churchwarden's reason, if not his justification, for expressing any opinion that he did express. But it is admitted that they were not communicated. It is then moved and seconded that Monday, the 30th Aug., be fixed for the nomination of the candidates, and it was then moved as an amendment, that Monday, the 30th Aug. at 7 o'clock, should be fixed (the difference being between the hours of six and seven o'clock) for the nomination of candidates, which amendment was put and carried. It is next moved by Mr. Brighty that there should be a one day's poll only from 8 a.m. to 8 p.m., which motion was put and lost. The chairman then intimated that there would be three days' poll, as usual, which was unanimously agreed to. It was next moved by Mr. Thompson that it be left to the churchwardens to make all necessary arrangements for carrying out the election, and then there was a vote of thanks and the meeting adjourned. Now, I say again, I can conceive no reason, and certainly none has been suggested to me either in the evidence or during the course of the argument, why that advice which the churchwardens had very properly taken from their legal assistant, Mr. Boulton, was not communicated to the meeting. Possibly if it had been communicated to the meeting, some of the other proceedings would not have been taken. Persons would have been either satisfied or dissatisfied with the suggestions contained in Mr. Boulton's letters. They had no opportunity given to them by the churchwardens—who claim for themselves, and who to a certain extent are justified in claiming, the exercise of perfect impartiality, and a sincere desire to meet the wishes of the parishioners—of dissenting from it. No mention whatever is made of it, but, it being resolved that it should be left to the churchwardens to make all necessary arrangements for carrying out the election, by the course of the argument, and still more by what is said by the churchwardens themselves in their examination and by some of their witnesses, it seems now to

have been concluded that when the meeting once resolved that all the necessary arrangements for carrying out the election should be left to the churchwardens, it was intended they should have supreme authority to do whatever they thought fit in the matter; but that is not the construction I should put upon it. Even if the letters of Mr. Boulton had been communicated, that is not the construction I should have put upon it. The words do not mean that. They mean that the churchwardens are to regulate the manner of carrying out the election. That is all that they have to do—they are to carry it out still at the wish and will of the parishioners and inhabitants. That is put beyond all doubt and question, and it is not in the power of the churchwardens now to say that inasmuch as that resolution which I have last read may have been come to, the power of the parishioners and inhabitants to control and regulate the election was exhausted and gone, and that they could not, to use a phrase which some of the gentlemen used, upset that resolution. That, as I have said, was an afterthought, because the churchwardens did not then take that view of the subject. I pass over the meeting of the 11th Aug. On the 25th Aug. a meeting was held of which there is no entry in this book. The meeting of the 28th July was the first meeting, and then the meeting of the 30th Aug. was fixed by the minute which I just now read. Upon that occasion Mr. Brighty moved that motion, and it was lost upon a division. The statement in the claim is, "that the chairman promised to be guided by precedent and to take a legal opinion upon the subject, whereupon the motion was negatived," and the evidence establishes that fact. In considering the impartiality of the churchwardens, I ask what was the meaning of that? The chairman knew of the nature of Mr. Brighty's proposition that there should be only one day's polling from 8 to 8, and he declined to adopt it, but promised to be guided by precedent and to take a legal opinion upon the subject, and thereupon the motion was negatived, and it was negatived for that reason. That is the meeting of the 28th July. Then the parishioners, not satisfied with what had taken place, and not thinking that they had exhausted their powers, presented a requisition to the churchwardens, urging them to call a meeting of the 11th Aug., which was accordingly done. Then a second requisition is signed and is addressed to the churchwardens, and is accepted and acted upon by them, and they in pursuance of that requisition, and in discharge of their duty, call a meeting for the 25th Aug. The requisition is this:—"The ratepayers request the churchwardens to call a public meeting to consider in the interests of the public, the best mode of conducting the forthcoming election for the vicar." It then states certain private resolutions which had been carried at the house of a Mr. Von Joel. Then the churchwardens, in the exercise of their functions, do this: They publish an advertisement in these terms—"Pursuant to the above requisition we hereby convene a public meeting of the parishioners and inhabitants to be held in the Parochial School Rooms on Wednesday, the 25th Aug. at 7 o'clock precisely, to consider the questions referred to in such requisition." Can the churchwardens who have so acted be heard now to say that, the resolution of the 28th July having reposed in them the authority or power to

regulate the forthcoming election, there was an end of the matter, and that that resolution could never be altered, when they themselves call a public meeting to consider the questions referred to in such requisition? The meeting takes place on the 25th Aug. Mr. Goad was present, but Mr. Culver was absent. Mr. Goad, however, declined to take the chair, and another person was appointed to the chair by a perfectly regular and proper proceeding, and then resolutions are passed. Now those resolutions are of the utmost importance to the case as stated by the plaintiffs. The original meeting stood fixed under the resolution of the 25th July, for the 30th Aug., and in the meantime this meeting takes place, at which these resolutions are moved and carried. [His Lordship read the resolutions.] Now this was a meeting convened by the churchwardens themselves. Their non-attendance at that meeting did not destroy the validity of the meeting. There was no appearance by them to protest against the resolutions which should then be carried, and no intimation to the parishioners that they did not feel themselves bound, as by issuing that placard they had confessed they were bound, to consider the wishes of the parishioners expressed at that meeting with respect to the election. The resolutions were immediately afterwards transmitted to the churchwardens. Then comes the 30th Aug., the day to which by the vote of the 28th July the meeting had been adjourned, but in the meantime this duly convened meeting had been called, and resolutions as to the legality or propriety of which I have heard no suggestion, excepting the one urged by Sir H. Jackson respecting the ballot, as to which I will say a word by-and-by, had been passed. [His Lordship then considered the resolution as to the hours of polling, and held that it was consistent with the evidence and reasonable in itself, that 9 o'clock was a convenient hour up to which the voting places should be kept open; and continued.] With these resolutions in their hands the churchwardens take the opinion of a learned counsel. Upon what statement that opinion was procured I have no sort of evidence. The case has been called for and has not been produced, but the opinion has been produced and it recommends the churchwardens to ignore the resolutions of the 25th Aug. It is no part of my business or intention to throw any doubt upon the value of that opinion, but I can conceive no reason drawn from the facts as they are in evidence why the churchwardens who had convened that meeting should ignore what was done at that meeting, which was of their own creation. Nevertheless they did, and having on the 27th Aug. procured the opinion upon which they say they acted, then comes the 30th Aug., to which day the meeting of the 28th July had been adjourned, and then this takes place: The candidates having been heard and a show of hands being taken, a poll was demanded by the friends of Mr. Rose, and then it was resolved that the poll should be open until 8 o'clock at the vestry hall, and that such poll should continue for three days as previously arranged. The churchwardens who had promised to take a legal opinion, and who had prevented the meeting on the 28th July going further than it had gone in consequence of that promise made by them, having taken that opinion, do not upon this occasion communicate that opinion to the meeting, do not give any

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information whatever to the meeting, but simply come to the resolution that the poll shall be for three days as previously arranged, and that is all that takes place at that meeting except only this that the persons whom the present plaintiff represents were very desirous of having the subject in which they were interested brought before that meeting, and Mr. Culver himself in his evidence says that he prevented that. He did it because, having been furnished with a copy of the intended resolutions, he said he knew its object was to upset what had been done on the 28th July. He says "I rose from the chair when Mr. Brighty was moving the resolutions because I thought he was out of order." Why was he out of order? It was a meeting of the parishioners and inhabitants, and every parishioner and inhabitant had a right to move for anything he liked and if it was seconded it ought to have been put to the vote. But the churchwarden's words are these "I rose from the chair when Mr. Brighty was moving, because I thought he was out of order. The meeting being for nomination I left the chair when that was done." But the churchwarden made a mistake if he thought it was not his duty while he was in the chair to listen to any motion that was made and put it when it was seconded. What right had the chairman by leaving the chair to put an end to a meeting duly convened? Leaving the chair did not put an end to the meeting. It is said that there was a vote of thanks then moved and seconded, but whether anybody in the uproar that took place heard the gentlemen who moved and seconded it is a matter which is left in considerable doubt. That nothing else was done by the chairman is quite clear. The minute in the vestry book announces that "a vote of thanks having been passed to Mr. Culver for his services in the chair, the meeting adjourned." How could the meeting adjourn except upon a resolution? Whoever moved that the meeting should be adjourned, the meeting did not adjourn, and the entry in the minute book is wholly erroneous. It is not the fact that there was any resolution to adjourn the meeting. On the contrary the facts proved are that Mr. Culver having left the chair when Mr. Brighty was moving, thought he had put an end to the meeting, and therefore the vestry clerk (Mr. Paget) takes down not a word of what takes place after that. Although he knew that other resolutions were being put and that other proceedings were being carried on, he thinks that it was not his duty to pay any attention to them because he was not authorised or required by the chairman to do so. But he had been authorised by the chairman to convene that meeting and he did it, and to attend and he did attend, and to record the proceedings and he did, until, either of his own will or by the direction of Mr. Culver, he concluded that the meeting was at an end, which he did as soon as the nomination was effected. Anything more utterly irregular than that cannot be conceived. Can anybody say that the parishioners and inhabitants who had come there for the purpose of having discussed, at least, the subject of the resolutions which they had transmitted to the churchwardens, avowing and announcing their intention, had a fair mode of expressing their wishes, they being the only persons whose wishes are to be attended to, because the chairman of that meeting being a churchwarden chooses to get up from his chair, as

he says, because he saw that Mr. Brighty was moving and because he thought he was out of order, and so put an end to the meeting? Is that a regular proceeding? If the court were to say that what was done was justifiable the court would constitute the churchwardens owners of the advowson which is in the hands of the parishioners and inhabitants. I will not go into the question with regard to what extent the churchwardens were partisans or friends of Mr. Rose, but they cannot deny and nobody has denied that the conduct they pursued at that meeting did prevent the parishioners and inhabitants, from whom alone they lawfully could take their directions, from expressing their wishes; and that in my opinion is clear beyond all possibility of doubt. So that as far as the regularity or legality of the proceedings go, I am convinced that they were wholly illegal and irregular. But that by no means disposes of the question. There remains the election itself to be considered. Apprised of this illegality and irregularity as these persons who are interested in this present suit were, what course did they pursue? It was open to them to attend at the election to vote and to see that nobody voted who was not entitled to vote—in short to exercise every right which the parishioners and inhabitants have in an election. The election goes on, it is proved, in a peaceable, orderly, and quiet manner and the poll is open for three days without objection, without check, and without any proceedings being taken, which might well have been taken then just as readily as at a later period, and terminates in the election of Mr. Rose by a very considerable majority. Well, what is the law that I have to apply to that state of circumstances? Having discharged what I conceive to be my duty by saying that the conduct of the churchwardens on the 30th Aug. was entirely erroneous, and therefore illegal, is it for that reason that I am to set aside the election which has been come to by a very considerable number of the inhabitants, and in which it has not been shown or pretended that any man was prevented from voting, or that any obstacle or difficulty was presented to his voting? In my opinion that is not the law as Lord Hardwicke laid it down in *Attorney-General v. Rutter*. That is not the law as has been most distinctly decided in the two cases which were mentioned by Mr. Everitt in the course of his argument. The first of those two cases was the case of *Reg. v. The Parishioners of St. Mary, Lambeth (sup.)* where the right of the electors was established that every rated inhabitant whether present at the vestry or not "has a right to come in and vote, and the closing of the vestry doors during the poll so as to exclude voters is illegal." I have already said that in my opinion the conduct of the churchwardens is illegal. The facts of that case were [His Lordship read them], and the judgment of the court was this: "Although there is no doubt whatever as to the law of the case, it does not appear on the affidavit that any single elector was prevented from voting. If the effect of closing the doors had been to exclude any one who had a right to vote, and an intention of exercising that right, the case would have assumed a different aspect, but it does not at all appear that if the whole parish had been present, the result of the election would have been different." And the judgment of Littledale, J., is to the same

effect. The other case was *Ex parte Mawby* (*sup.*) "where, upon the election of a churchwarden, the chairman of the vestry meeting had rejected votes which were alleged to be admissible, but it did not appear that the rejection had caused any difference in the result, the court refused to grant a *mandamus* ordering a fresh election, though the persons whose votes had been rejected were parties to the application." The judgment there is in very short and explicit terms. Lord Campbell says, "I do not undertake to say what can be done in this case, but clearly we cannot issue a *mandamus*." Then it speaks as to this case having gone on a technical ground; but Coleridge, J., says, "I agree that this is a safe ground of decision in this case. The election is not shown to be void, and it does not appear that the result would have been altered by the admission of the votes." And Crompton, J., says (Erle, J., concurring), "It is clear that the mere rejection of votes furnishes no ground for interfering by *mandamus* when it does not appear that the election has not been vitiated." That is a case upon *mandamus*, but the principle of law is exactly the same in that case as in this. If upon the evidence there had been any such proof as seems to have been required in the two cases at common law, and which would be required in any case to establish a grievance in order to justify the complaint, and more than that to justify the administering of the relief which this statement of claim calls for, it must be shown that there has been some wrong done to the persons in whose behalf the present plaintiff moves, and there has not been a particle of evidence upon that subject. On the authority of those two cases to which I have referred, and still more on the authority of *Attorney-General v. Parker*, before Lord Hardwicke, I am of opinion that I can grant no relief upon this action. If the ratepayers and parishioners have been prevented from exercising what was their right, and which they might have exercised I do not doubt, but they were prevented by their own conduct, because, although they were prevented by the churchwardens from holding a meeting by ballot, and from polling at various places, that is all they were prevented from doing, and the right of voting at the election of the clergyman they were not prevented from exercising at all. But some of them have declined to vote. I do not know what motives may have induced them not to vote, or what proceedings they may have contemplated at that time, but still there is certainly no particle of evidence that would justify me in coming to the conclusion that if every man who is interested with the plaintiff in this suit had declined to vote, and was not prevented by what was done, that, therefore, he would be entitled to the relief he asks by this action; because, although he could not have it *modo et formâ*, according to his own wishes, he had it abundantly, plentifully, and might have exercised it peaceably without any kind of interruption. Well now I have a few words to say upon what formed the subject of Sir H. Jackson's argument in this case, when he said that if the plaintiff and the persons who concur in his views had had their own way and had established an election by ballot, that would have been wholly illegal. I cannot follow that at all, and having attended to the authorities which were referred to I cannot conceive anything to

justify that assertion. The case of *Faulkner v. Elger* only decides that an election by ballot is not legal because it does not afford the opportunity of a scrutiny, and Lord Eldon echoes the same opinion, though he seems to have hesitated very much about it. But he refers to the fact that there are societies and institutions in this country in which for centuries past the mode of election by ballot had been practised, so that it was common enough. Acts of Parliament regulating Municipal and Parliamentary election which have introduced voting by ballot have at the same time introduced regulations which have freed voting by ballot from the objections which were taken in *Faulkner v. Elger*. Now you can trace with perfect accuracy by the machinery which is adopted the persons who vote and everything that is necessary to insure the validity of the vote. Is there anything by which the parishioners of Clerkenwell, not intending to adopt those statutes as statutes, not requiring or insisting that the statutes gave them this right—but being the persons in whom the right and duty of electing is vested by law—are prevented from adopting these improvements which have taken place in our generation? They find a more useful and efficacious mode of voting than that which their forefathers practised, and therefore they say, "We choose to adopt the ballot." In my opinion there is nothing invalid in the resolution that this election should be carried out by ballot. When it is said that the ancient custom and usage of this parish has been to have open polling, I do not find any foundation for that argument. There is no ancient custom which imposes, or which amounts to a binding authority, upon the parishioners at this day. They are as free as their ancestors to prescribe the regulations, provided they are lawful. They are free to say that one or two hundred years ago a certain custom or habit prevailed of electing in a particular way, but they are satisfied that that is not now a judicious mode of exercising their unquestionable rights, and therefore they will resolve to exercise it in a different way. That, in my opinion, they are perfectly entitled to do. Being therefore of opinion that the resolutions which had been proposed on 30th Aug., and which were intercepted by the mere wrongful act of the churchwarden, who ran from his chair when the motion was being put, were perfectly valid, and being of opinion that the conduct of the churchwarden was wholly erroneous, I think that the election which afterwards took place was open to objection on that score. But the election having taken place, and there being no evidence whatever that it was improperly conducted, or that any voter was prevented from recording his vote in his own way, I think it right that this action should be dismissed. I cannot however dismiss it with costs. I cannot give the churchwardens costs because in my opinion they have not discharged their plain duty properly. I cannot give the trustees costs because they have taken part with the churchwardens, and have thrown in their lot with them, and as far as I can judge and see do not add one shilling to the costs of the action. Nor can I give costs to Mr. Rose. If he had relied on the validity of his election well and good. He might have done so, but he has made himself a partisan in the discussion of this matter, the legality of which I

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have been considering, and against the legality of which I have decided. Therefore, I can make no order as to costs. The decree, therefore, will be, and the judgment is, to dismiss this action without costs.

Solicitors for the plaintiffs, *Books, Kenrick, and Co.*

Solicitors for Mr. Rose, *Lewis and Son.*

Solicitors for the churchwardens and trustees, *J. Boulton and Son.*

DIVISIONAL COURT FOR APPEALS FROM INFERIOR COURTS.

Reported by *M. W. McKELLAR, J. M. LELY, and R. H. AMFLETT, Esqrs., Barristers-at-Law.*

Thursday, April 27, 1876.

VAN MINING COMPANY LIMITED (apps.) v. CHURCHWARDENS OF LLANIDLOES (resps.).

Rating of lead mine—Different leases—Reservation in kind—37 & 38 Vict. c. 54, s. 13.

The appellants occupied and worked a lead mine under three leases: by one a royalty of one fourteenth of the minerals obtained under it, when ready for smelting and merchantable on the banks of the works, was reserved to the lessor, or at his option in lieu thereof the full value in

money; by the second and third the lessor, who was a different person from the lessor of the first lease, had a reservation for the time being only in money. The appellants were rated for the machinery and buildings occupied for the purposes of the mine, and the lessor of the first lease for the mine and the royalty or dues wholly reserved in kind.

Held, upon appeal, that this was a case within the exemption of the Rating Act 1874 (37 & 38 Vict. c. 54), s. 13; that the previous rating clauses as to mines did not apply to it; and that the rate was properly made.

THIS was a special case stated for the opinion of this court under 12 & 13 Vict. c. 45, s. 11.

The appellants are the Van Mining Company (Limited), and the Most Honourable the Marquis of Londonderry.

The respondents are the churchwardens and overseers of the poor of the parish of Llanidloes and their assistant overseer, and the assessment committee of the Newtown and Llanidloes Union, in the county of Montgomery.

The assessment committee of the Newtown and Llanidloes Union in June 1875 made an assessment, upon which the overseers of the poor of the parish of Llanidloes on the 3rd July 1875 made the following poor rate:—

PARISH OF LLANIDLOES—RATE MADE IN THE MONTH OF JULY, 1875.

No.	Name of Occupier.	Name of Owner.	Description of Property Rated.	Name or Situation of Property Rated.	Estimated Extent.	Gross Estimated Rental.	Rateable Value.	Rate at 1s. in the Pound.
523	Marquis of Londonderry.	Marquis of Londonderry.	Lead mine and the royalty or dues wholly reserved in kind.	Van Mines.	.....	£ s. d. 5849 12 8	£ s. d. 5849 12 8	£ s. d. 292 9 7½
—	Van Mining Company (Limited).	Van Mining Company (Limited).	The engines, machinery, workshops, tramways, and other plant, buildings, and works, and surface of land occupied in connection with and for the purposes of the mine.			3548 10 0	2998 0 0	149 1s 0

The present appeal is from the said assessment and rate.

The Van Mining Company (Limited) are the lessees of certain lead mines known as the Van Mines, situate in the parish of Llanidloes, and in the above mentioned union and county.

These mines are occupied and worked by the Van Mining Company (Limited), under the three following leases, copies of which were in the appendix marked respectively A, B, and C.

The first lease dated 11th April 1864 is from Earl and Countess Vane to Messrs. Edward Morris and Joseph Howell, which by subsequent assignments has become and is now the property of the appellants, the Van Mining Company (Limited), and is the one marked A in the appendix.

The reddendum in this lease is the royalty of one full fourteenth part or share of the minerals had or obtained under the said lease when ready for smelting and merchantable on the banks of the said works, or at the option of the lessors in lieu thereof the full value thereof in money.

The second lease, dated 25th March 1870, is from Sir Watkin Williams Wynn, Bart. to the Van Mining Company (Limited), and is the one marked B in the appendix.

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The reddendum in this lease is wholly in money.

The third lease, dated 29th Sept. 1871, is from Sir Watkins Williams Wynn, Bart., to the Van Mining Company (Limited), and is the one marked C in the appendix.

The reddendum in this lease is a minimum dead rent of 100l. in money, and also one-tenth of the ores and minerals which should be got and raised out of the premises—or, at the option of the lessor, the value thereof in money—after the same should have been washed, dressed, and made merchantable.

The appellants have not raised any ores or minerals out of the premises contained in this lease, but have and are working under the same. They also work a quarry, and have erected a magazine for dynamite thereon, and the same intersects and forms the only means of passage from one part to another of the premises held under lease A.

The above-mentioned leases, and the facts mentioned in the recitals, form part of this case.

The watercourse and reservoir mentioned in the lease marked B are occupied with and in connection with and for the purposes of the Van

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Mine only, but are not comprised within the boundaries of lease A.

The rents reserved by these leases have always been paid in money.

The mines are and always have been worked by means of a shaft or shafts, and the ore is obtained wholly from underground workings. The shafts are sunk on part of the land comprised within the boundaries of lease A, and on the said lands the engine houses and other buildings and works connected with the Van Mines are constructed.

On the land comprised within the boundaries of lease B some buildings have been erected, and a reservoir constructed, from which reservoir the water is conveyed by watercourses to the mine.

The appellants have never before been assessed or rated in respect of this mine, nor the royalty or dues thereof, nor for the machinery or works in connection with it.

The respondents contend that the appellant, the Marquis of Londonderry, is liable to be assessed and rated under 43 Eliz. c. 2, as for royalty or dues wholly reserved in kind, and not under the Rating Act of 1874 (37 & 38 Vict. c. 54); and they further contend that the appellants, the Van Mining Company, are liable to be assessed under the statute 43 Eliz. c. 2 for the surface lands comprised in the lease B, and for the shafts, buildings, machinery, reservoir, and watercourses connected with the Van Mine; and they have so assessed and rated them accordingly.

The appellants contend that the Van Mine should be assessed and rated under the estimate of value, and in the manner prescribed by the Rating Act of 1874 (37 & 38 Vict. c. 54), and not under 43 Eliz. c. 2; and the Marquis of Londonderry, one of the appellants, contends that he is not liable to be assessed or rated as occupier of the Van Mine or the royalty or dues thereof.

The question for the opinion of the court is: Whether under the facts and documents above set forth the premises mentioned in the said leases or any and which of them respectively should be assessed and rated under 43 Eliz. c. 2, or the Rating Act of 1874 (37 & 38 Vict. c. 54), or on what principle the same should be assessed and rated.

If the court should be of opinion that the above assessment and rate are wrong in law, the decision of this court is to be in favour of the appellants, and judgment of allowance of the said appeal and for such costs as the court shall adjudge, and for the amendment of the said assessment and rate, and that the said amendment shall be entered at the sessions accordingly; but if the court should be of the contrary opinion, its decision is to be in favour of the respondents, and judgment for dismissing the appeal and for such costs as the court shall adjudge is to be entered at the sessions accordingly.

The material part of lease A was that by which the lessors demised to the lessees the premises as follows:

To have and to hold, use, exercise, work, and enjoy the said mines and minerals, and all and singular the liberties, powers, privileges, authorities, and premises, hereinbefore expressed to be hereby demised and granted unto the said lessees, their executors, administrators, and assigns from the 29th Sept. 1863 for the full end and term of twenty-one years from thence next ensuing and fully to be complete and ended, yielding and rendering therefore yearly and every year at the times and in the manner hereinafter mentioned during the continuance of

this demise unto the said lessors and to the person or persons for the time being entitled to the reversion or remainder of the premises hereby demised immediately expectant on the determination of the said term hereby granted the royalty of one full fourteenth part or share, the whole into fourteen equal parts or shares to be divided or considered as divided, of all and singular the ores, mines, and minerals which shall be had or obtained out of or from the said premises hereby demised or any part thereof, the same to be rendered on the banks of the said works when ready for smelting and merchantable at such time or times as hereinafter covenanted in that behalf, or otherwise at the option of the said lessors and the person or persons entitled as aforesaid, yielding and paying at the times and in the manner hereinafter mentioned in lieu of the said last mentioned rent or royalty unto the said lessors and to the person or persons entitled to the immediate reversions or remainder as aforesaid, the full value in money of such one fourteenth part or share on the bank of the said works of all such ores, mines, and minerals, and other matters as shall be raised and gotten out of the said premises, and rendered ready for smelting and merchantable as aforesaid at such time or times as hereinafter covenanted in that behalf, such rendering and delivering and payments to be respectively clear of all costs, and expenses, or losses of and attending the raising, getting, making ready for smelting, rendering, selling, and disposing of the said ores, mines, and minerals, and other matters and produce, and of all taxes, charges, and assessments whatsoever, save and except the landlord's tax.

Manisty, Q.C. (with him *Crompton*) argued for the appellants.—By sect. 3 of the Rating Act 1874 (37 & 38 Vict. c. 54), the Poor Rate Acts are extended to certain "hereditaments in like manner as if they were mentioned in the recited Act," viz., 43 Eliz. c. 2. Amongst other hereditaments, "(3) To mines of every kind not mentioned in the recited Act." And by section 7, "Where a tin, lead, or copper mine is occupied under a lease or leases granted without fine, on a reservation wholly or partly of dues or rent, the gross value of the mine shall be taken to be the annual amount of the whole of the dues payable in respect thereof during the year ending on the 31st December preceding the date at which the valuation list is made, in addition to the annual amount of any fixed rent reserved for the same which may not be paid or satisfied by such dues. The rateable annual value of such mine shall be the same as the gross value thereof, except that where the person receiving the dues or rent is liable for repairs, insurance, or other expenses necessary to maintain the mine in a state to command the annual amount of dues or rent, the average annual cost of the repairs, insurance, and other expenses for which he is so liable shall be deducted from the gross value for the purpose of calculating the rateable value. In the following cases, namely, First, where any such mine is occupied under a lease granted wholly or partly on a fine; secondly, where any such mine is occupied and worked by the owner; and thirdly, in the case of any other such mine which is not excepted from the provisions of this Act, and to which the foregoing provisions of this section do not apply, the gross and rateable annual value of the mine shall be taken to be the annual amount of the dues, or dues and rent, at which the mine might be reasonably expected to let without fine on a lease of the ordinary duration, according to the usage of the country, if the tenant undertook to pay all tenants' rates and taxes and tithe rentcharge, and also the repairs, insurance, and other expenses necessary to maintain the mine in a state to command such annual amount of dues, or dues and rent. The purser, secretary, and chief managing agent for

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the time being of any tin, lead, or copper mine, or any of them, may, if the overseers or other rating authority think fit, be rated as the occupier thereof. In this section, the term 'mine' when a mine is occupied under a lease, includes the underground workings, and the engines, machinery, workshops, tramways, and other plant, buildings (not being dwelling houses), and works and surface of land occupied in connexion with and for the purposes of the mine, and situate within the boundaries of the land comprised in the lease or leases under which the dues or dues and rent are payable or reserved: the term 'dues' means dues, royalty, or toll, either in money or partly in money and partly in kind; and the amount of dues which are reserved in kind means the value of such dues: the term 'lease' means lease or sett, or licence to work, or agreement for a lease or sett, or licence to work: the term 'fine' means fine, premium, or foregift, or other payment or consideration in the nature thereof." By sect. 8, "Where any poor or other local rate which at the commencement of this Act any lessee, licensee, or grantee of a mine is exempt from being rated to in respect of such mine becomes payable by him in respect of such mine during the continuance of his lease, grant, or licence, or before the arrival of the period at which the amount of the rent, royalty, or dues is liable to revision or readjustment, he may (unless he has specifically contracted to pay such rate in the event of the abolition of the said exemption) deduct from any rent, royalty, or dues payable by him, one half of any such rate paid by him: provided that he shall not deduct any sum exceeding what one half of the rate in the pound of such poor or other local rate would amount to, if calculated upon the rent, royalty, or dues so payable by him." By sect. 13, "Nothing in this Act shall apply to a mine of which the royalty or dues are for the time being wholly reserved in kind, or to the owner or occupier thereof." The sole question in this case is whether sect. 13 applies to it or not. [BRAMWELL, B.—If it were not for leases B and C, sect. 13 would, I presume, admittedly apply.] Subject to a further question whether the reservation in lease A is in kind. But this is a mine held under leases, and sect. 13 does not apply to it for that reason; there are express provisions in the Rating Act applicable to mines held under several leases, *e.g.*, sect. 7. As to the reservation, it is either in kind or money, at the option of the landlord. [BRAMWELL, B.—Could they before this Act have caught the landlord upon this reservation? Mellor, Q.C.—Yes; upon the authority of *Re v. St. Austell* (5 B. & Ald. 693).] The old law has been much questioned recently: (see *Guest v. East Dean*, L. Rep. 7 Q. B. 331; *Kitow v. Liskeard Union*, 31 L. T. Rep. N. S. 601.) By affirming this rate the court would be carrying the old principle further than it has been carried hitherto, although there is now a new system for rating mines.

Mellor, Q.C. (with him Channell) appeared for the respondents.

BRAMWELL, B.—We need not trouble you, Mr. Mellor. It seems to me that sect. 13 of the Rating Act 1874 is applicable to this case, and excludes these premises from being rated under the new system established by that Act. I think, too, it is reasonable that the old system should here apply.

It was a curious device by which the rating authorities got over the exemption of mines, which was maintained on the ground of their not being mentioned in the Act of Elizabeth; but it was established law, and Lord Londonderry was liable to be rated before this recent statute. Although he might to some extent be reached by sect. 8, yet I think he clearly comes within sect. 13, which is a reasonable provision to prevent the existing obligations of parties from being altered. The first question which arises under that section is whether this is "a mine" to which the reservation applies. I think it is, for of all the premises rated the only taking of ore is from that part which is leased from Lord Londonderry and liable to the reservation. Further, I think, if this be not so, the part held under lease A must be taken as a separate holding, which would come to the same thing. But another objection has been taken by Mr. Manisty, that this case does not come within the other words of the section; it is necessary that "the royalty or dues are for the time being wholly reserved in kind." Now, in the first place, it is said that the royalty cannot be in kind when the material has first to be made ready for smelting and merchantable; and in the next, that the alternative option of the lessor to take the value in money is enough to put the appellants out of the reach of the 13th section. That section, however, was clearly intended to cover all cases in which rateability previously existed; and the device by which such rateability was established, although it was so stretched as to become occasionally difficult to comprehend, applied to such a case as this. The case of *Re v. St. Austell* (5 B. & Ald. 693) was open to both these objections; and, although they are not specifically alluded to in the judgments, they must have been considered. That judgment, therefore, shows that under such circumstances the landlord could be got at for rating purposes, and it must govern our conclusion in this case. I think Lord Londonderry comes properly within the application of sect. 13, and the appellants were rightly rated. Our judgment will be for the respondents.

MELLOR, J.—I am entirely of the same opinion. As to sect. 13, whether *Re v. St. Austell* was right or not, that principle of rating has been established a long time, and it was the intention of the new Act to reserve all previously rated mines from its application. The rate must be affirmed.

DENMAN, J.—I am of the same opinion.

Judgment for respondents.

Solicitor for appellants, T. H. Harrison.

Solicitors for respondents, Milne, Biddle, and Mellor, for Williams, Gittins, and Taylor, Newtown, Montgomeryshire.

Feb. 4 and May 11, 1876.

(Before CLEASBY, B., GROVE and FIELD, JJ.).

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Gaming house—Statutes 8 & 9 Vict. c. 109, s. 3 and 16 & 17 Vict. c. 119, s. 3—Conviction of justices without information or summons.

By 8 & 9 Vict. c. 109, s. 3, a justice of the peace, on complaint made before him on oath that there is reason to suspect any house, room, or place of being kept or used as a gaming house, may give authority by special warrant under his hand, to any constables

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to enter such house, room, or place, and, if necessary, to use force for making such entry, and to arrest all persons found therein. By 16 & 17 Vict. c. 119, s. 3, any owner, or occupier, or persons having the management of any house, &c., and who use it for the purpose of betting, are liable on summary conviction before two justices to a penalty not exceeding one hundred pounds, and on the non-payment thereof, or in the first instance may be committed to prison with or without hard labour for any period not exceeding six months. And by sect. 11 power is conferred upon justices to issue a warrant authorising constables to enter any house, office, room, or place kept and used as a betting house or office, and to arrest persons found therein.

The respondent, who was the chief constable for the borough of Bolton, laid a complaint upon oath before a justice of the peace acting for the borough that a house was kept or used as a common gaming house within the meaning of 8 & 9 Vict. c. 110. The justice thereupon issued his warrant, and authorised the constables to enter into the house and to arrest all persons found therein. By virtue of this warrant the appellant, who was found in the house, was arrested, brought before two justices, and charged under 16 & 17 Vict. c. 119, as a person who had the management of a room used for the purpose of betting with persons resorting thereto. No information was laid, nor was any summons issued to the appellant embodying the substance of such information. The appellant's solicitors objected to the hearing and determination of the charge by the justices on the ground that in the absence of such information and summons the proceedings were void. The justices, however, overruled the objection, and after hearing the evidence convicted the appellant.

Held by Cleasby, B. and Grove, J. (Field, J. dissentiente), that the information and summons were necessary, and that the conviction was therefore bad.

THIS was a case stated under the statute 20 & 21 Vict. c. 43.

1. At a petty sessions holden at the borough of Bolton, on the 23rd Oct. 1875, Robert Blake, the above-named appellant was brought before us with other persons by virtue of a warrant granted by William Henry Wright, Esq., one of Her Majesty's justices of the peace acting in and for the said borough under the authority of 16 & 17 Vict. c. 119, an Act for the suppression of betting houses, the appellant and the other persons being found in a certain house within the said borough, alleged to be used for the purpose of betting upon horse races which warrant was in the words following:

Borough of Bolton, in the county of Lancashire to wit. —To the constables of the borough of Bolton, in the said county and to other peace officers in the county aforesaid, Whereas it appears to me, William Henry Wright, Esq., one of the justices of our Lady the Queen, assigned to keep the peace in the said borough, by the information on oath of Thomas Beech, of the said borough, chief constable, that the house known as the "Angel" situate in Church-gate, in Great Bolton, in the said borough, is kept or used as a common gaming house within the meaning of an Act passed in the 8th & 9th years of the reign of the Her present Majesty, intituled "An Act to amend the law concerning games and wagers," this is, therefore, in the name of our Lady the Queen to require you, with such assistants you may find necessary, to enter into the said house, and if necessary to use force for making such entry whether by breaking doors or otherwise and to

arrest, search, and bring before me or other of the justices of our Lady the Queen assigned to keep the peace within the borough, all such persons found therein and to seize all lists, cards, or other documents relating to racing or betting found in such house or premises, to be dealt with according to law, and for so doing this shall be your warrant. Given under my hand and seal at Great Bolton, in the said borough this 15th Oct. 1875.

W. H. WRIGHT, J.P.

2. The appellant was charged under the 3rd section of the Act 16 & 17 Vict. c. 119, "For that he, the said appellant, on the 17th Oct. 1875, at the borough aforesaid, being the person having the management of a room in a certain house called the 'Angel' situate at Church-gate, Great Bolton, in the said borough, did use such room for the purpose of betting with persons resorting thereto upon certain events and contingencies, to wit certain horseraces, contrary to the form of the statute in such case made and provided."

3. The evidence given before us was as follows, in regard to the appellant: On Sunday the 17th Oct. 1875, at about 7 o'clock in the evening, a number of police officers of the said borough, under the guidance of Thomas Beech, chief constable of the said borough, in pursuance of the warrant before mentioned, went to the public-house called the Angel, in Churchgate aforesaid, kept by James Putney Weston. In a room behind the vaults, which is not open to the street, they found the appellant and sixteen other persons. There are cushioned seats all round the room. At the time the police entered the appellant was on his feet at one end of the room. At the point where the appellant stood there is a seat with arms to it. Upon the officers entering the appellant put his hands behind him. His hands were seized, and he then dropped on the floor a book and a piece of paper. The book was picked up and was found to contain memorandums relating to betting. The house was searched, and the following were found therein: Three telegrams relating to horseraces, which were directed to the appellant, *Weekly Turf Record*, an ivory tablet, upon which the appellant stated would be found a few bets. In the pocket of a coat belonging to the appellant were found a betting list and four telegrams addressed to the appellant. Upon the appellant was found 17l. 17s. 10d. in money and a cheque for 5l. 2s.

4. The licensee of the house or usual landlord, Mr. J. P. Weston, was away from home at the time, but the appellant stated that he was the manager of the place.

5. Two of the persons, who were respectively named Simpson and Cullen, found in the room, also gave evidence. They had been arrested along with appellant, but, upon the application of the police, were discharged to enable them to become competent witnesses for the prosecution. One of them, Cullen, stated that on Sunday, the 17th Oct. 1875, he paid the appellant 3l. for money that he owed him in respect of a bet made on the Cæsarewitch race, which had then taken place some weeks previously; but there was no evidence that such bet had been made at the Angel. The other of them, Simpson, stated that on the same night he was in the said house and rooms and asked the appellant what he would lay against a horse called Sutton, and the appellant said he would lay 8 to 1. Witness said he would take 16 to 2, and the appellant said, "All right, I'll lay it you." The horse Sutton was to run in the

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Cambridgeshire race, which was to come off that week or next.

6. The appellant's attorney contended that under sect. 17 of the before-mentioned Act (16 & 17 Vict. c. 119) one calendar month's notice of action should have been given before taking the proceedings. That after the issuing of the aforesaid warrant an information ought to have been laid, and that a summons embodying the substance of such information ought to have been delivered to the appellant.

7. We, however, considered that the notice required by the 17th section had no application to the present proceedings. We also thought it was due to the defendants to have the information, but we did not think it was sufficient groundwork for discharge.

8. We found the charge proved against the appellant, and convicted him in the penalty of 100*l*.

9. The attorney for the appellant expressed himself dissatisfied with our determination, as being erroneous in point of law, and pursuant to the 2nd section of the statute 20 & 21 Vict. c. 43, duly applied to us in writing to state and sign a case setting forth the facts, and the ground of our determination as aforesaid for the opinion of this court, and the appellant duly entered into a recognizance as required by the said statute in that behalf.

The questions for the opinion of the court are: First, Whether under the said 17th section of the 16 & 17 Vict. c. 119, one calendar month's notice in writing of the proceedings should have been given to the appellant before prosecuting the same? Secondly, Whether after the issuing of the warrant as aforesaid, and apprehension of the parties, it was necessary to lay an information, and issue a summons to the appellant embodying the substance of such information? Thirdly, Whether the fact of the bet made by the appellant with Simpson upon the horse Sutton, as stated in the case, and the payment of 3*l*. by Cullen upon a past event was evidence sufficient to justify such conviction under the statute? Fourthly, Whether upon the facts stated we were justified in law in convicting the appellant?

If it is the opinion of the court that we were wrong in our decision then judgment to be given in favour of the appellant.

Baylis, Q.C. and *Wheeler*, for the appellant.

Arbuthnot for the respondents.

The arguments will be found fully discussed in the judgments. The following authorities were cited and referred to:

- 8 & 9 Vict. c. 109, s. 8;
16 & 17 Vict. c. 119, ss. 3, 11, and 17;
Reg. v. Shaw, 12 L. T. Rep. N. S. 47; 34 L. J. 169, M. C.;
Reg. v. Berry, 28 L. J. 86, M. C.; 33 L. T. Rep. 323;
Turner v. Postmaster-General, 11 L. T. Rep. N. S. 369; 5 B. & S. 758; 34 L. J. 10, M. C.;
Barn's Justice of the Peace, title "Conviction," vol. 1, p. 1104 (13th edit.);
Oldham v. Ramsden, 32 L. T. Rep. N. S. 825; 44 L. J. 309, C. P.;
Martin v. Pridgeon, 1 Ell. & Bl. 778;
Reg. v. Brickhall, 33 L. J. 156, M. C.; 10 L. T. Rep. N. S. 385;
Reg. v. Hunell, 3 F. & F. 271.

Cur. adv. vult.

May 11.—The judgment of *Oleasby B.* and *Grove J.* was delivered by

CLEASBY, B.—We are not considering the liability of persons found in a gaming-house to give sureties under the statute 33 Hen. 8, but their liability to a penalty under the statute 16 & 17 Vict. The question which has been argued before us is that raised by the second question put to the court. It was admitted before us that the objection of the want of a proper information was taken before the case was proceeded with, and that there was nothing in the nature of waiver. The charge made against the appellant was an offence under the 16th and 17th Vict. for using a room of which he had the management for the purpose of betting with persons resorting thereto. By the 3rd section, owners or occupiers or persons having the management of a house or room who use it for the purpose of betting are liable to a penalty not exceeding 100*l*., and to be sent to prison for six calendar months in case of non-payment. And by the 4th section persons being owners or occupiers, or having the management of any house, rooms, &c., who receive money or other property as a deposit to be returned on the happening of a certain event, are liable to a penalty not exceeding 50*l*., and to three months imprisonment on nonpayment. It is quite clear that the regular way of recovering those penalties would be by information and summons in the ordinary way, with a warrant if summons should be ineffectual, and this appears from other parts of the Act. Now it is a rule that an information is essential as the foundation of such proceedings (*Paley on Convictions*, p. 34). And it is well settled by decided cases that where the information is for one offence, and, where the defendant appears, the charge against him is for another offence, the proceedings are irregular and a conviction cannot be upheld: (*Marten v. Pridgeon, ubi sup.*; *Bey v. Brickhall, ubi sup.*). Such an irregularity may be waived as appears by several cases, particularly *Turner v. Postmaster-General (ubi sup.)*, but in that case the Lord Chief Justice says, "In strictness the appellant was entitled to insist that there should be an information and complaint in pursuance of sect. 62, but they waived that," &c. And in *Reg. v. Shant (ubi sup.)* which was an indictment for perjury, it appeared that in the proceedings in which the perjury was said to have been committed there was no proper information, but a regular summons issued purporting to be founded on a proper information, and the defendants appeared and the case was tried without any objection; the court thought the irregularity, if any, was waived, and the jurisdiction sufficiently appeared by the summons. The irregularity in the present case was not waived, but on the contrary, the objection taken, and the question is, whether there was a proper information. The only information was that on which the warrant was issued under the 8th & 9th Vict. c. 109, s. 4, viz., for keeping a common gaming-house. But the charge made when the defendant was brought up, was a charge which could not be made under the 8 & 9 Vict., and it was made under the 16 & 17 Vict. c. 11*u*. It appears to us that this made the proceeding irregular. It would be extremely inconvenient to enter in each case into the consideration of the similarity or dissimilarity of different charges. It is better, especially in cases involving an imprisonment for six months, to abide by the rule established by the authorities that the charge

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must be comprised within the information and not different from it. I not only accede to those authorities, as I feel bound to do, but I think they rest upon a foundation which cannot be questioned. If this court has any control over summary jurisdictions, it cannot be better exercised than by insisting that there shall not be such a departure from the first principles of criminal justice, as that a man shall be heard in his defence before he is convicted, as would be the result of allowing a man who happened to be in custody to be at once put upon his trial for any offence of which he could have had no notice before. If there is a regular information and summons, and the man is afterwards brought up on a warrant, the argument would not apply, because it was his own fault that he had not notice of the charge. And I do not think it any answer to this objection that the accused might, if he required it, apply for delay in order to obtain advice and prepare his defence. If he waives the want of information and summons, it would be the proper course to apply for delay, and it would be in the discretion of the justices to grant it or not, or to say to what extent they would grant it. And this court would not interfere with the exercise of that discretion in a proceeding which, by the assent of the man charged, was properly before the magistrates. But it is not a matter within the discretion of the magistrates whether a man shall be put on his trial without any proper preliminary proceedings, and when such a question is brought before this court I conceive one answer only can be given. A proper exercise of the magistrate's discretion in granting delay if applied for, would no doubt correct the erroneous conclusion of the magistrates in entertaining the case; but no one would contend that a man should be at the mercy of the magistrates in granting delay where he has a right not to be put upon his trial or that this court would not allow it. In the present case the question is very properly put to the court by the magistrates themselves. These observations apply with equal force to the other ground principally argued before us, viz., whether the warrant and arrest under the 11th section dispensed altogether with the necessity of a regular information and summons giving the defendant notice of the charge made against him; in other words, whether the 11th section is auxiliary to the regular proceedings by information and summons or a substitution for them. It is plain from several sections that the proceedings by information and summons are contemplated; for example, sect. 8 begins, "If any person convicted under this Act on information before justices, &c." But sect. 10 is more express on the subject; it provides that "If any person who has laid an information does not appear at the time when the defendant has been summoned to appear he shall be liable to pay costs," &c. This and other parts of the Act and general considerations of importance such as have been already referred to, seem to show that sect. 11 was not intended to introduce an exceptional procedure of having a man put on his trial without any previous notice. It is an important section, because, as the purpose for which the house, &c. was used would be difficult of proof, and the person managing the house not known, it enables the magistrates to have the person found on them brought up, so as to know who ought to be charged. The view above taken

is of a strict and somewhat technical nature, but the question which we have considered has reference not to the proper conclusion of law upon a case properly tried, but to the mode of administering justice, and in administering justice summarily strict regularity must be observed. As regards the first question put to the court it is clear that no notice was necessary and the question was founded upon an obvious mistake, and it is sufficient answer to the other question to say—we think, for the above reasons, that appellant ought not to have been convicted.

FIELD, J.—This is a case stated by two justices of the peace for the borough of Belton for the opinion of this court upon certain question of law. The facts are that on the 15th Oct. 1875, the respondent, who is the chief constable for the borough, intending to act, and acting under the 11th section of the 16 & 17 Vict. c. 119 laid a complaint upon oath before a justice of the peace acting for the borough, that a house known as the Angel was "kept or used as a common gaming house within the meaning of the 8 & 9 Vict. c. 109," and thereupon the magistrate, intending to exercise the power conferred upon him by the same section, issued his warrant to the constables of the borough by which after hearing the complaint in the terms above stated he required the constable in the terms of the 11th section: "to enter into the house, &c., and to arrest, search, and bring before him or some other of the justices having jurisdiction, all such persons found therein and to seize all lists, cards, or other documents relating to racing or betting found in such house or premises to be dealt with according to law." On the execution of and by virtue of this warrant the appellant who was one of the persons found in the house was brought before the two justices who have stated the present case. When so brought the appellant was charged under the 3rd section of the first mentioned Act (16 & 17 Vict. c. 119) as "the person who" having the management of a room "in the Angel used it for the purpose of betting with persons resorting thereto." Upon this charge being so made, the appellant's solicitors objected to the hearing and determination of it on the ground (amongst others) that after the issuing of the warrant an information ought to have been laid, and that a summons embodying the substance of such information ought to have been delivered to the appellant, but the justices considering that the appellant was sufficiently informed of the charge intended to be made against him, declined to discharge him; and, no application having been made for any adjournment, they proceeded with the hearing and determination of the charge. Witnesses were thereupon called and examined and cross-examined, and at the close of the evidence the appellant's solicitors contended that he should be discharged upon the ground above stated; but the justices upon the evidence found the charge proved, convicted the appellant in the penalty of 100*l.*, and upon the appellant's application stated the present case for the opinion of this court upon (amongst other questions) the question whether such information and summons were necessary. I answer that question in the negative. The answer to it must depend upon the construction of the statute which creates the offence, and gives the justices authority to convict, controlled it may be by the provisions of the general law, and the statute regulating the procedure in such cases, the

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11 & 12 Vict. c. 43. Now in order to understand the provisions of the 16 & 17 Vict. c. 119, it is necessary first to observe that by the 8 & 9 Vict. c. 109, s. 3, a power was given to a justice of the peace upon complaint upon oath, that a house was suspected of being used as a common gaming house to issue a warrant (in the form given by that act) empowering a constable to enter the house and bring before a justice or justices the persons found therein, to be dealt with according to law. And by the 2nd section of the 16 & 17 Vict. c. 119 a house used for the purposes mentioned in that Act was declared to be a "common gaming house" within the meaning of the 8 & 9 Vict. c. 109. Further by sect. 11 the justices were empowered upon such complaint on oath as was made in this case to issue a warrant (which by the express terms of the section may be in the Form A. in the schedule to the 8 & 9 Vict.) to bring before the justices, not only the persons to be found therein to be dealt with according to law, but also in the terms of the warrant in this case all "lists, cards, or other documents relating to racing or betting found in such house or premises." The next thing to consider is what is the offence and what are the powers of the justices to deal with it. The offence in the present case is created by the 3rd section of the Act, and the jurisdiction of the justices to convict summarily is given by the same section. Now, no doubt in all cases of summary conviction by justices, an information or complaint is necessary as well as to the jurisdiction of the justices as also in order that the person charged may be informed of the charge intended to be made against him. But it is equally clear that such information or complaint may be instantaneous in point of time (*Reg. v. Fuller*, 1 Ld. Ray. 509) and need not be in writing or upon oath unless the statute requires it (*Reg. v. Millard*, 1 Dearsley 166). The statute in question in this case does, in fact, require that the warrant to search the premises and apprehend the persons found therein which is to be granted upon an *ex parte* application, shall be preceded by a complaint upon oath as is almost if not quite invariably the case where a magistrate is required upon an *ex parte* application to issue a warrant of apprehension. But in the present instance, inasmuch as the offence to be dealt with is one like gaming usually committed in secret, and under circumstances rendering it ordinarily difficult to say beforehand what the precise offence is and who are the persons who may be found committing it, the statute seems to me to substitute for the ordinarily requisite statement in an information or complaint of the specific person and offence, the general allegation of a suspicion that particular premises are used for the purpose of committing the offence in order that by means of the entry and seizure of cards and lists it may be discovered whether any and what offence has been committed, and who are the persons, if any, committing it. It must be observed that by the very terms of the warrant the person found in the suspected house (as the appellant was), upon being brought before the justices, to be dealt with according to law—i.e., as I read it, a complaint or charge is then to be made against him of some specific offence in order that he may know what he has to answer, and in order that the magistrates' jurisdiction to hear and determine it may thus be founded. Now in the present case it appears that the charge against the appellant was

fully stated in his presence, and I have no doubt but that a minute of it was made in writing, although the statute does not require any writing at all. The appellant therefore might, if not prepared to answer the charge, have applied for an adjournment, and if he had done so, and the justices had refused it when it ought to have been granted, they would have done wrong. But I cannot think that any further information or complaint was required to give the justices jurisdiction to hear and power summarily to convict under the 3rd section. Then if such an information as is supposed was not required by the statute of the 16 & 17 Vict. c. 119, was it rendered necessary by the provisions of the 11 & 12 Vict. c. 43? I think not. No doubt under that statute where a summons is applied for, or a warrant is required to be issued either without or after a summons an information or complaint is necessary, but it seems to me that the special information provided for by the 17 & 18 Vict. fulfils the offices which such an information would fill and supersedes its necessity. The absence of a summons seems to me in like manner to form no valid objection to the conviction. The office of a summons is to inform the party to be charged of the offence which he has to meet, and when he is to meet it, and to require his attendance, and the current of modern authority is to show that if parties are before a magistrate, who has jurisdiction as to time and place, no summons or information is necessary: *Reg. v. Millard* (*ubi sup.*), *Turner v. Postmaster-General* (*ubi sup.*), *Reg. v. Shaw* (Leigh & Cave 579). In the present case the appellant was rightfully brought before the magistrates under the warrant of search and apprehension, and might, I think, be dealt with according to the charge preferred at that time, and of which the magistrates have found that he was sufficiently informed. We were pressed by the counsel for the appellant with the argument that the effect of supporting the present conviction would be that the appellant would have been brought before a magistrate upon one charge and convicted of another, and in support of this objection the case of *Marten v. Pridgeon* (*ubi sup.*) was quoted, and this argument has great weight with one of my learned brethren. But I cannot yield to it. The present conviction does not proceed upon any charge in the information; it proceeds upon the charge made at the hearing. It is to be observed that by express provision of the 11 & 12 Vict. c. 43, ss. 1 and 9, no objection can now be made to any variance between an information and the evidence, it being left to the justice to adjourn the hearing of the case to a future day, if he is of opinion that by such variance the party charged has been deceived or misled (11 & 12 Vict. c. 43, ss. 1 and 9). It is also to be observed that the particular statute of the 16 & 17 Vict. c. 119, which gives an appeal by sect. 10, also provides that upon such appeal no objection shall be taken to the information or (amongst other things) any insufficiency of statement if it shall appear to the justices in quarter sessions that the defendant was sufficiently informed of the charge intended to be made against him. It appears to me, therefore, that as the charge upon which he has been convicted was actually made, and he was sufficiently informed of it, it was unnecessary as it certainly would have been useless to have gone through the process of laying

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another formal information or issuing a summons. I think that the objection to the conviction ought not to prevail, but as my two learned brethren have come to a different conclusion the result is that the conviction must be quashed.

Conviction quashed.

Solicitors for the appellant, *Chester, Urquhart, and Co.*

Solicitors for the respondent, *Gregory, Rowcliffe, and Co., for Hall, Bolton.*

Saturday, May 20, 1876.

(Before CLEASBY, B., and GROVE, J.)

MAYOR, &C., OF SCARBOROUGH (apps.) v. THE RURAL SANITARY AUTHORITY OF THE SCARBOROUGH POOR LAW UNION (resps.).

Public Health—Sale and deposit of manure in a field—Nuisance—Order of abatement and prohibition—Statute 38 & 39 Vict. c. 55, s. 91.

The appellants contracted to sell their ashes and manure to some farmers, and to deliver the same at a certain field in the occupation of W. The manure was taken in carts and deposited in the field, and it was proved by the medical officer of health appointed by the respondents that the deposit became a nuisance, and injurious to health, from the time it was tipped from the carts of the appellants. The deposit was near to a fence adjoining the road, along which there was a large daily traffic; and complaints had been made to the inspector by travellers using the road. The nearest house was some 400yds. from the field, and the occupants were not affected in any way by the deposit. The appellants were indicted under the 91st section of the Public Health Act 1875, for a nuisance. The justices convicted, and under the provisions of the 96th section, made an order requiring abatement, and also prohibiting the recurrence of the nuisance.

Held, that the justices were wrong in ordering the abatement of the nuisance by the corporation, inasmuch as they had no power to remove it from the field, but that the order of prohibition was rightly made.

CASE stated by justices under 20 & 21 Vict. c. 43.

At a petty sessions held at Scarborough in and for the division of Pickering-by-the-East, in the north riding of the county of York, on the 23rd March 1876, a complaint, preferred by G. W. O. Woodall, clerk to the rural sanitary authority of the Scarborough Poor Law Union (which said union extends into the said division and riding) hereinafter called the respondents, against the mayor, aldermen, and burgesses acting by the Council of the borough of Scarborough, being the urban sanitary authority of the said borough (hereinafter called the appellants) under sect. 91 of the Public Health Act 1875, charging that on the 19th Feb. last there existed on or upon premises situate at Stone Haggs, in the township of Seamer, in the said division and riding, the following nuisance, to wit, a deposit of foul manure, which deposit, on the date aforesaid, and on several other days in the month of February aforesaid, before and after the said 19th Feb., was a nuisance and that the said nuisance was caused by the act of the appellants, contrary to the form of the statute in that case made and provided, was heard and determined, the said parties respectively being then present, and upon such hearing

we adjudged the charge to be proved, and we ordered the appellant, within one calendar month from the date of an order, or a true copy thereof according to the said Act, to abate the said nuisance by covering over, or otherwise disinfecting, the said deposit, or so much thereof as then remained in the said field, so that the same should no longer remain a nuisance, or injurious to health as aforesaid. And we, being satisfied that, notwithstanding the said nuisance might be abated, the same was likely to remain on the same premises, did therefore by the same order prohibit the appellants from causing or permitting any foul manure or other matter to be deposited upon the said premises in such manner as to cause the recurrence of the said nuisance; and also to pay to the respondents on demand their costs, charges, and expenses attendant on the prosecution of the said complaint, and the costs of the court in respect thereof; and if the said order should not be complied with, we authorised and required the respondents from time to time to enter upon the said premises, and to do all such works, matters, and things as might be necessary for carrying the said order into effect.

The appellants were dissatisfied with our determination as being erroneous in point of law, and duly applied to us in writing to state a case setting forth the facts and the grounds of our determination; and in compliance with such application, we state the following case.

Upon the hearing of the complaint, it was proved, on the part of the respondents, and not disputed by the appellants, that a deposit of foul manure, to wit Scarborough ashes, was made and existed in a field situate at Stone Haggs, in the township of Seamer, between the 27th Dec. 1875, and the 19th Feb. 1876; that the said field is in the occupation of Mrs. Ann Woodall, of Seamer, and adjoins the high road; that the heap of deposit was near to the fence adjoining the said road, and about 150yds. from the line of railway from Scarborough to York; that the appellants or their servants, carts, and horses, led the manure, and deposited it in the field in question; that notice of the above-mentioned deposit was given by the respondents to the appellants some time prior to the commencement of these proceedings; and that the nuisance complained of was not abated within the time specified for that purpose in the notice.

There is a large daily traffic on the road adjoining the field containing the deposit, and complaints had been made to the inspector of nuisances by persons using the road in question. It was also proved by the medical officer of health appointed by the respondents, that the deposit was, and is, a nuisance, and injurious to health, and was so from the time it was tipped from the carts of the appellants into the field, and that it would be injurious to parties passing along the road, but not to the occupiers of the nearest dwelling house, which is situate about 400yds. from the field referred to. It was also proved that the occupants of the said dwelling-house might, in some winds, experience a nuisance from the foul smell, but that they had made no complaint; and that no injurious effects could be experienced at the village of Seamer, which is about a mile and a half from the field in question.

On the part of the appellants, it was proved and not denied by the respondents, that by the authority of the appellants, their foreman of the

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scavenging department had contracted for the sale of Scarborough ashes, manure, and refuse, to six farmers in Seamer and the neighbourhood, and for delivery thereof to them in the field in question; that the appellants have no interest either as owners or tenants of such field, but that the purchasers of such ashes pay the tenant for the use of the field for the purpose, and that the purchasers agreed to take the ashes away to their respective farms as soon as possible after delivery thereof by the appellants as aforesaid, or otherwise cover up such ashes so as to prevent a nuisance; that such purchasers contracted to pay the appellants an agreed sum for every load of ashes delivered in the said field, and that after delivery thereof the said ashes remained subject to the exclusive order of the respective purchasers.

The deposit referred to in the said complaint was made by authority of the appellants under or by virtue of the contract above referred to, and by order of the purchasers.

On the part of the respondents it was urged, that the appellants having themselves by their servants and vehicles led and deposited the manure in the field in question are liable, and that under sect. 255 of the Public Health Act 1875, which provides that where any nuisance appears to be wholly or partially caused by the acts or defaults of two or more persons, proceedings may be taken against any one of such persons, they (the appellants), notwithstanding any default or negligence on the part of the farmers sending to contribute towards, or to increase, the said nuisance, may be called on to abate the same, and to prohibit the recurrence thereof, and to pay the costs of the proceedings.

On the part of the appellants it was contended that they deposited such ashes in the field in question under the contract referred to and by order of the purchasers, and that the appellants were lawfully authorised so to do; that on such deposit the delivery was complete to such purchasers, and that after such delivery the appellants ceased to have any control or responsibility in respect of such deposit: that the appellants were neither owners nor occupiers of the said field; and that under these circumstances the appellants had themselves no power to remove the said deposit or to comply with any order which might be made for the abatement of the nuisance complained of.

We, however, being of opinion that the deposit in question is, and was a nuisance, and injurious to health at and from the time of the deposit, and that the evidence given before us brought the case within sects. 91 and 255 respectively of the Public Health Act of 1875, gave our determination against the appellants in the manner before stated.

The question submitted for this honourable court is:—Whether on the facts above stated the appellants are liable to be called upon to abate the nuisance complained of, in manner and form as directed in the said order, and hereinafter to discontinue the delivery of such ashes on the field in question, and to pay the costs of the proceedings.

If the court should be of opinion that the said order was legally and properly made, and the appellants are liable as aforesaid, then the said order is to stand, but if it should be of opinion

otherwise, then the said complaint is to be dismissed.

The following are the material sections of the Public Health Act 1875 (38 & 39 Vict. c. 55), relating to the case:

Sect. 91. For the purposes of this Act any premises in such a state as to be a nuisance or injurious to health. . . Any accumulation or deposit which is a nuisance or injurious to health . . . shall be deemed to be nuisances liable to be dealt with summarily in manner provided by this Act: provided that a penalty shall not be imposed on any person in respect of any accumulation or deposit necessary for the effectual carrying on any business or manufacture, if it be proved to the satisfaction of the court that the accumulation or deposit has not been kept longer than is necessary for the purposes of the business or manufacture, and that the best available means have been taken for preventing injury thereby to the public health.

Sect. 94. On the receipt of any information respecting the existence of a nuisance, the local authority shall, if satisfied of the existence of a nuisance, serve a notice on the person by whose act, default, or sufferance, the nuisance arises or continues, or, if such person cannot be found, on the owner or occupier of the premises on which the nuisance arises, requiring him to abate the same within a time to be specified in the notice, and to execute such works, and do such things as may be necessary for that purpose.

95. If the person on whom a notice to abate a nuisance has been served makes default in complying with any of the requisitions thereof with the time specified, or if the nuisance, although abated since the service of the notice is, in the opinion of the local authority, likely to recur on the same premises, the local authority shall cause a complaint relating to such nuisance to be made before a justice, and such justice shall thereupon issue a summons requiring the person on whom notice was served to appear before a court of summary jurisdiction.

96. If the court is satisfied that the alleged nuisance exists, or that although abated it is likely to recur on the same premises, the court shall make order on such person requiring him to comply with all or any of the requisitions of the notice, or otherwise to abate the nuisance within a time specified in the order, and to do any works necessary for that purpose; or an order prohibiting the recurrence of the nuisance, and directing the execution of any works necessary to prevent the recurrence, or an order requiring abatement and prohibiting the recurrence of the nuisance.

Simpson for the appellants contended that the corporation had neither created nor contributed towards this nuisance in such a way as to bring them within the provisions of the Public Health Act, and cited

Gwynnell v. Eamorr, L. Rep. 10 C. P. 658; 33 L. T. Rep. N. S. 755;

Mayor of Reigate v. Hart, 18 L. T. Rep. N. S. 237; L. Rep. 3 Q. B. 244;

Brown v. Mallett, 5 C. B. 599;

Murphy v. Caralli, 3 H. L. Cas. 462; 34 L. J. 14, Ex.

Patterson for the respondents cited

Brown v. Russell, 18 L. T. Rep. N. S. 19; L. Rep. 3 Q. B. 251; 37 L. J. 119, Q. B.

CLEASBY, B.—It seems to me pretty clear what our decision in this case should be. The order made by the justices consists of two parts; the appellants were first of all ordered to abate the nuisance complained of within one calendar month; and, secondly, are prohibited from permitting the recurrence of the nuisance. As regards the abatement of this nuisance, it appears to me that from the time this manure got on the land of the tenant it became a nuisance, which he (the tenant) had in the first instance caused; the manure was there for his purpose, and he is responsible. The appellants are, therefore, not the proper parties to call upon to abate this continuing nuisance. The second part of the order relates to the discontinuance of the nuisance for the future. It has been argued that

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the act of the corporation does not create a nuisance such as they can be called upon to discontinue. I do not, however, agree to this; what is done by the corporation might be a nuisance to all passing along the highway, though it is not necessary to decide that now. It seems to me that the justices had power to issue this prohibitory order. The case stated that the field where this manure is deposited adjoins the land along which there is a large daily traffic, and that complaints had been made by travellers to the inspector of nuisances. By that act in stopping this nuisance where they do, they do that which in itself is a nuisance, and which necessarily involves a nuisance. So far, therefore, as regards that part of the order which relates to the discontinuance of this nuisance, I think the justices rightly exercised their power; but for the reasons I have given, I think the order for the abatement of it is bad.

GROVE, J.—I am of the same opinion. As regards part of this order, there was only one ground on which the case was arguable for the appellants, viz., that this was a necessary act; for that the manure must be taken somewhere and deposited in some place. But then the question is, were the best available means taken for preventing injury to the public health, for in that case the 91st section of the Public Health Act 1875 specially provides that no penalty shall be imposed. It is not proved here that the corporation did take the best available means to prevent the public health from being injured; indeed it is not disputed that this manure might have been taken to some other place where no nuisance could have been created by its deposit. The corporation have by their own act created this nuisance, and if they choose to contract to sell their ashes, manure, and refuse, they must take care not to infringe the provisions of the law. As regards the other point, viz., that which relates to the abatement of the nuisance, I think the justices acted wrongly, because when the manure was once there the corporation had no power to remove it.

Order of abatement to be quashed; order of prohibition to be affirmed. No costs.

Solicitor for appellants, *W. H. Lammin*, for *Moody*, Scarborough.

Solicitors for respondents, *Woodall and Woodall*, Scarborough.

Thursday, June 1, 1876.

(Before *BRAMWELL, B.* and *GROVE, J.*).

SMITH (app.) v. BARNHAM (resp.).

Navigation Acts—River—Watercourses thereto belonging—Wilfully throwing in rubbish—Claim of right.

The appellant was charged and convicted upon an information laid under the statute 14 Geo. 3, c. 96, which was one of several Acts passed to improve the navigation of the rivers Aire and Calder. By the 97th section of that Act any person who wilfully throws any ballast, &c. into any part of these rivers, or of any watercourses thereunto belonging, is liable to a penalty. The appellant carried on the business of a tanner, and it was proved that on a certain day a quantity of rubbish was discharged by him into a beck, adjoining the premises, at a point about four miles from the

river Aire, into which it flows at a place where that river is navigable.

Held, that the conviction was wrong, inasmuch as the words "watercourses thereto belonging did not include tributary streams," unless they formed part of the navigation.

Semble (per *Bramwell, B.*) the section points to a knowingly wilful act on the part of the doer, and, as the appellant merely exercised a supposed right there was no wilful throwing in of rubbish at all within the meaning of the section.

CASE stated under 20 and 21 Vict. c. 43, s. 2.

At a petty sessions holden at Leeds, in and for the borough of Leeds, in the county of York, on the 3rd March 1876, before me, the undersigned *William Bruce, Esq.*, one of Her Majesty's justices of the peace of and for the said borough, being the stipendiary police magistrate, an information preferred by *Richard Barnham* (hereinafter called the respondent) against *Samuel Smith* (hereinafter called the appellant) under 14 Geo. 3, c. 96, s. 97, charging for that "he, the said appellant on the 8th day of Jan. in the year aforesaid, in the borough aforesaid, wilfully and unlawfully did throw a quantity of soil, earth, and rubbish into a beck there situate called *Sheepscar Beck*, the said beck being a watercourse belonging to the river Aire in the borough" was heard and determined by me, and upon such hearing the appellant was duly convicted.

At the hearing of the information it was proved that the real complainants were undertakers of the Aire and Calder navigation upon whom statutory powers are conferred by 10 & 11 Will. 3, c. 19; 14 Geo. 3, c. 96, 1 Geo. 4, c. 39, and 9 Geo. 4, c. 98. The information was laid under 14 Geo. 3, c. 96, s. 97, which enacts "that if any person or persons shall wilfully throw any soil, earth, ballast, gravel, stones, roots, bushes, or other rubbish into any part of the said rivers, cuts, or canal, or any drains, trenches, or watercourses thereto belonging, every such person shall, for every offence forfeit any sum not exceeding five pounds nor less than forty shillings, at the discretion of the justice or justices of the peace before whom the offender shall be convicted."

The appellant is a farmer having premises on the *Sheepscar Beck* (a beck averging in its course about 5ft. in width and 18in. in depth at the middle of the stream) at a point about four miles from the river Aire, into which it flows at a place where that river is navigable, and forms part of the navigation first referred to. The beck is now and has for many years been used by the occupiers of several tanneries and manufactories on its banks. The appellant carries on the business of a tanner. The beck was under the appellant's premises in a large culvert, through the wall of which thirty-three pipes of about 5in. diameter project over the stream, and there are also two drains about two feet square from the appellant's premises into the beck. On the day in question the business was being carried on, and it was proved that out of a 5in. pipe water charged with lime and earthy matter was discharged into the beck, that a sieve was put under the mouth of the said pipe, and allowed to remain for about three-quarters of an hour, during which time it received and retained about 1lb. of lime and earthy matter which would otherwise have been passed into the beck; and that out of a drain 2ft. square, water was discharged with earthy and

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fleshy matter, which during the same time left a residue in a basket of about half a peck in measure of such earthy and fleshy matter which would otherwise have passed into the beck.

The appellant had carried on the same business of a tanner in the same manner on the same premises for less than twenty years. On the part of the appellant it was contended that the statute did not apply to the case of a manufacturer who, in the course of his business, turned mere refuse matter from his works held in suspension in water into the beck. It was also contended that the beck was not such a watercourse as is mentioned in sect. 97, and further that the lime and earthy and fleshy matter discharged into the beck were neither soil, earth, or rubbish within the meaning of that section; and lastly, that they were not wilfully thrown in within the meaning of that section. It appeared to me that the object of sect. 97 was to keep the rivers mentioned in the Act, and their tributaries free from obstruction which might be caused by the throwing of soil, earth, or rubbish into them, and that it could make no difference whether such soil, &c., was thrown into them by using the hand or machinery or water as the motive power, or whether it was so thrown out of mere wantonness or for the purpose of getting rid of soil, &c., which having served the purpose of a manufacturer was no longer useful to him. It further appeared to me that the lime and earthy and fleshy matter discharged into the beck by the appellant were soil, earth, or rubbish. Whether Sheepscar Beck was a watercourse belonging to the Aire within the meaning of sect. 97 was a question upon which I entertained some doubt, but I was of opinion that it was such a watercourse. I therefore convicted the appellant, and ordered him to pay a penalty of 60s. and the costs.

The questions of law arising on the above statement, therefore, are whether I was right in convicting the appellant on the aforesaid grounds.

Manisty, Q.C. and *Forbes*, for the appellants.—First, this is a navigation Act, and is entitled "An Act for the Making and Keeping Navigable the Rivers of Aire and Calder in the County of York," and is not an Act to prevent the pollution of streams. Secondly, there has been no wilful throwing in of rubbish within the meaning of the 97th section.

Hugh Shield (A. Wille, Q.C. with him), for the respondents.—This case comes within the 97th section. The Legislature intended to extend the powers of the courts both of law and equity, and have enacted that for the purpose of summary jurisdiction actual damage is not necessary. If this is not a watercourse thereunto belonging these words have no meaning at all. [BRAMWELL, B.—Do the words "thereunto belonging" refer to the rivers, or the cuts, or the canals?] To the rivers. [BRAMWELL, B.—Do all tributaries belong to a river? Supposing that is so then if A belongs to B, and B to C, then A belongs to C. GROVE, J.—At what point does it cease to belong?] No doubt the question is a difficult one, and depends in some degree on how far matter can float. [GROVE, J.—That depends on the matter and its specific gravity.] It is contended that a watercourse distant only four miles from a navigable river is within the section.

BRAMWELL, B.—I am of opinion that this information should have been dismissed. There

is no doubt a difficulty in construing this clause, which has evidently been put in by some draughtsman who was anxious to use as comprehensive words as possible. My opinion is that the meaning of the section is shown by the marginal note, which is "penalty on throwing ballast into the navigation." It is made penal by the statute to throw certain things into rivers, cuts, or canals, or any trenches or watercourses "thereunto belonging." Now it is urged on behalf of the respondent that this section includes tributary streams. I think, however, that that is really not so, and that the meaning of the words "watercourses thereunto belonging" (and it is an intelligible use of the words) applies to something belonging to the navigation. Not only do I think this the reasonable construction of the words, but sect. 103, in my opinion, shows it to be the right meaning. Under the last mentioned section half of the penalty is to go to the party injured; therefore an injury of some kind is supposed, and though it is possible that the throwing in of large quantities of soil, &c., four miles above the navigable part of this river might be injurious, yet the words of the 96th section are not "injuriously thrown in." It is necessarily injurious if such soil, &c., is thrown in where the navigation is going on, and I think sect. 97 applies to acts that are done to the navigation. Unless some limit of this kind be placed on the operation of the statute, then throwing rubbish into any part of the river would be penal, which would include up to the source. The words would, no doubt, admit of such a construction; but I cannot help having a strong feeling that they should be limited so as to include only those parts of a river where navigation is carried on. In answer to this it may, perhaps, be said, "Well, but if this is the right construction, rubbish may be thrown in just above the point where the river becomes navigable." That is possibly a case not provided for by the Legislature, and in that event the commissioners would be obliged to have recourse to the ordinary remedies provided by the law independently of their statutory powers. It may be that what the Legislature intended to prevent was the throwing of rubbish, &c., in any place where it must necessarily be injurious. But at all events I am satisfied that tributary streams are not included in the Act, unless they are part of the navigation. I doubt in any case whether the length of time that a manufactory has been carried on has any bearing, because the words here are not "injuriously," but "wilfully;" and therefore if we give a literal interpretation to those words, the effect would be that although the act done was done in a way which could do no harm, and done for centuries, still if wilfully done, the doer is liable to a penalty. I cannot think that the Legislature ever so intended, and that the section does not apply to a stream like this, forming no part of the navigation. Again, there is no statement of any damage here, and I greatly doubt whether this is a wilful throwing in of rubbish at all within this statute. What was done here, was done in the exercise of a supposed right, and the Act seems to me to point to a knowingly wrongful act on the part of the doer.

GROVE, J.—I also think the appellants are entitled to succeed. I shall confine my observations entirely to the scope of the 97th section, by which it is made an offence to throw "soil, earth, or

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other rubbish into any part of the said rivers, cuts, or canals, or of any drains, trenches, or watercourses thereunto belonging." It is argued that the use of the word "watercourses" in conjunction with the words "thereto belonging," includes any stream or river which flows into the Aire and cuts under the provisions of the Act. If that be so, the Act would give jurisdiction to the magistrates over the whole of the basins which feed the Aire, including perhaps hundreds or even thousands of square miles. The Act should not be construed so as to be manifestly absurd, as it certainly would be if so extensive a jurisdiction were held to be given by the words "thereunto belonging." In my judgment these words are confined to something appertaining to the navigation and ancillary to the object for which the Act was passed. The term "belonging" should receive a reasonable limitation. Similar words are used in sect. 111, which begins thus: "Whereas the legal estate and interest in the present navigation of the said rivers, with the works and appurtenances thereunto belonging," &c. The meaning of the words are, as it seems to me, sufficiently clear; certain works are authorised by the Act, and at the close you have the words "thereunto belonging," which show that the word "belonging" means those things which appertain or are ancillary to navigation. Then in sect. 46, we have power given to the undertakers to make "arches, drains, &c., over, under, across, by, or into the said river, and the several cuts and canals authorised to be made by this Act, and the said trenches, streams, and watercourses communicating therewith," to carry the water from the adjoining lands. True the words there are somewhat changed, and are "streams and watercourses," but I think they refer to nothing else than to the drains, &c., previously spoken of. The word "watercourse" is the term employed in the principal Act of 10 & 11 Will. 3, c. 19; but it is not to be found in the preamble of this Act. The scope of the Act was to give power to the commissioners over everything forming part of the navigation, such as locks, and also drains, trenches, and watercourses which appertain to the navigation, including a power to cleanse. In order to keep those clean the present clause was inserted; and this construction is consistent with all the Acts, and gives a reasonable limitation to the magistrates' jurisdiction. As regards the meaning of the words "into any of the said rivers," there is doubtless a difficulty as pointed out by my brother Bramwell; but it is not necessary to dilate further on that now. Strictly rivers have not one source only; often they have two dozen or more sources. Often fifty streams running into one another at a particular spot form a river. But I think that all that was intended to be included in the word "rivers" were those parts of the rivers within the scope of the Act. The construction sought to be put on this section by the respondents would be an extravagant one, and one altogether, as it seems to me, opposed to the intention of the Legislature.

Judgment for the appellant.

Solicitors for appellant, *Torr and Co.*, agents for *Simpson and Burrell*, Leeds.

Solicitors for respondents, *Evans, Foster and Butter*, for *Newstead and Wilson*, Leeds.

QUEEN'S BENCH DIVISION.

Reported by M. W. McKELLAR, J. M. LELY, and E. H. AMPELLETT, Esqrs., Barristers-at-Law.

Wednesday, May 3, 1876.

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Tollhouses, rating of—Conjoint assessment—Notice of appeal against rate—25 & 26 Vict. c. 103, ss. 18, 19—27 & 28 Vict. c. 39, s. 1—"Failure to obtain relief."

By 27 & 28 Vict. c. 39, s. 1, before any appeal against an assessment to a poor rate is heard by quarter sessions, the appellant must give twenty-one days' notice previous to the sessions to the assessment committee, and "no person shall be empowered to appeal to any sessions against a poor rate made in conformity with the valuation list approved by such committee, unless he shall have given to such committee notice of objection against such list, and shall have failed to obtain such relief in the matter as he deems just."

The appellant gave notice of objection to the respondents as and being the assessment committee of the B. Union. The assessment committee adjourned their decision upon the appellant's case until a decision of the Court of Queen's Bench upon another case, which the committee took to be not distinguishable from his, should be given. The appellant then appealed to quarter sessions:

Held, upon a case stated by the recorder, that the appellant had not "failed to obtain relief" from the assessment committee, and that therefore the quarter sessions had no jurisdiction.

Tolls are not rateable in themselves, but a tollhouse is increased rateable by reason of the facilities which it affords for the collection of the tolls.

Where the subject-matter of a rate is improperly described in a rate book, the rate is not to be quashed by striking out the name of the person rated, but amended by altering the description of the property rated.

*THIS was an appeal against a rate made for the relief of the poor by the churchwardens and overseers of the parish of Bedminster on the 11th Oct. 1872, in which the appellant was assessed as follows:—No. 620.—Name of occupier, William Williams; name of owner, The Bristol Harbour Railway Company; description of property rated, tollhouse and tolls for foot passengers on Prince-street Bridge; situation of property, Wapping; Gross estimated value, 800*l.*; rateable value, 700*l.**

The appeal came on to be heard at the Epiphany Quarter Sessions 1873, for the city and county of Bristol, before T. Kingdon Kingdon, Esq., the recorder, who amended the assessment by striking out the name of the appellant subject to the opinion of the Court of Queen's Bench on the following:

CASE.

3. The Dean and Chapter of Bristol were at the time of the erection of the Prince-street Bridge, as hereinafter mentioned, possessed of land in the parish of Bedminster on the southern bank of the River Avon, and of an ancient ferry called the "Gib Ferry" across the said river from the said land. The land and ferry were at that time under lease to one Sidenham Feast.

4. The said Prince-street Bridge was erected on the site of the said Gib Ferry under the

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authority of and in accordance with the provisions of 48 Geo. 3, c. 11 (a copy of which accompanies and is to be taken as part of this case) by the Bristol Dock Company, who are now represented by the Corporation of the City of Bristol. The bridge and its approaches form a public highway, and the property in them, except in the tollhouse for foot passengers and trucks hereinafter mentioned, is exclusively vested in the said corporation.

5. In accordance with the provisions of sect. 21 of the said Act, the said dock company erected at the Bedminster end of the bridge, in the parish of Bedminster, two tollhouses opposite each other, one for foot passengers and the other for carriages. A different collector occupies each tollhouse, and between the tollhouses are two gates, a large one for carriages and a smaller one for foot passengers—such gates extend from one tollhouse to the other.

6. By a deed poll dated the 1st Oct. 1869 the representatives of Sidenham Feast conveyed to the Great Western and Bristol and Exeter Railway Companies the tolls and tollhouse for foot passengers and trucks for the residue of a term of years then vested in them, and the Great Western and Bristol and Exeter Railway Companies subsequently purchased the reversion in the lease from the Ecclesiastical Commissioners, and some time previously to the making of the said rate demised the said tolls and tollhouses to the appellant.

7. For some time previous to the making of the said rate, and up to the time of hearing the said appeal, the said tollhouse for foot passengers and trucks was occupied by a man in the employment of the appellant named Adolphus Dye, who collected at this tollhouse the tolls of foot passengers and trucks referred to in sect. 21 of the said Act (48 Geo. 3, chap. 11), and handed them over to the appellant every fortnight. The other tollhouse is occupied by the Corporation of Bristol, who place therein a servant who collects the tolls on horses, carts, and carriages referred to in the same section. Neither Dye nor the corporation collector interfered with any tolls but those which they were employed to collect, Dye attending exclusively to tolls of foot passengers and trucks, and the corporation collector attending exclusively to the tolls for horses, carts, and carriages.

8. The toll is taken from all foot passengers who pass through the said gate, and it is not taken from any foot passengers even though they pass up to the said gate if they return back and do not pass through the said gate.

9. The amount of the tolls on foot passengers and trucks collected at the said tollgate and received by the appellant is upwards of 800*l.* a year.

10. The appellant is liable to be rated in respect of the occupation of the tollhouse, and the gross value of the tollhouse as a building is 12*l.*, and its rateable value 10*l.*

11. The Corporation of Bristol as successors to the said Dock Company are bound to repair, and do repair, the said bridge, with the exception of the said tollhouse for foot passengers and trucks, which is repaired by the appellant.

12. The said poor rate of the 11th Oct. 1872 was made in conformity with the valuation list then existing, and which had been approved of by the respondents.

13. On the 25th Nov. 1872, the appellant served

on the churchwardens and overseers of the parish of Bedminster, and also on the respondents, a notice of objection against the said valuation list in accordance with the provisions of "The Union Assessment Committee Amendment Act 1864."

14. The appellant had appealed against the previous poor rate, and the appeal had been heard at the Michaelmas General Quarter Sessions, 1872, for the city and county of Bristol, when the recorder had decided in favour of the appellant, but reserved a case for the opinion of this court. The case so reserved was still pending before this court at the meeting of the respondents hereinafter mentioned.

15. On the 3rd Dec. 1872, a meeting of the respondents was held (being their first meeting after the making of the said rate of 11th Oct. 1872), at which both the appellants and the churchwardens and overseers of the poor of Bedminster appeared, and the appellant then urged two objections only to the said valuation list, which were the same as two of those reserved for the opinion of this court by the said case in the last paragraph mentioned.

16. After the appellant had been heard, the respondents announced that they should not give their decision till the said case for the opinion of this court had been decided, and resolved to adjourn the hearing of the objection until after the decision of this court had been given, but as it was impossible to say when that decision would be given, and therefore to fix a day, it was adjourned *sine die*. And no decision of this court, or of the said committee, had been given before the hearing of the appeal to the court of quarter sessions hereinafter mentioned.

17. On the 12th Dec. 1872, the appellant served the respondents, and the churchwardens and overseers of the parish of Bedminster, a notice of appeal to the Epiphany Quarter Sessions held on Tuesday, the 7th of Jan. 1873, for the city and county of Bristol, and also served grounds of appeal upon the same parties.

18. At the hearing of the appeal, the respondents objected that the appellant had not failed to obtain relief from the respondents, and that the appeal had been brought too soon, but the court of quarter sessions overruled the objection on the ground that as the respondents had not given a judgment on the objections referred to in the 15th paragraph of this case, the appellant had failed to obtain such relief in the matter as he deemed just, but reserved the point for the opinion of this court. The court of quarter sessions further decided that the appellant was not liable to be rated in respect of the amount received by him for the said tolls under the circumstances set forth in this case either as a separate subject of rating, or as enhancing the value of the said tollhouse, and that as the appellant was rated as a conjoint assessment in respect of a tollhouse and tolls in respect of the latter of which he was not, in the opinion of the court, liable to be rated, the whole assessment on the appellant was bad, and the said court accordingly made an order that the rate should be amended by striking out the name of the appellant, which order is the order set forth in the 2nd paragraph of this case.

19. The questions for the opinion of this court are: first, whether the appellant was entitled to appeal to the quarter sessions under the circumstances stated in the case; secondly, whether the

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appellant was liable to be rated in respect of the amount received by him from the said tolls; thirdly, whether the court of quarter sessions had power to amend the rate by striking out the name of the appellant.

20. If the court shall be of opinion on the first and third questions in the affirmative and the second in the negative then the order of sessions is to be confirmed.

21. If the court shall be of opinion either on the first or third question in the negative, or if they shall be of opinion on the second question in the affirmative then the order of sessions is to be quashed.

Lopes, Q.C. and Murch, for the appellant, cited *Reg. v. North and South Shields Ferry Company*, 1 E. & B. 440;
Reg. v. Snowden, 4 B. & Ad. 713;
Reg. v. Wellbank, 4 M. & S. 222;
Reg. v. Cunningham, 5 East, 478.

[BLACKBURN, J. referred to *Reg. v. Ambleside*, 16 East 38.]

Bompas, for the respondents, cited *Reg. v. Macdonald*, 12 East, 324;
but he chiefly relied on

Reg. v. Biggleswade, 21 L. T. Rep. N. S. 494,
as showing that the appeal ought not to have been entertained.

Lopes, Q.C. in reply, sought to distinguish *Reg. v. Biggleswade* (*ubi sup.*).

BLACKBURN, J.—In this case the first question is whether the appellant was entitled to appeal under the circumstances. The answer to that question depends upon whether he has complied with the condition precedent marked out by the proviso equivalent to a substantive enactment of 27 and 28 Vict. c. 39, s. 1. That section enacts that before any appeal is heard by quarter sessions, the appellant shall give twenty-one days' notice previous to the sessions to the assessment committee. And the proviso is that "no person shall be empowered to appeal to any sessions against a poor rate made in conformity with the valuation list approved of by such committee, unless he shall have given to such committee notice of objection against the said list, and shall have failed to obtain such relief in the matter as he deems just." Now has the appellant fulfilled the condition precedent marked out by this proviso? I think not; I think that the effect of *Reg. v. Biggleswade* (21 L. T. Rep. N. S. 494) must be taken to be that his notice of appeal was premature. It appears that the assessment committee after first hearing him adjourned *sine die* until a judgment of the Court of Queen's Bench should be given, expecting that that judgment would decide the point involved in his case. The judgment of the Court of Queen's Bench was delayed for a year and a half, and after all did not decide the point. But the appellant had not failed to obtain relief. In *Reg. v. Biggleswade* the poor rate was made on the 30th May. On the 11th June the appellant gave notice of objection to the assessment committee. The committee met on the 30th June and refused to grant him relief. He appealed to sessions held on the same day and the justices allowed the appeal to be entered. But the Court of Queen's Bench granted a prohibition to stay all proceedings on the ground that the appellant had not failed to obtain relief from the committee until 30th June. The present case is an *a fortiori* one to *Reg. v. Biggleswade*, for here there has been no fault on the part of the assessment

committee. Their delay was justifiable in this case, whereas in *Reg. v. Biggleswade* it appears to have been otherwise. The notice of the appellant, therefore, was premature, and the appeal ought not to have been entertained. This would be enough to decide the case, but I think we ought to intimate our opinion on the second point. I am of opinion then that the recorder decided rightly that the tolls in themselves were not rateable, as not being incident to the real estate; only the toll houses were rateable, and their rateable value was the value of the houses coupled with the value of the facilities afforded by the houses for collecting the tolls: *Reg. v. North and South Shields Ferry Company* (7 R. Cas. 849, 1 E. & B. 440), decides this. But the recorder also thought that the mode of description amounted to a rate on two subject matters. Now in many like cases the court has said that this is mere repetition. The recorder might have struck out the non-assessable part, and ought not to have struck out the name of the appellant altogether. As to the third point, I have already said that the rateable value of the houses is enhanced by the facility which they afforded for collecting the tolls.

MELLOR, J.—I am of the same opinion on the three points. I cannot help thinking that the real contention before the recorder was, that the tolls were rateable in themselves, whereas of course this is not so. The recorder was right in his opinion that the tollhouse was to be considered as rendered more valuable by reason of the facilities which it afforded for the collection of the tolls. But I think that *Reg. v. Ambleside* (*ubi sup.*) is a clear authority that where a person is improperly rated, the proper course for the court is not to quash the rate but amend it. The proper course for the recorder here was not to strike out the name of the person rated, but to alter the amount and description.

Rule absolute to quash the order of quarter sessions.

Solicitors for appellant, *Clarke, Woodcock, and Byland*, for *Fussell, Prichard, and Swann*, Bristol.

Solicitors for the respondents, *Guscott, Wadham, and Daw*, for *O'Donoghue and Anson*, Bristol.

June 19 and 26, 1876.

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Coroner—Rejection of evidence—Open verdict—Further evidence after verdict—Melius inquirendum.

Where a coroner rejects evidence which he ought to have admitted, and the jury return an open verdict, the Queen's Bench Division of the High Court has jurisdiction to order the coroner to reopen the inquiry.

Such jurisdiction will not be exercised unless the court can see that to do so will further the ends of justice.

The inquiry will be before a new jury.

An inquest was held on the body of B., and nine witnesses were examined. One of these, C., deposed that B. had told her that he had taken poison. The coroner rejected evidence of a doctor who stated that he had attended the deceased throughout his illness, and had material evidence to give. The jury returned a verdict that deceased died of a poison called antimony, but that

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there was no evidence to show how such poison came into his body.

O. afterwards stated that B. had before his death stated the reason for which he had taken poison. The doctor whose evidence had been rejected stated that B. had denied suicide. The Solicitor to the Treasury having taken the statements of O., of the doctor, and of about thirty other persons, some of whom had, and some of whom had not given evidence at the inquest, deposed that such persons could give further material evidence, and that further material evidence would be forthcoming from other persons upon a new inquiry.

Held, that the inquisition ought to be quashed, and a *melius inquirendum* awarded before the same coroner and another jury.

THIS was a rule calling upon the defendant as and being one of the coroners for the county of Surrey, to show cause why a writ of *certiorari* should not issue to remove into this divisional court all and singular inquisitions taken by or before him at the house called the Priory, in the parish of Streatham, in the said county of Surrey, on the 25th April last, on view of the body of Charles Delauney Turner Bravo; and why the said inquisitions and the proceedings thereon, when returned, should not be quashed and set aside, and why a better or new inquiry should not be directed to be held, and oral evidence taken either before the coroner or commissioners, and either before the same or a fresh jury; and on view of the body or without view thereof, as to this divisional court should seem fit; or why the court should not direct such steps to be taken as to reopening the inquiry or holding a new inquiry as to the court should seem fit; on the ground that there had been a miscarriage of justice and misconduct or mistake on the part of the said coroner, and on the ground that material evidence was rejected, and that material witnesses were not examined and the inquiry closed prematurely, and the coroner's depositions were incorrect, and that material evidence had since been discovered, and that the inquiry was incomplete, and the verdict of the jury imperfect and inconclusive, and the inquisition bad in law on the face of it.

The above rule had been drawn up on reading the affidavits of A. K. Stephenson, Solicitor to the Treasury, R. T. Reid, F. H. M'Calmont, G. Johnson, H. R. Bell, and W. H. Pollard, and certain exhibits annexed to such affidavits respectively. The effect of such affidavits and exhibits was as follows:

The deceased, who was a barrister, was taken ill upon the 18th March about 9.30 p.m., and died on the 21st of the same month. The inquest was held on the 25th, and afterwards by adjournment on the 28th, when it was concluded. The jury returned an open verdict, and the inquisition terminated as follows:

The said jurors now here say upon their oaths that the said C. D. T. Bravo on the 21st April, by taking of a poison called antimony, became mortally sick and distempered in his body, of which said mortal sickness and distemper he did die, and the jurors aforesaid upon their oaths aforesaid do say how or by what means the said poison came to be taken by the said C. D. T. Bravo we have no sufficient evidence proved to us.

From the depositions furnished by the coroner, it appeared that the following witnesses were examined at the inquest:

Mr. Bravo, step-father of the deceased.

Mrs. Cox, who had been living in the house of the deceased as companion to his wife, deposed that as soon as she went to the deceased upon his being first taken ill, he said he had taken poison: but, although she saw him continually until his death, he did not explain to her, or in her hearing, how he came to take the poison; also that he and his wife lived on good and affectionate terms.

Amelia Bushell, lady's maid, deposed that the deceased was conscious to the last, and did not account for his illness to her or to anybody in her hearing.

George Harrison, surgeon, deposed that the deceased was first treated for collapse, but afterwards had symptoms of labouring under an irritant poison.

[The inquiry was at this point adjourned.]

Mary Anne Kieber, servant, deposed that the deceased did not make use of the word poison in her presence.

J. T. Payne, physician, deposed that the *post-mortem* examination taken by him showed antimony to have been the cause of death.

H. R. Bell, surgeon, and cousin of the deceased, deposed that the deceased said that he had taken laudanum for neuralgia, but did not otherwise explain his symptoms.

T. Redwood, professor of chemistry, deposed to antimony having been the cause of death.

F. H. M'Calmont, barrister, and friend of the deceased, deposed that he was a most unlikely person to commit suicide.

Certain notes, taken by Mr. Reid, who had attended the inquest, but not professionally, at the request of the stepfather of the deceased, varied from the depositions taken by the coroner.

The following was the affidavit of Dr. Johnson:—

I professionally attended the late C. D. T. Bravo during the illness of which he died, having visited him on five separate occasions in two days in the month of April last past. I saw him first on Wednesday, the 19th April, at about 2.30 a.m., with Mr. Royce Bell, Mr. Harrison and Dr. Moore. I saw him a second time on the same day, at about 3 p.m., in company with (to the best of my recollection) the same three gentlemen. I saw him the third time on the following day (Thursday), at about 9 a.m., in company with (to the best of my recollection) the same three gentlemen. I saw him the fourth time on the same day (Thursday), at about 2.30 p.m., in company with Mr. Henry Smith, surgeon, of Wimpole-street, and the above-mentioned Mr. Royce Bell. I saw him the fifth time on the same day (Thursday), at about 6.30 p.m., with Sir William Gull and the above-mentioned Mr. Royce Bell. I did not see him again alive, but was informed that he died on the following day, Friday the 21st. I was present at the *post-mortem* examination made by Dr. Payne. On the morning of Friday, April the 28th, about 10 a.m., being the morning of the day on which the adjourned inquest was appointed to be held, Mr. Campbell, sen., the father of Mrs. Charles Bravo, the widow of the deceased, called on me at my house, and said to me that he had been advised by Sir William Gull to come to me, or words to that effect. Mr. Campbell further said to me, as near as I can recollect, the following words: "The question is, what verdict shall we get; I can get a verdict of suicide in five minutes." I said "How?" He said, "By repeating Sir William Gull's opinion." I said, "Well, it may be suicide, but, so far as I can see, there is no evidence to show it, and the only possible verdict is an open one, that he died by antimony." I added that I thought of going to the inquest. He said he hoped that I would not go, or he thought I had better not go, and that he would telegraph for me whether I should come or not. I received no telegram, but I went to Balham that afternoon, and attended the adjourned inquest about 4 p.m.

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I was present when Mr. Royes Bell was giving his evidence. I heard Mr. Royes Bell, in giving his evidence, mention my name and state a conversation which had passed between myself and the deceased (Mr. Charles Bravo) with reference to taking poison. The conversation stated by Mr. Royes Bell was a portion only of what had passed between me and the deceased, and it was that portion which occurred immediately after I had heard Mrs. Cox's statement that the deceased said that he had taken poison. I heard Mr. Royes Bell tell the coroner that I had said to Mr. C. Bravo, "Mrs. Cox tells us you have taken poison," and that I asked him (Mr. C. Bravo) what the meaning of it was, and that he (Mr. C. Bravo) admitted taking laudanum, and that I said to him (Mr. C. Bravo) "That won't do," or "That won't explain your symptoms." The coroner said, "Dr. Johnson is not here, I suppose," upon which some person in the room said, "Yes, Dr. Johnson is here." I heard Mr. McCalmont give his evidence, after which the coroner was apparently about to close the inquiry, when I heard one of the jury say that the jury were in a state of doubt, and would be glad to have any assistance, or words to that effect. Upon this I got up from the other end of the room where I had been sitting and stepped forward to the table and said to the coroner, "My name is Dr. Johnson, I have seen Mr. Bravo several times, and I wish to give evidence." To the best of my recollection I also told the coroner that I had had several conversations with the deceased (Mr. C. Bravo) on the subject of his illness and its cause, but I cannot now undertake to repeat the exact words I used to the coroner in telling him of these conversations. The coroner said, "We don't require any further evidence; it is quite unnecessary to examine you." I have made a statement to the Treasury Solicitor of facts within my knowledge, and I should have been prepared to give evidence of these facts had I been examined by the coroner.

It will be convenient to set out here the coroner's affidavit filed after the rule had been served upon him.

I was elected one of Her Majesty's Coroners for Surrey in the year 1836, and since that time I have never taken a holiday or been absent from my duty either from sickness or any other cause, and no complaint has ever been made against me in respect of any of the many thousands of inquiries held by me during the forty years that have elapsed since my said election.

2. Previous to the inquest on the body of Charles Delaney Turner Bravo, deceased, I had no knowledge whatever of his family or relations, or of the family or relations of his wife, or of any member of either family.

3. The said inquest was conducted by me throughout in an orderly and regular manner, and simply with a view to advance the interests of justice, and in conducting the same I was influenced by no personal interest or corrupt motive.

4. To the best of my belief, the depositions taken by me and signed by myself and the foreman of the jury contain all the material evidence given by the witnesses before me, and to my knowledge no evidence was omitted that had any real bearing on the case.

5. It was not suggested to me during the said inquest that the deceased gentleman came to his death by any foul means, and I saw no reason to suspect any one of having caused his death, and I did not consider that by any further adjournment of the inquest or otherwise any evidence could or might be obtained as to how the poison came into the body of the deceased.

6. I have read the affidavits and statements of Dr. Johnson and Mr. Reid, and the statements of Mrs. Cox and Mrs. Charles Bravo, and if, before the close of the inquest, my attention had been called to the material facts therein stated, I would have again adjourned the inquiry.

7. I cannot recall the exact words used by Dr. Johnson when he offered to give evidence at the inquest, but I understood that he proposed to give medical evidence as to the cause of death only; but if I had known that he was prepared to give the evidence mentioned in his affidavit and statement, I should most certainly have received it.

8. In summing up the evidence, I drew the attention of the jury to the medical testimony, and also to the fact given in evidence by Mrs. Cox that the deceased had

admitted to her that he had "taken poison," but I informed the jury that it was for them to say whether the poison was administered by the deceased himself or by others, or taken by accident.

9. After Mrs. Cox's evidence that the deceased had confessed to her that he had taken poison, I regarded the case as one of suicide, but from subsequent statements made by Mrs. Cox and others, I feel that further inquiry is necessary, and humbly submit to any order this honourable court may think fit to make.

The Secretary of State for the Home Department had requested the solicitor to the Treasury to "make all possible inquiry into the cause of the death of Mr. Bravo, and to take such further steps therein as he might be advised." The Solicitor to the Treasury, or persons acting under his directions, took down in writing, statements made either voluntarily or upon request by thirty-four persons. The voluntary statement of Mrs. Cox was to the effect that the deceased had admitted to her having taken the poison himself and on purpose, and had privately told her the reason for his having done so. The thirty-four statements were made exhibits to the affidavit of the Solicitor to the Treasury, and such affidavit concluded as follows:

I say that from the statements and other documents, copies of which are annexed to my affidavit, and also from information I have received which does not appear in any of these statements or documents, I believe that some of the persons who have made statements to me could, if they chose to do so, make further statements which, in my judgment, would be material, either as going to the credit of such persons, or as bearing upon the circumstances attending the death of the deceased, and that if a further inquiry were had on which such persons could be compelled to attend and give evidence upon oath, further material evidence, which was not before the coroner's jury at the inquest holden on the 25th and 28th days of April last, would be forthcoming.

The Attorney-General having obtained a rule as above, which rule was served on the coroner, on the widow of the deceased, and on the stepfather of the deceased,

Parry, Serjt. (with him *B. Burleigh Muir*, and *Macnamara*, for the coroner), showed cause, and admitted that the coroner had committed an error of judgment in refusing to hear the evidence tendered by Dr. Johnson. He read the affidavit (set out *ante*) of the coroner, who was absent through illness, and referred to

Reg. v. Bunney, 1 Salk. 190; s.c. nom. *Reg. v. Bonney*, Carth. 72;

Reg. v. White, 3 E. & E. 1860.

[COCKBURN, C.J.—There has been no verdict here. The coroner has dismissed the jury. *Reg. v. White* (*ubi sup.*), no doubt, decides that the coroner cannot of himself re-open an inquiry, but the question is whether the court cannot direct him to do so.] It cannot be said that justice has been defeated by the coroner, who acted with perfect *bona fides*, whose *bona fides* is still unimpeached, and who now submits in everything to the directions of the court.

The Attorney-General (Sir J. Holker, Q.C.) with him the Solicitor-General (Sir H. Giffard, Q.C.), Poland, and C. Bowen for the Crown.—This inquiry has been conducted in a most unsatisfactory manner, and there has been no real conclusion at all, but a miscarriage of justice. [COCKBURN, C.J.—That may be, but I doubt whether there is any precedent for the granting a new inquiry on the ground of a mere error of judgment on the part of the coroner.] From *Michael Barclay's case* (2

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Siderfin, pp. 90, 101), it would seem that there is. In that case a new inquiry was ordered on the ground that both sides had not been heard, after a finding of *felo de se*, before six of the old jurors and six new ones, and Glyn, C.J. said that the inquiry might have been held before him, inasmuch as "each Chief Justice of England is Chief Coroner of England." [COCKBURN, C.J.—There was a perfect finding in that case, so that it is distinguishable from the present, in which the finding is imperfect. If we order an inquiry before a new jury, exhumation will be necessary to satisfy the technical requisite of the law that all inquests must be *super visum corporis*. This is a requisite which ought to be made unnecessary by the Legislature, but until that is done, we must be governed by the law as it is. FIELD, J.—In *B. v. Bunney* (1 Salk 190), it is said that a new inquiry before special commissioners is held not *super visum corporis*, but upon affidavits]. He also referred to

Anon. 12 Mod. 112.

Sir H. James, Q.C. and Biron, for the widow, and Grantham, for the stepfather of the deceased, were not heard.

COCKBURN, C.J.—I am of opinion that the rule ought to be absolute to quash the inquisition, and to direct the coroner to hold a new inquiry before a fresh jury. I do not think the same jury can entertain the question again. The jury were discharged by the coroner, and were, therefore, *functi officio*. As we quash the inquisition, this will involve the very painful necessity of an exhumation of the body, inasmuch as the inquest must be *super visum corporis* according to law. The course which we now take is most in accordance with legal precedents. But I wish it to be very distinctly understood that a new inquiry will not be granted in every case of an open verdict, but only in the case where the court sees that some practical end may be gained. Ordinarily, the court will take care not to increase public excitement by a further public investigation. But the present case is one of a mysterious character, and the coroner rejected evidence which might have thrown light on the cause of death. Heaven forbid that we should suggest that the death was caused by either murder or suicide. It might have been caused by accident. It will be for the jury to say what the cause of death was, and the evidence of Dr. Johnson may assist them in forming a conclusion. The rule, therefore, will be absolute.

MELLOR and FIELD, JJ. concurred.

Rule absolute.

Solicitor for the Crown, *The Solicitor to the Treasury*.

Solicitors for the coroner, *Morrison*.

The rule was drawn up as follows: "Upon reading the affidavit of William Carter, and upon hearing counsel on both sides, it is ordered that a writ of *certiorari* issue to remove into this divisional court all and singular inquisitions taken by or before the said William Carter, one of Her Majesty's coroners for the County of Surrey, at the house called the Priory, in the parish of Streatham, in the said county of Surrey, on the 25th day of April last, on view of the body of Charles Delauney Turner Bravo. And it is further ordered that the said inquisition and the proceedings thereon when returned be quashed for

the insufficiency thereof, and that the said coroner have leave to hold a fresh inquest on view of the said body, and before a new jury."

COMMON PLEAS DIVISION.

Reported by P. B. HUTCHINS and CYRIL DODD, Esqs.,
Barristers-at-Law.

May 4 and 5, 1876.

MATHER (pet.) v. BROWN AND ANOTHER (resps.).

Municipal election—Nomination paper—Misnomer—Use of initial for name—5 & 6 Will. 4, c. 76, s. 142, 38 & 39 Vict. c. 40.

By 5 & 6 Will. 4, c. 76, s. 142, a misnomer in certain documents, among which nomination papers are not mentioned, is immaterial, if the description is such as to be commonly understood. 38 & 39 Vict. c. 40, which requires nomination papers at municipal elections to state the surname and other names of the person nominated, is to be construed as one with that Act.

At a municipal election a candidate's second Christian name was represented in his nomination paper by its initial. The nomination paper was objected to, and was rejected by the mayor.

Held, on a case stated on petition against the mayor's decision, that there was a fatal misnomer, and that 5 & 6 Will. 4, c. 76, s. 142, does not apply to nomination papers, and did not cure the objection.

A SPECIAL case had been stated on an appeal from the decision of the mayor of Southport, who had allowed an objection to the nomination of the petitioner as a candidate for the office of town councillor for the Talbot Ward of the borough of Southport. The nomination paper of the petitioner was duly subscribed by two enrolled burgesses of the borough as proposer and seconder, and by eight other enrolled burgesses of the borough as assenting to the nomination in accordance with the Municipal Elections Act 1875 (38 & 39 Vict. c. 40) sect. 1, sub-sect. 2, and was delivered to the town clerk in due time as required by sub-sect. 3. The name of the petitioner was Robert Vicars Mather; the nomination paper was filled up as follows:

Surname.	Other Names.	Abode.	Description.
Mather.	Robert V.	Chapel-street.	Hotel Proprietor.

The petitioner's name was on the burgess roll as "Robert V. Mather." There were only three other ratepayers named Mather in the borough of Southport, of whom two were women, and the other was Richard Mather, who resided at 28, Sussex-road, and who was not a hotel proprietor.

The mayor attended at the town hall, as directed by the Act (sect. 1, sub-sect. 3), to decide on the validity of objections to the nomination papers. No one was in attendance on behalf of the petitioner.

An objection was made by John Holt, one of the burgesses, to the petitioner's nomination paper, on the ground that his Christian names were insufficiently stated. The mayor decided that this objection must prevail, and the town clerk published the names of the two respondents, Brown and Witham, as the only candidates, and

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they were declared duly elected. Mr. Mather took objection to the decision of the mayor disallowing his nomination paper by petition, which was turned into a special case by order of Huddleston, B., and the case now came before the court for decision. (a)

May 4.—*A. L. Smith* (Hutton with him) for the petitioner.—It must be admitted that the use of an initial for one of the petitioner's names is a misnomer: (*Reg. v. Plenty*, L. Rep. 4 Q. B. 346: 38 L. J. 205, Q. B.; 9 B. & S. 386; 20 L. T. Rep. N. S. 521). But it was there held that a similar misnomer was cured by 5 & 6 Will. c. 76, s. 142, which is incorporated by 38 & 39 Vict. c. 40, s. 13. The earlier Act does not expressly mention nomination papers, because they were not then used in municipal elections, but the Legislature has incorporated its provisions in an Act which treats of nomination papers, and must have intended to apply sect. 142 to nomination papers. *R. v. Tugwell* (L. Rep. 3 Q. B. 704; 37 L. J. 275, Q. B.; 9 B. & S. 367) shows that this section applied to nomination papers under 22 Vict. c. 35, s. 6. The description is clearly such as to be commonly understood.

No counsel appeared for the respondents.

Our. adv. vult.

May 5.—Lord COLERIDGE, C.J.—In the case of *Mather v. Brown*, which was argued yesterday, we have looked into the authorities to see if we could give effect to Mr. A. L. Smith's argument, and overrule the objection which has been taken to the nomination of the petitioner, and we are of opinion that we cannot. We have arrived at this decision with extreme reluctance, but it is our duty to

(a) By the Municipal Elections Act 1875 (38 & 39 Vict. c. 40), sect. 1, sub-sect. 2, at any such election every candidate shall be nominated in writing; the writing shall be subscribed by two enrolled burgesses of such borough or ward as proposer and seconder, and by eight other enrolled burgesses of such borough or ward as assenting to the nomination. . . . The nomination paper shall state the surname and other names of the person nominated, with his place of abode and description, and shall be in the Form No. 2 set forth in the first schedule to this Act, or to the like effect. . . .

Sub-sect. 3. Every nomination paper subscribed as aforesaid, shall be delivered by the candidate himself, or his proposer or seconder, to the town clerk, seven days at least before the day of election, and before five o'clock in the afternoon of the last day on which any such nomination paper may by law be delivered; the town clerk shall forthwith send notice of such nomination to each person nominated. The mayor shall attend at the town hall on the day next after the last day for the delivery of nominations to the town clerk between the hours of two and four in the afternoon, and shall decide on the validity of every objection made to a nomination paper, such objection to be made in writing. . . . The decision of the mayor, which shall be given in writing, shall, if disallowing any objection to a nomination paper, be final, but if allowing the same, shall be subject to reversal on petition questioning the election or return. . . .

Sect. 13. This Act shall, so far as consistent with the tenor thereof, be construed as one with the Act 5 & 6 Will. 4, c. 76, and the Acts amending the same, and the Acts for the time being in force relating to elections of councillors, auditors, and assessors in boroughs.

By 5 & 6 Will. 4, c. 76, s. 142. . . . No misnomer or inaccurate description of any person, body corporate, or place named in any schedule to this Act annexed, or in any roll, list, notice, or voting paper required by this Act, shall hinder the full operation of this Act with respect to such person, body corporate, or place, provided that the description of such person, body corporate, or place, be such as to be commonly understood.

decide what is the law, and we can come to no other conclusion than that the objection is good. The question has arisen thus. There was a municipal election for Southport, and Robert Vicars Mather was nominated for the office of town councillor. He was duly nominated in every respect, except that in the nomination paper in the column for the Christian names of the candidate, where the names inserted should have been "Robert Vicars," what actually was inserted was "Robert V." Objection was taken to this defect in the nomination paper in proper time and the objection was allowed by the mayor, and the question for our decision is whether we are obliged to give effect to the objection which has been so taken and allowed. The Municipal Elections Act of last year (38 & 39 Vict. c. 40) among other provisions directs by sect. 1 sub-sect. 2 that "The nomination paper shall state the surname and other names of the person nominated, with his place of abode and description, and shall be in the Form No. 2 set forth in the schedule to this Act, or to the like effect;" and the form in the schedule gives four separate columns, for the surname, other names, abode, and description. The objection is that whoever filled up the paper has not properly filled up the column for the candidate's other names. It was made at a time when the defect might have been cured. The nomination paper is to be delivered by the candidate himself or his proposer or seconder, and the candidate had no opportunity of correcting the defect when he knew of the objection. The question is, is it a misnomer? In the absence of authority I do not know what my opinion might have been, but there is a unanimous decision that a description in which the Christian name, which is required to be stated, is represented by an initial, is a misnomer; for although it was held in *R. v. Bradley* (3 E. & E. 634) that "Wm." or "Willm." might be used for "William," yet it has since been held in *Reg. v. Plenty* (*ubi sup.*) that the use of an initial was insufficient. In that case it was held that 5 & 6 Will. 4, c. 76, s. 142 cured the objection. That section enacted that no misnomer or inaccurate description of any person, &c. in certain documents required by the Act, including voting papers should hinder the full operation of the Act with respect to such person, &c., provided the description of such person, &c. were such as to be commonly understood. Therefore this decision carries the matter thus far; there was undoubtedly a misnomer, but it was cured by sect. 142 of the old Municipal Act (5 & 6 Will. 4, c. 76). 38 & 39 Vict. c. 40 incorporates that Act by sect. 13, but in these words, "This Act shall, as far as consistent with the tenor thereof, be construed as one with the Act 5 & 6 Will. 4, c. 76," and it does not say that the operation of sect. 142 of the old Act shall be extended. If this provision were taken as inserted in the later Act, still nomination papers would not be mentioned; for at the time when the old Act was passed nomination was oral, and the Act does not seem to extend to a document which was not in existence at that time. I confess I am aware that this is a technical objection, but the respondents had a right to take it, and it was taken in time and when the nomination paper might have been amended. We must give effect to the law; and we feel bound, being the court of final appeal in these election cases, to follow the strict letter of the law. Political questions, or questions between political parties, often arise in these cases,

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and we ought to abstain from any attempt to strain the words which have been used by the Legislature. Although I have come to this conclusion with great reluctance, I am clearly of opinion that we must give judgment against the petitioner.

LINDLEY, J.—I am of the same opinion. I have examined the authorities to see if there is any decision which would enable us to get over this objection, but I cannot find any authority which enables us to do so, and I can find authorities to the contrary. In *Davison v. Farmer* (6 Ex. 242) there was an omission from a statute which the court said was no doubt an oversight in the Legislature; but they held that they could not supply the defect. The same point was decided in the same way in *Lane v. Bennett* (1 M. & W. 70). The Act of last year by sect. 13 is to be construed as one with the old Act, but it has omitted to continue the language used in sect. 142 of the old Act so as to extend that Act to documents in *pari materia* with those which are there mentioned. Here it appears probably to have been by an oversight that the provision in question was not so extended, but we cannot stretch the language which is actually used beyond its true meaning.

Lord COLERIDGE, C.J.—My brother Archibald, who heard the argument, has authorised me to state that he concurs in the view which we have adopted.

Judgment for the respondents.

Solicitors for the petitioner, *Gregory, Rowcliffe, Rowcliffe, and Rawls.*

May 18 and 22, 1876.

STONE v. THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF YEovil.

Construction of statute—Word making clause unintelligible—Diversion of streams—Injury to lands—Waterworks Clauses Act 1847 (10 Vict. c. 17)—Lands Clauses Consolidation Act 1845 (8 & 9 Vict. c. 18), s. 9.

Where a word in a statute would make the clause in which it occurs unintelligible the word may be eliminated and the clause read without it.

8 & 9 Vict. c. 18, s. 9 provides for assessment of purchase money for lands taken from parties under disability and compensation for injury "to any such lands."

Held, that the section may be read as if the word "such" were not in it, and therefore a party under disability is entitled to compensation for injury to lands not taken.

Defendants, under a private Act incorporating the Lands Clauses Consolidation Act 1845 and the Waterworks Clauses Act 1847, diverted streams which supplied a mill of which plaintiff was tenant for life, and were empowered to divert, and gave notice of intention to divert others. Plaintiff and defendants agreed to refer to two surveyors the amount of compensation to be paid for all such streams. The surveyors disagreed, and a third surveyor was nominated by two justices under the Lands Clauses Consolidation Act 1845, s. 9, who made his award assessing compensation for all such streams.

Held, on demurrer to a statement of claim, that defendants' submission to valuation was not ultra vires, that there had been a good valuation under sect. 9, and that plaintiff was entitled to have compensation assessed for the streams which defendants had power to divert and had given

notice of intention to divert, as well as for those which they had already diverted.

The statement of claim was as follows:

1. The plaintiff, before and at the time of the agreement hereinafter mentioned was and is the owner, to wit as tenant, for life of a certain water grist mill and premises called "Withyhook Mill," situate in the parish of Leigh, in the county of Dorset, and also was and is entitled to the use and enjoyment of certain streams, springs, and waters flowing down to the said mill, and necessary for the purpose of working the same.

2. By the "Yeovil Improvement Act 1870" (which incorporated amongst other Acts the "Lands Clauses Consolidation Act 1845" and the "Waterworks Clauses Acts 1847 and 1863") the defendants were authorised and empowered to construct certain waterworks for supplying water to the borough of Yeovil and to the other places mentioned in the said Act, and for that purpose to take, use, divert, and appropriate the several streams, springs, waters, and sources of water shown on the plans, and described in the books of reference deposited by the defendants as mentioned in the said Act.

3. The streams, springs, and waters which the defendants were so empowered to divert and appropriate for the purposes of the waterworks authorised by the said Act, included certain streams, springs, and waters flowing down to and forming the principal supply of water to the plaintiff's said mill.

4. In or about the month of Sept. 1872, the defendants gave notice to the plaintiff of their intention to divert and appropriate under the powers of the said first-mentioned Act the whole of the said last-mentioned streams, springs, and waters, and at or about the same time the defendants actually took and diverted a great portion of the said streams, springs, and waters for the purposes of the said waterworks.

5. The necessary effect of such diversion and appropriation of the said streams and waters by the defendants was to cause permanent injury and damage to the said mill and premises of the plaintiff; and the plaintiff, as such owner thereof as aforesaid, then became and was entitled to have the permanent damage and injury which then had been or might thereafter be sustained by the plaintiff or the owner for the time being of the said mill and premises by reason of the exercise by the defendants of the powers of the said Act ascertained by valuation in the manner provided by the "Lands Clauses Consolidation Act 1845."

6. A correspondence subsequently took place between the plaintiff's solicitors and the solicitor of the defendants as to the best mode of determining the amount of compensation due to the plaintiff.

7. On the 13th April 1874 an agreement was made and entered into between the plaintiff and the defendants. (The agreement, in which the defendants were called "the corporation," was set out; so far as material for this report, it is as follows.) . . . "Whereas the corporation, in pursuance of the powers and provisions of the Yeovil Improvement Act 1870 and the several Acts and parts of Acts incorporated therewith, are, for the purposes of the waterworks authorised by the said first-mentioned Act, empowered, and intend from time to time to take use, divert, and appropriate the streams, springs, and waters arising," &c. . .

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(describing them by reference to the plans and book of reference deposited with the clerk of the peace.) "And whereas the said Thomas Stone" (the plaintiff) "as tenant for life of a certain water grist mill called "Withyhook Mill," and certain lands adjoining and belonging thereto situate, &c. . . under and by virtue of the last will and testament of John Stone deceased is interested in all or some of the said streams, springs, and waters. Now be it known that in pursuance of the Lands Clauses Consolidation Act 1845 the corporation do hereby nominate on their behalf Henry Parsons, of &c. . . an able practical surveyor and the said Thomas Stone doth hereby nominate John Day, of &c. . . another able practical surveyor, to be the two surveyors who shall determine (if they can agree) the amount of compensation money to be now paid by the corporation for the damage which the owner or owners for the time being of the said premises may sustain by the abstraction of the whole of the said streams, springs, and waters, which the said corporation are so as aforesaid authorised to take, use, divert, and appropriate for the purposes of the said waterworks or otherwise by reason of the execution of the powers of the said first-mentioned Act."

8. The said Henry Parsons and John Day, the valuers named in the said agreement, having disagreed in the valuation of the matters and things referred to them by the said agreement, one James Rawlence, an able practical surveyor, was shortly afterwards, upon the application of the defendants and with the consent of the plaintiff duly, nominated by two justices in accordance with the provisions in that behalf of the Lands Clauses Consolidation Act 1845, to determine the amount of compensation to be paid by the defendants to the plaintiff in respect of the said damage and injury to the said mill and premises as aforesaid.

9. The said James Rawlence afterwards took upon himself the burthen of such valuation accordingly, and having been attended by the said parties respectively, their respective solicitors and witnesses duly and in accordance with the provisions of the said Lands Clauses Consolidation Act 1845 made his award and valuation respecting the premises as follows (that is to say):

I, James Rawlence, the surveyor, nominated by two justices in and by the nomination under their hands indorsed on the above-written agreement do by this my valuation determine that the sum of £939 5s. is the compensation money to be paid by the above-named corporation for the permanent damage and injury which the owner or owners for the time being of the above-mentioned mill, lands, and premises may have sustained or shall or may sustain by the abstraction of the whole of the streams, springs, and waters which the said corporation are authorised to take, use, divert, and appropriate for the purposes of the waterworks authorised by The Yeovil Improvement Act 1870. . . (dated 18th July 1874).

10. The defendants themselves took up the said award and valuation of the said James Rawlence, but (though frequently requested by the plaintiff so to do) have not paid either to the plaintiff, nor into the bank pursuant to the directions of the Lands Clauses Consolidation Act 1845 the amount of the said valuation, but on the pretext of the said valuation, and award being *ultra vires* or otherwise invalid have constantly neglected and refused so to do.

The plaintiff claims 939l. 5s. and interest thereon from the 18th July 1874 until judgment and a writ

of *mandamus* directing the defendants to pay the above amount and interest into the bank pursuant to the provisions of the Lands Clauses Act 1845. Demurrer. (a)

Kingdon, Q.C. (H. Cary Batten with him) for the defendants.—The defendants have not taken or used lands or streams within the meaning of the Waterworks Clauses Act 1847 (10 Vict. c. 17) sect. 6; the plaintiff's claim must be for lands and streams injuriously affected. *Ferrand v. The Corporation of Bradford* (21 Beav. 412), where the Master of the Rolls took the opposite view to this, is directly in conflict with *Bush v. The Trowbridge Waterworks Company* (32 L. T. Rep. N. S. 182; L. Rep. 19 Ex. 291; 44 L. J., 235, Ch.) affirmed by the Lords Justices (33 L. T. Rep. N. S. 187; L. Rep. 10 Ch. 459; 44 L. J. 645, Ch.) The plaintiff, then, is not entitled to compensation, for sect. 9 of the Lands Clauses Consolidation Act 1845 (8 & 9 Vict. c. 18), under which the compensation payable to parties under disability is to be ascertained, applies only to cases where lands are purchased or taken, and does not provide for payment of compensation for lands which are injuriously affected without being taken. The words, "compensation to be paid for any permanent damage or injury to any such lands" in that section can only refer to the lands mentioned earlier in the section, that is "lands to be purchased or taken." The agreement for submission was *ultra vires*, and therefore not binding on the ratepayers:

Ashbury Railway Carriage and Iron Company v. Riche, 33 L. T. Rep. N. S. 450; L. Rep. 7 H. of L. 653; 44 L. J. 185, Ex.

Pinder (Lopes, Q.C., with him) for the plaintiff.—This is not a valuation under the Lands Clauses Consolidation Act, but an arbitration by agreement on the terms of the Act. First, if there had been no agreement the arbitrator would have been bound under sect. 68 to give damages for all the streams, and there could have been no second action or arbitration. Secondly, if this would not be so independently of the agreement, the parties have made an agreement to that effect. *Groft v. The London and North-Western Railway Company* (3 B. & S. 436; 32 L. J. 113, Q. B.), is an authority for the first of these propositions, which is also supported by the judgment of the court delivered by Erle, C.J., in

(a) Lands Clauses Consolidation Act 1845 (8 & 9 Vict. c. 18), s. 9. The purchase-money or compensation to be paid for any lands to be purchased or taken from any party under any disability or incapacity, and not having power to sell or convey such lands except under the provisions of this or the special Act, and the compensation to be paid for any permanent damage or injury to any such lands, shall not, except where the same shall have been determined by the verdict of a jury or by arbitration, or by the valuation of a surveyor appointed by two justices under the provision hereinafter contained, be less than shall be determined by the valuation of two able practical surveyors, one of whom shall be nominated by the promoters of the undertaking, and the other by the other party; and if such two surveyors cannot agree in the valuation then by such third surveyor as any two justices shall, upon application of either party after notice to the other party for that purpose, nominate; and each of such two surveyors if they agree, or if not then the surveyor nominated by the said justices, shall annex to the valuation a declaration in writing subscribed by them or him of the correctness thereof; and all such purchase money or compensation shall be deposited in the bank for the benefit of the parties interested in manner hereinafter mentioned.

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Brogden v. The Llynvi Valley Railway Company (9 C. B., N. S., 229; 30 L. J. 61, C. P.). The latter case shows that the submission was not *ultra vires*; see also as to this point, *Martin v. The Leicester Waterworks Company* (3 H. & N. 463; 27 L. J. 432, Ex.). There can be a reference to settle the amount of compensation, not according to the provisions of the Lands Clauses Consolidation Act: (*Collins v. The South Staffordshire Railway Company*, 7 Ex. 5.) The defendants, having appeared and taken up the award, are estopped from taking the objection that the submission is *ultra vires*:

Tyerman v. Smith, 6 E. & B. 719; 25 L. J. 359, Q. B.;

Andrews v. Elliott, 5 E. & B. 502; 25 L. J. 1, Q. B.; affirmed 6 E. & B. 338; 25 L. J. 336, Q. B.

Assuming that sect. 9 of the Lands Clauses Consolidation Act applies, the words "compensation to be paid for any permanent damage or injury to such lands," cannot refer to lands which are taken, for that construction would make the clause unintelligible. They must refer to lands belonging to the tenant for life.

Kingdon, Q.C., in reply, referred to:

The Waterworks Clauses Act 1847 (10 Vict. c. 17) sect. 12;

Caledonian Railway Company v. Lockhart, 3 Macqueen 808.

BRETT, J.—In this case the statement of claim is founded on an allegation that the plaintiff was tenant for life and in possession of a certain mill, and the defendants, under a private Act incorporating the Lands Clauses Consolidation Act and the Waterworks Clauses Acts, diverted part of certain streams which did not belong to the plaintiff, but over which he was entitled to a millowner's rights, and that the defendants had given notice to the plaintiff of their intention to divert the whole of the said streams. The remedy sought is a writ of *mandamus* directing the defendants to pay the amount which has been assessed as compensation for damage sustained or to be sustained by the plaintiff by the diversion of the whole of the springs. To this statement of claim there is a demurrer, and therefore all the facts alleged must for the purposes of the present decision be taken to be true. The plaintiff argues that the submission and assessment have taken place under and according to sect. 9 of the Lands Clauses Consolidation Act 1845 (8 & 9 Vict. c. 18), or if not under sect. 9 then under sect. 22, and that in either case the assessment is binding on both the plaintiff and the defendants. The defendants argued that the submission and assessment are not within sect. 9, and if not within sect. 9, are not within sect. 22, and therefore not properly within the provisions of the Lands Clauses Consolidation Act; or that if they are within this Act the provisions of the Act are not applicable to a part of the claim, that is the claim for compensation for diversion after the time of the assessment. The defendants further argue that if the submission and assessment are not within the Act, the defendants are not bound, nor is the plaintiff; and that if the defendants agreed to assess and pay compensation for diversion after the time of the assessment, they attempted to bind the shareholders or ratepayers where they were not compelled to make compensation, and therefore they were not entitled to make the agreement for submission which they did, and the

submission was *ultra vires*. It was said for the defendants that the Waterworks Clauses Acts did not enable a corporation to bind their shareholders to make compensation for injury which might be sustained after the time of the assessment. The first question is whether the submission and assessment are under the Lands Clauses Consolidation Act 1845, which is incorporated by the Private Act under which the defendants diverted the streams. Now I think that sect. 22 of the Lands Clauses Consolidation Act, gives no power to refer, and that the word "agreement" in that section means an agreement as to value, not an agreement for reference; but whether this is so or not, I think that under that section a tenant for life cannot bind a remainderman, although he might bind himself; for the remainderman is not bound by the decision of any person who settles the amount of compensation to be paid, unless that person is chosen by the remainderman himself, or else is a person invested with power by the Act. Therefore, if there is to be an arbitration to assess the amount of compensation to be paid, it should be carried out by persons who have a right by the statute to act. The umpire is to be selected by the arbitrators, and no one else by the Act has power to bind the remainderman. Now it is clear that in the present case the person who assessed the amount of compensation to be paid was not chosen by the arbitrators, but was selected by two justices. Therefore this assessment of compensation cannot be binding if it is to be regarded as an arbitration, but if it is to be regarded as a valuation within the meaning of sect. 9, I think it is binding. It is said on behalf of the defendants that it is not within sect. 9, because compensation is sought for injury by diversion as compensation for injuriously affecting, not for taking the property of the claimant, for that sect. 9 applies only to cases of taking property, and not to cases where compensation is sought for property which has been injuriously affected. The question as to whether diverting a stream is taking property or injuriously affecting it, is one which has been decided by judicial authority. In *Ferrand v. The Corporation of Bradford* (21 Beav. 412), Lord Romilly, M.R., decided that where there was a taking of water from a stream under the Waterworks Clauses Act, the property of a person claiming compensation was to be valued, as if his land were taken; but the present Master of the Rolls (Sir G. Jessel) differed from that decision, and came to a contrary conclusion in *Bush v. The Trowbridge Waterworks Company* (32 L. T. Rep. N.S. 182; L. Rep. 19 Eq. 291; 44 L. J. 235, Ch.), and decided that the person claiming compensation cannot say that any property of his is taken, but can only claim for property injuriously affected. If the question depended on the conflicting decisions of the two Masters of the Rolls, we should have to decide which of the two, in our opinion, ought to be followed; but the Court of Appeal took the view of the present Master of the Rolls, and affirmed his decision (33 L. T. Rep. N.S. 137; L. Rep. 10 Ch. 459; 44 L. J. 645, Ch.), and their decision is binding on us. If we had to determine the point for ourselves, we should have determined it as they have. Therefore this case comes under the Lands Clauses Consolidation Act, for the property of the plaintiff has been injuriously affected. Then can this be the subject of valuation under sect. 9? By that section, "the

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purchase-money or compensation to be paid for any lands to be purchased or taken from any party under any disability or incapacity, and not having the power to sell or convey such lands except under the provisions of this or the special Act, and the compensation to be paid for any permanent damage or injury to any such lands" is to be assessed in the way in which the compensation claimed by the plaintiff in this case has been assessed. The word "such," at first sight, appears to confine the provisions of the section to lands purchased or taken, but this construction is so nonsensical that it is impossible to give effect to it. A true canon of construction is, that if you can give effect to the exact words of any statute or other document, you are bound to do so, but if a word or phrase occurring in an Act of Parliament or agreement can have no sensible meaning, it must be eliminated. Therefore, the word "such" must be eliminated from the 9th section of the Lands Clauses Consolidation Act. Then the subjects dealt with by sect. 9, if we look at the general provisions of that section, are lands purchased or taken, or injuriously affected, and if this is so, compensation for permanent injury is within sect. 9; and so far as the plaintiff's property has been injuriously affected, it is within sect. 9, and may therefore be treated as matter for valuation. But it is said that the assessment is wrong, because it gave compensation for damage by diversion which had not yet taken place. The statement of claim says that the defendants had power to divert all the streams in respect of which compensation is assessed, so it is not a case where they had not power to do that for which the claim is made. Were that so, the agreement under which the compensation was assessed would be clearly *ultra vires*, but here the compensation is in respect of streams which the defendants had power to divert; for paragraph 4 of the statement of claim alleges that "the defendants gave notice to the plaintiff of their intention to divert and appropriate under the powers of the said first-mentioned Act, the whole of the said last-mentioned streams, springs, and waters;" that is, those supplying the plaintiff's mill, which, as alleged in paragraph 3, the defendants were empowered to divert and appropriate. I do not so much rely on that notice, but when the agreement under which the compensation has been assessed is referred to, it will be seen that it is recited that the defendants, who are the promoters of the waterworks, "intend from time to time to take, use, divert, and appropriate the streams, springs, and waters," for which the plaintiff claims compensation. Therefore, at the moment of the submission, they say that they are about to divert the whole of the water, which is equivalent to saying that they would shortly divert the whole. Yet it is said (the intention to divert the whole being expressed, and the arbitrator having notice of such intention) that the arbitrator was not entitled to assess compensation for the whole. It would seem almost insensible if we were to hold that if the defendants diverted part of the streams in May and the rest in June, there must be one assessment of compensation in May and another in June. I think the true interpretation is, that where there are diversions from time to time, there may be separate assessments, but it does not follow that if when compensation is assessed for the first diversion the persons having power to divert have given

notice of their intention to divert further, there is anything to prevent the arbitrator from assessing compensation for all diversions of which notice has been given. Then the Waterworks Clauses Act 1847 (10 Vict. c. 17, s. 12) is relied on by which power is given to the undertakers (i.e. the persons authorised to construct the waterworks) from time to time to divert and impound the water from the streams mentioned for that purpose in the special Act, &c., "Provided always that in the exercise of the said powers the undertakers . . . shall make full compensation to all parties interested for all damage sustained by them through the exercise of such powers." It is argued from the use of the word "sustained" that it is only where the damage has taken place that compensation is to be made, but according to the common interpretation this would mean "sustained or to be sustained." Therefore the defendants and the plaintiff had a right to refer the matter for valuation under sect. 9 to have the amount of compensation assessed not only for diversion which had been made already, but also for that which was about to take place and of which notice had been given, and the valuer had authority to assess compensation in both instances. The case in the House of Lords, which has been referred to (*Caledonian Railway Company v. Lockhart*, 3 Macq. 808) only shows that where there are successive diversions there may be successive valuations; but it does not show that compensation may not be assessed for all diversions of which notice has been given. It therefore seems that the case is brought within sect. 9 of the Lands Clauses Consolidation Act, and the claim to compensation is not invalidated by sect. 12 of the Waterworks Clauses Act. I think, therefore, that the case is within the statute, and that there is no ground for the argument that the submission was *ultra vires*, and the statement of claim is good.

ARCIBALD, J.—This is a statement of claim in which the plaintiff avers that he was tenant for life of a mill, and the defendants were authorised by statute to divert the streams which formed the principal supply of water to the mill, that they had given notice of intention to divert the whole of these streams, and had actually diverted some, and that the necessary effect of such diversion was to cause permanent injury and damage to the mill and premises of the plaintiff. It then sets out an agreement by which the plaintiff and defendants agree to nominate two surveyors to assess the amount of compensation to be paid for damage which might be caused by abstraction of the whole of the streams. It then goes on to say that the two surveyors disagreed, and a third was nominated by two justices and undertook the valuation; and it then gives his award assessing compensation for all damages which the plaintiff's premises may have sustained, or shall or may sustain by the diversion of the whole of the streams. To this statement of claim there is a demurrer on the ground that the award is *ultra vires*, because the Waterworks Clauses Act (10 Vict. c. 17, s. 12), provides that the undertakers may divert water from time to time, and shall make full compensation for all damage sustained. The question arises whether this reference to the surveyor was an arbitration within sect. 68 of the Lands Clauses Consolidation Act or a valuation within sect. 9. Sect. 9 gives

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power to make a valuation in respect of the money to be paid for lands purchased or taken from persons under disability and in respect of compensation for permanent damage or injury to any such lands. Here the Lands Clauses Consolidation Act and the Waterworks Clauses Act are incorporated in the special Act. The question on sect. 9 of the Lands Clauses Consolidation Act is whether the provisions of that section apply only to lands taken or extend also to lands injuriously affected. It has been pointed out in the argument that the words are larger than the language necessary for cases of purchase; but it is said on the other side that the expression "such lands" shows that compensation was not intended to be assessed under this section for lands not taken, but injuriously affected. I think the former argument must prevail. The only circumstance opposed to it is the use of the word "such;" and I agree with my brother Brett that it is a just canon of construction that where a word occurring in a statute would render the clause in which it occurs senseless it must be eliminated. If this were read without the word "such" it would be "the compensation to be paid for any permanent damage or injury to any lands." This interpretation seems to give sense and meaning to the clause, and to apply it to cases of compensation such as sect. 68 applies to. The umpire was appointed by the justices, and his award is a valuation, which gives the plaintiff all that he can require. The Waterworks Clauses Act gives power to divert from time to time, and at once give notice of intention to take the whole. It is recited in the agreement that the defendants have power to take the whole, and that they intend to do so, and the whole amount of compensation was very properly submitted to reference, and the arbitrators or umpire were entitled to find the whole amount. It follows that the defendants are bound by sect. 9, and therefore the plaintiff is entitled to a writ of *mandamus*. As to whether this may be a good reference under sect. 22 I do not mean to bind myself to any express opinion. It is clear that this comes under sect. 9, and therefore the demurrer must be overruled, and the statement of claim held sufficient.

Judgment for the plaintiff.

Solicitors for the plaintiff, *Warry, Robins, and Burges*, for *Thomas Ffooks*, Sherborne, Dorsetshire.

Solicitors for the defendant, *Wedlake and Letts*, for *H. B. Batten*, Yeovil.

Monday, June 19, 1876.

ALLGOOD v. GIBSON.

Common of fishery—Profit à prendre—Claim by dwellers in parish and manor—Unreasonable custom.

A custom for the commoners, copyholders, and ancient freeholders of a manor and their tenants, and the dwellers in the parish and manor to have common of fishery over the lord's waters on the waste of the manor, and to take and carry away fish as a profit à prendre, is unreasonable and bad.

THE statement of claim alleged that the plaintiff was possessed of certain lands and land covered with water, and of a sole and exclusive right of

fishery, or several fishery, and that the defendant trespassed on the plaintiff's land, and infringed her right of fishery.

Statement of defence.

Para. 5. The defendant says that all the lands and land covered with water aforesaid are lands within the parish of Hexham and manor of Hexham aforesaid, and form part of the waste land of that manor, and that there is an ancient, laudable, and reasonable custom within the said manor, that all persons of the class of and being commoners, copyholders, ancient freeholders, and tenants of such commoners, copyholders, and ancient freeholders and dwellers in such parish and manor aforesaid, have a customary common of fishery over and in the lord of the manor's waters, and over the lord's land covered with water, forming part of the waste of and in the said manor, and that the defendant and his ancestors, and other persons of the above-mentioned class have always enjoyed such common of fishery uninterruptedly and peaceably from time immemorial and by prescription, and also in right of their customary tenements within the said manor, and that they have immemorially been accustomed without licence or leave of the lord of the manor, and still of right have common of fishery to fish, and take, and convey away fish from the lord's waters in the same waste as profits à prendre out of the lord's soil, and a right to enter upon the lands bordering on the lord's waters in the said waste for the above purposes.

6. The places in which the acts complained of in the third paragraph of the said statement are alleged to have taken place are within the waste land, and are part of the said manor, and of the lord's waters within it.

7. The defendant was at the times of the committing of the acts complained of, a tenant of a commoner, copyholder, and ancient freeholder within the said manor, as well as a commoner in the said manor, and a dweller in the parish of Hexham, and in the said manor; and the defendant was and is therefore entitled to enter and go upon the lands and to fish in the waters mentioned in the first paragraph of the said statement.

8. The acts complained of were committed in the defendant's exercise of his said right as a tenant of a commoner in right of his customary tenement, as also as a commoner as aforesaid.

Demurrer to paragraphs 5, 6, 7, and 8 of the statement of defence.

Herschell, Q.C. (*Gainsford Bruce* with him) for the plaintiff.—The custom alleged is bad. The words "the above-mentioned class" include all dwellers in the parish, but you cannot have such a custom to enjoy a profit à prendre existing as to such a class:

Race v. Ward, 4 E. & B. 702; 24 L. J. 153, Q.B.;
Bland v. Lipscombe, 4 E. & B. 713 (note); 24 L. J.
155, Q.B.; 24 L. T. Rep. O. S. 92.

The custom must be bad, unless it is confined to a custom of the manor as between the lord and the tenants. A custom to take fish cannot be unlimited. It was so held as to turbary in *Wilson v. Willes* (7 East 121); Lord Ellenborough there says, "A custom, however ancient, must not be indefinite and uncertain; and here it is not defined what sort of improvement the custom extends to. . . . There is nothing to restrain the tenants from taking the whole of the turbary of the common and destroying the pasture altogether.

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A custom of this description ought to have some limit; but here there is no limitation to the custom as laid but caprice and fancy."

McClymont for the defendant.—The custom is good, and the want of an allegation of stint is no objection. Taking turf or sand without stint would injure the freehold, which makes a distinction between customs of that sort and the custom claimed here. In *Davies' case* (3 Mod. 246) a prescription claimed by the defendants for themselves, their tenants and farmers to fowl on another person's land was held not to be too large, and fishing is a right of exactly the same nature: (*Wickham v. Hawker*, 7 M. & W. at p. 79). In *Hall v. Nottingham* (L. Rep. 1 Ex. Div. 1, 45 L. J. 50, Ex.; 33 L. T. Rep. N.S. 697), a custom for all the inhabitants of a parish to enter on land and erect a maypole and dance round it, and enjoy other lawful recreations at any times in the year was held good; and a custom for all the inhabitants of a parish to play at all lawful games at all seasonable times of the year on another person's ground was held good in *Fitch v. Rawtins* (2 H. B. 394). See also,

Commissioners of Sewers of the City of London v. Glasse, L. Rep. 7 Ch. 456; 41 L. J. 409, Ch.; 26 L. T. Rep. N. S. 647;

Warwick v. Queen's College, Oxford, L. Rep. 6 Ch. 716; 40 L. J. 780, Ch.; 25 L. T. Rep. N. S. 254.

The Court did not call for a reply.

BRETT, J.—The statement of claim is for trespass to land alleged to be in the possession of the plaintiff, and also to land covered with water, which is also alleged to belong to the plaintiff. Paragraph 5 of the statement of defence sets up that the lands were part of the waste land of a manor, and then sets up a custom under which the defendant seeks to justify the alleged trespasses. The defendant's contention must come to this—that the plaintiff had encroached on the waste land of the manor, but was in actual possession, and then the defendant must be ready to justify as if against the lord of the manor. The question is whether all commoners, copyholders, and ancient freeholders, and tenants of such commoners, copyholders, and ancient freeholders, can have the right here claimed, and whether not only persons belonging to those classes, but also all dwellers, it may be in the manor, or it may be in the parish, can have the same right, if they are neither commoners, copyholders, or ancient freeholders, nor tenants of such persons. Two objections are taken to the custom alleged. It is said to be so large as to be unreasonable, and therefore void in two particulars. First, assuming that it is claimed by the proper persons, it is said to be too large, as being a right to take fish in an indefinite quantity. I am not prepared to say that it would be void on that ground, but secondly, it is objected to as being a right claimed to belong to too many persons. Assuming that the custom would be good if it were confined to commoners, copyholders, and ancient freeholders, and the tenants of persons of these classes, still I think that, inasmuch as the right is alleged to exist in others besides these, namely, all dwellers in the parish or manor, the claim is too large, for the number of people for whom it is made is unreasonable, and therefore the custom is void. The custom set up is one and indivisible, and is bad as alleged in the statement of defence. Our judgment, therefore, must be for the plaintiff.

GROVE, J.—I have very little to add. I think it cannot be contended with any show of reason that all "dwellers" in a parish or manor, (an expression which is so vague that one cannot properly call them a class) can have a customary right to fish in another person's river. None of the cases which were cited at all supported the defendant's contention. The case of the maypole (*Hall v. Nottingham, ubi sup.*) is perfectly distinct from this. It may be a reasonable custom for the inhabitants to dance on the green, but a custom for all the dwellers to take the profits of a valuable property which would otherwise belong to an individual only requires to be mentioned to show how unreasonable it would be, for it would ruin the property over which it was exercised. Besides there is a distinct authority against the validity of such a custom. In the *Commissioners of Sewers of the City of London v. Glasse* (L. Rep. 7 Ch. at p. 465) James, L.J. says "It is settled and clear law that you cannot have any right to a *profit à prendre in alieno solo* in a shifting body like the inhabitants of a town or residents of a particular district." This is a clear authority that the custom claimed in the present case is bad, and our judgment must be for the plaintiff. As to the mode in which the custom is alleged, there may be some doubt as to how far it could exist in all the commoners, copyholders, and ancient freeholders, and their tenants; for supposing the tenants of the manor were to cut up their holdings into very small divisions, it may be doubtful whether the right of fishing could be exercised by every occupier to whom the tenants sublet. It is not necessary to express an opinion as to whether this could be so or not; but the Epping Forest case (*Commissioners of Sewers of the City of London v. Glasse, ubi sup.*) does not go that length, for there the owners and occupiers who claimed common of pasture claimed it as appendant and appurtenant to their lands and tenements. The words there are very different from the words in which the custom is alleged here. In that case there were tenements in which the right existed. I have no doubt that the custom here claimed is bad.

Judgment for the plaintiff.

Solicitors for the plaintiff, *Cookson, Wainwright, and Pennington*, for N. G. Clayton, Newcastle-on-Tyne.

Solicitor for the defendant, *John Tucker*, for *Thomas William Welford*, Hexham.

Monday, May 8, 1876.

HOWES AND ANOTHER (pets.) v. TURNER AND ANOTHER (resps.)

Municipal Elections Act 1875 (38 & 39 Vict. c. 40, s. 1, sub-sect. 1)—*Notice by town clerk—Time for delivery of nomination papers—Objection to nomination—Decision of mayor—Withdrawal of nomination paper—Jurisdiction of court to decide on petition.*

An objection to the nomination of a candidate at a municipal election, on the ground that the notice, which by 38 & 39 Vict. c. 40, s. 1, sub-sect. 1, is to be given by the town clerk nine days at least before the election, is invalid, is not an objection to be decided by the mayor under sub-sect. 3, but may be taken by petition.

If the notice is such as to mislead a material part of the electors the election is void.

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An objection that a nomination paper was delivered too late is not an objection to the nomination paper within the meaning of sub-sect. 3 so as to make the mayor's decision disallowing the objection final.

The town clerk gave notice of a municipal election in due time, but the notice directed candidates to deliver their nomination papers on a day which by sub-sect. 3 was too late. The petitioners and the respondent W. delivered their nomination papers in proper time. The respondent T. delivered his on the day named in the notice. Afterwards W. took away his paper to correct a supposed error, and re-delivered it after the proper time for delivery. The petitioners objected before the mayor to the nomination of the respondents. The mayor disallowed the objection, the election was held, and the respondents were elected.

Held, on a special case, that the mayor's decision was not final, and that the court had jurisdiction to decide the question raised by the petition.

Held, also, that W.'s taking away the nomination paper was not such a withdrawal as to avoid his nomination.

Held, also, that the notice was such as to mislead the electors, and therefore the election was void, and there must be a new election.

A PETITION had been presented by Richard Howes and William John Pierce against the return of Richard Turner and Thomas Wright as councillors for the East Ward of the borough of Northampton. By order of Denman J. the questions raised by the petition were stated in the form of a special case, which was as follows:

1. The borough of Northampton, in the county of Northampton, is a borough incorporated under the name of "The Mayor, Aldermen, and Burgesses of the Borough of Northampton," having a mayor, six aldermen, and eighteen councillors. The said borough is divided into three wards, one of which is called and known by the name of the East Ward. The East Ward is represented in the council of the said borough by six councillors, who are elected from the burgesses duly qualified in that behalf. Two of such councillors retire annually on the 1st Nov., when two fresh ones are elected or the same re-elected.

2. On the 19th Oct. 1875 Mr. Wm. Shoosmith, the town clerk for the said borough, published a notice that the nomination papers of candidates at the forthcoming election of two councillors for the wards of the said borough were to be delivered to him at his office before 5 p.m. on Saturday the 23rd Oct. 1875, and that the mayor of the said borough, Mr. Wm. Adkins, would attend at the town hall on Monday the 25th Oct. 1875, from 2 to 4 in the afternoon to hear and decide objections to nomination papers.

3. The petitioners, being duly qualified burgesses, were nominated as candidates at the said election for the East Ward, and their respective nomination papers were duly signed by properly qualified persons, and were duly delivered to the town clerk before 5 p.m. on Friday the 22nd Oct. 1875, in accordance with the Municipal Elections Act 1875.

4. The respondent, Thomas Wright, being also a duly qualified burgess, was nominated as a candidate at the said election for the East Ward, and his nomination paper in like manner signed in the manner hereinafter appearing was delivered

to the town clerk before 5 p.m. on Friday the 22nd Oct. 1875, in accordance with the said Act, and was accepted and received by the said town clerk as a due and proper nomination of the said Thomas Wright, and the said town clerk placed the said nomination paper with the other papers relating to the said election. Afterwards on the same day the said Thomas Wright, without the sanction, authority, or knowledge of the town clerk obtained the said nomination paper from one of the town clerk's clerks (who had no authority to give up the same) for the purpose of getting one of the proposers who had signed one of his Christian names abbreviated to sign it in full, and the said Thomas Wright, having got the signature altered accordingly, delivered back the said nomination paper at the town clerk's office on the following day before 5 p.m.

5. The respondent, Richard Turner, being also a duly qualified burgess, was nominated as a candidate at the said election for the East Ward, and his nomination paper, duly signed, was delivered to the town clerk before 5 p.m. on Saturday the 23rd Oct. 1875.

6. On the said 23rd Oct. 1875 the said mayor of the said borough did not attend at the town hall, but on Monday the 25th Oct. 1875, according to the above-mentioned notice of the town clerk, he attended at the town hall between the hours of 2 and 4 p.m., as mentioned in the said statute, to decide on the validity of objections made to nomination papers. An agent on behalf of the petitioner, William John Peirce, then appeared before the mayor, and contended that the nomination of the respondents was not legal, and ought not to be allowed. The mayor, having heard the said contention, disallowed the objection. No objection was made to the right or authority of the mayor then to hear such contention and to determine such objection.

7. On the said 25th Oct. 1875 the town clerk published the names of the petitioners and respondents as candidates for the office of councillors in the East Ward in the form required by the statute, and notice was given that the elections for the said ward would be proceeded with on the 1st Nov. 1875 according to notice.

8. On the 1st Nov. 1875 the poll was taken in the usual manner for all the four candidates aforesaid, when the returning officer declared the respondents duly elected by a majority of votes to fill the two vacancies in the said East Ward.

9. On the 20th Nov. 1875 the said petition in this case was duly filed, but it was not served upon the returning officer, nor was any notice thereof given to him, and on the 11th Jan. 1876 the order of the honourable Mr. Justice Denman was made herein.

The questions for the opinion of the court are:

1. Whether the election of the respondents, under the circumstances, can be questioned by petition?

2. Whether the respondents were duly elected and returned, or whether the petitioners were elected and ought to have been so returned pursuant to the statute in that behalf, or whether there ought to be a fresh election?

By the Municipal Elections Act 1875 (38 & 39 Vict. c. 40), s. 1. "The following provisions shall be enacted and apply to nominations at all municipal elections of councillors, auditors, and assessors after the passing of this Act:

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1. Nine days at least before any such election the town clerk shall prepare, sign, and publish a notice in the form No. 1 set forth in the first schedule to this Act, or to the like effect, by causing the same to be placed on the door of the town hall, and in some conspicuous parts of the borough or ward for which any such election is to be held.

2. At any such election every candidate shall be nominated in writing; the writing shall be subscribed by two enrolled burgesses of such borough or ward as proposer and seconder, and by eight other enrolled burgesses of such borough or ward as assenting to the nomination. . . .

3. Every nomination paper subscribed as aforesaid shall be delivered by the candidate himself or his proposer and seconder to the town clerk, seven days at least before the day of election, and before five o'clock in the afternoon of the last day on which any such nomination paper may by law be delivered; the town clerk shall forthwith send notice of such nomination to each person nominated. The mayor shall attend at the town hall on the day next after the last day for the delivery of nominations to the town clerk between the hours of two and four in the afternoon, and shall decide on the validity of every objection made to a nomination paper, such objection to be made in writing. The candidate nominated by each nomination paper and one other person appointed by or on behalf of the candidate as hereinafter mentioned, and no person other than aforesaid, shall, except for the purpose of assisting the mayor, be entitled to attend such proceedings, and each candidate and the person appointed by him shall, during the time appointed for the attendance of the mayor for the purposes of this section have respectively power to object to the nomination paper of every person nominated at the same election. The decision of the mayor, which shall be given in writing, shall, if disallowing any objection to a nomination paper, be final, but if allowing the same shall be subject to reversal on petition questioning the election or return.

Sect. 11. In reckoning time for the purpose of this Act, Sunday, Christmas Day, Good Friday, and any day set apart for a public holiday, fast, or public thanksgiving, shall be excluded.

By sect. 1 of the Corrupt Practices (Municipal Elections) Act 1872 (35 & 36 Vict. c. 60),

The election of any person at an election for a borough or ward may be questioned by petition before an election court constituted as hereinafter in this Act provided, and hereinafter in this Act referred to as the "court," on the ground that the election of such person was avoided by corrupt practices or offences against this Act committed at the election, or on the ground that he was at the time of the election disqualified for election to the office for which the election was held, or on the ground that he was not duly elected by a majority of lawful votes.

An election shall not, except in the manner provided by this Act, be questioned upon an information in the nature of a *quo warranto*, or by or in any process or manner whatsoever for a matter for which it might be questioned under the provisions of this Act.

Cave, Q.C. (*A. L. Smith* with him), for the petitioners.—The petitioners are entitled to be declared duly elected, for they are the only candidates who have complied with the provisions of 38 & 39 Vict. c. 40, s. 1, subsect. 3 as to delivery of nomination papers. The delivery of the respondent Wright's nomination paper, though valid at first, was avoided by his taking it away, and the subsequent delivery was too late. If after he had taken away the nomination paper he had never returned it at all he would clearly have been disqualified, and his having redelivered the paper when it was too late cannot get rid of the disqualification. This was not an objection to a nomination paper, which the mayor could hear, and on which his decision, if he disallowed the objection, would be final. Here there was no nomination paper before the mayor; there had been no proper nomination. The objections as to

which the mayor is to decide are objections such as those to the description of a candidate, which he would be peculiarly well qualified to decide; see the Ballot Act 1872 (35 & 36 Vict. c. 33) sched. 1 rules 6, 12, 13. The mayor's jurisdiction applies only to objections that can be decided on inspection of the nomination papers. Assuming that the mayor's decision is not final, this is a proper subject for petition, the petitioner could not have proceeded by information in the nature of a *quo warranto* (35 & 36 Vict. c. 60, s. 12). The respondents were not qualified, and therefore were not duly nominated; therefore the votes given for them were void, and the petitioners are elected. He also referred to

Reg. v. Ledgard, 8 A. & E. 535;

Reg. v. Parkinson, L. Rep. 3 Q. B. 11; 37 L. J. 52, Q. B.; 17 L. T. Rep. N. S. 169.

J. O. Griffiths, Q.C. (*Anstie* with him), for the respondents.—The giving of a proper notice of the election by the town clerk is not a condition precedent to the validity of the election; the clause is directory only. The defect, if there is one, is not such a defect as can be taken advantage of by petition, for the right to petition is given by 35 & 36 Vict. c. 60, s. 12, which does not extend to cases where the nomination is questioned. As to the nomination papers, the mayor has jurisdiction to see that they are in the proper form and are delivered in time. It was not intended that there should be any appeal from the decision of the mayor, except where a nomination paper was rejected; here there has been no such rejection, and therefore the mayor's decision is final. The respondent Wright's nomination paper having been delivered to and accepted by the town clerk, Wright had become duly nominated as a candidate, and his subsequent act in taking back the paper could not make him cease to be a candidate; it was not a withdrawal, for he could only withdraw by giving notice according to the terms of 38 & 39 Vict. c. 40, s. 7. Therefore Wright was duly elected. If the respondents' contention is wrong, and the election is invalid, the petitioners cannot be held to have been duly elected, but there must be a new election.

Cave, Q.C. in reply.

BRETT, J.—The material fact of this case is that the notice given by the town clerk under 38 & 39 Vict. c. 40, s. 1, was bad in this particular, that though it was issued in proper time, it gave notice that the nominations were to be given in on the 23rd Oct., whereas it should have been the 22nd. The petitioners were nominated, and their nominations were sent in insufficient time, as also was that of one of the respondents, but on the same day he takes it away, to correct it, as he thought. The nomination of the other respondent was sent in within the time named by the town clerk, but not in proper time. An objection was taken on this ground, but the mayor decided against it, and the election was held. The petitioners, relying on the validity of their objection, did not poll their voters, and the two respondents were elected. It has been suggested on behalf of the petitioners that the notice given by the town clerk was void because it has not followed the terms prescribed by the section of the Act, and the question is raised whether we can declare it to be void. It is said for the respondents that we have no jurisdiction, for we are not the election court, but that

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the only remedy is in the nature of a *quo warranto*; the other side says that we have jurisdiction. The question is, are we bound if there is a defect in the notice to say that the election is void, or are we at liberty to hold that some defects in the notice would have the effect of avoiding the election, but others would not, and then what is the effect of what has been done in this case? It is suggested that the mayor having decided as to the validity of the objection, his decision is final and we cannot review it. With regard to the decision of the mayor, the question seems to us not to be one, arising on the form of the nomination paper, but as to the time within which the nominations were to be sent in, and as to whether the nominations were void; it is not an objection to the paper, and both the grounds of objection might exist without there being any defect in the paper. By sect. 1 sub-sect. 3 it is enacted that the mayor shall attend at the town hall on the day next after the last day for the delivery of nominations to the town clerk between the hours of two and four in the afternoon, and shall decide on the validity of every objection made to a nomination paper. We think that the only office of the mayor is to decide as to objections arising on the nomination paper, and this was not a question for the mayor to decide, and therefore it is open to us. Then as to the delivering back of the nomination paper, the paper was sent in in proper time at first. The Christian name of the proposer was written with an abbreviation, but it was not such an abbreviation as would render the nomination invalid; therefore it was a good nomination paper. If the paper had been withdrawn, and the candidate in withdrawing it had intended that the nomination should be withdrawn, but he had afterwards changed his mind, this might have amounted to a withdrawal of the nomination. As at present advised I should say that in such a case as that the second delivery of the nomination paper would be equivalent to a first delivery, and would, therefore, be too late, and the same would be the case if at first there were a bad nomination owing to a defect in the paper, and it were taken away to be corrected, and when it was redelivered the time for delivery had elapsed. But where the nomination was in the first instance good, and the paper was withdrawn, not in order to withdraw the nomination, but for another purpose, and redelivered after the time for delivery had expired, I do not think that this makes the nomination void. The two petitions were nominated in time, and one of the respondents was also nominated in time, but the nomination of the other respondent was too late, because he was misled by the notice of the town clerk, who made a mistake, which might very easily be made before the question had been decided. I am of opinion that the notice was wrong, but we have to decide whether this is the proper court to say whether it is wrong in such a manner as to avoid the election. We cannot decide more than the Election Court could decide under the Corrupt Practices (Municipal Elections) Act 1872 (35 & 36 Vict. c. 60) ss. 12 to 15. Sect. 12, after enunciating certain other causes for which a municipal election may be questioned, says that it may be questioned on the ground that the person elected was at the time of the election disqualified for election to the office for which the election was held; it follows that the person elected may therefore be petitioned against,

and the election may be declared void because the disqualification existed. It has been suggested that this provision refers only to personal disqualifications, and that if any other kind of disqualification is suggested the proper remedy would be by information in the nature of a *quo warranto*; but at the end of the same section there is a provision that an election shall not, except in manner provided by the Act, be questioned upon an information in the nature of a *pro warranto*, or by or in any process or manner whatsoever for a matter for which it might be questioned under the provisions of the Act. If the first part of the section applied merely to personal disqualifications, as there is nothing provided by the Act for the trial of questions relating to the validity of elections except a petition, it would appear that an election could not be questioned at all for any disqualification which was not a personal one. This seems to show that disqualification is not to be construed in such a confined sense as that contended for on behalf of the respondents. All inquiry under the Act is to be by petition, and by ss. 12—15 this court has the same power in municipal as it has in parliamentary election petitions. The Legislature intended all decisions of all questions by which a parliamentary election could have been avoided before this court had jurisdiction to be decided by this court, and also, by these sections to which I have referred, this court has the same jurisdiction in cases of municipal elections. I think, therefore, that we have jurisdiction to determine what was the effect of the notice of the town clerk. It is said that, although this notice was given in time, yet because it was wrong in its terms it was void; it is said that if there is any defect which causes the notice not to be like the form given in the schedule to the statute, then the notice is void necessarily, although no one may have been misled by it. I cannot think this is so; I think that even if the notice is only to the same effect as the form provided by the statute, but differs from that form in some particulars, it is not necessarily void. But I think if the defect is so great as to persuade the court that the electors, or a material part of them, were misled, so as to cause the election to be contrary to the real views of the constituency, and this result has fairly and reasonably been brought about by a defect in the notice, the court has power to say that the notice is void, and if it is void it seems that every person nominated as a candidate for election would be disqualified, and the election would be void. Here it is clear that one candidate, the person who had a majority of votes at the election, was misled by the defect in the notice. We cannot say which of the two petitioners would be elected if we simply declared that the respondent Turner was not duly elected. The defect in the notice may have or might have misled others, and it seems to be such a defect as misled an important part of the constituency; and so the notice and nomination were bad, which made the whole election void, and all the petitioners and respondents were disqualified. I think the proper decision is that this election is void, and there must be a new election.

DENMAN, J.—I am of the same opinion. The first point is as to the power of the mayor, and as to that I agree with my brother Brett that 38 & 39 Vict. c. 40, s. 1, sub-sect. 3, was not intended to give the mayor so strong a power as to enable

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him to dispense with the necessity for delivering the nomination papers on the statutory day; the questions as to the day of delivering the nomination papers, and as to the effect of the notice were beyond the jurisdiction of the mayor. It follows, that if the mayor had no power, this court must decide the matter, for the question arises whether the candidates were disqualified, or whether those who were elected were not duly elected by a majority of lawful votes. Unless this is a *casus omissus*, I think it is a case within sect. 12 of the Corrupt Practices (Municipal Elections) Act 1872 (35 & 36 Vict. c. 60). On the facts stated in the special case, it was directly in question whether certain persons were disqualified, and whether certain persons were duly elected by a majority of lawful votes. It is contended that this court has no power to avoid the election, but I think that would be an erroneous conclusion. By sect. 15 of the Corrupt Practices (Municipal Elections) Act, 1872 (35 & 36 Vict. c. 60), this court has jurisdiction. That statute imposes on the court the duty of first seeing whether on the facts of the case, or according to law, the person declared elected was properly elected, or if any other persons were elected, and if the court cannot say either that the person declared elected was properly elected, or that some other person was, the court has power to declare the election void. Now in this case can the court do justice by declaring that any person is entitled to be considered duly elected, or are we driven to the alternative of declaring the election void? I think justice cannot be done except by adopting the latter course. We can not say that any one or more of the candidates were properly rejected or elected. Consequently the election is void, and there must be a new one.

ARCHIBALD, J.—I am of the same opinion. Questions are raised as to the effect of the nomination papers, and as to the jurisdiction of the mayor. I agree with my brothers Brett and Denman as to the power of the mayor, that it only extends to deciding on objections arising on the face of the nomination paper, and that he cannot decide whether a candidate is qualified or not. I think that the respondent, Wright's nomination paper, if it was good, was never withdrawn with the intention of withdrawing the nomination, and, as to its validity, writing the proposer's Christian name "Fredk" is sufficient. If the paper was invalid, and were taken away and amended, I think it would be right to say that it would be invalid if it were redelivered after the proper day for delivery, but it is not necessary to decide that point, for our decision rests on the ground that the notice was invalid. The statute 38 & 39 Vict. c. 40, which repeals 22 Vict. c. 35, s. 5, provides by sect. 1, sub-sect. 1, that nine days at least before the election, the town clerk shall give a notice in the form in the schedule or to the like effect, and specifies how the notice is to be published, and by sub-sect. 3 every nomination paper is to be delivered seven days at least before the day of election. This was the ordinary annual election. The town clerk gave the notice wrong; two candidates, the petitioners, were in time in delivering their nomination papers, and the respondent Wright was also in time, but the respondent Turner was too late. Then was he misled? The only inference is that in consequence of having received insufficient notice he

delivered his nomination paper on the 23rd. Without necessarily considering whether the provisions as to notice are directory or compulsory, it is enough to say that if they are directory, and the candidate is misled through their not having been followed, it is a bad notice. In this case the defect in the notice did mislead one of the candidates, and caused him to send in his nomination paper too late, and there has not been a proper election by the voice of the constituency. It is said then we have no jurisdiction to decide this case, but I think that the Corrupt Practices (Municipal Elections) Act 1872 (35 & 36 Vict. c. 60) shows that the intention was to transfer all such trials to the Election Court created by that Act, with power to reserve questions of law for the Court of Common Pleas. Sect. 12 of that Act provides for questioning an election on the ground of disqualification in terms which on one reading may appear somewhat restricted, but I do not think that they need be so read, and sect. 15, sub-sect. 4, shows that the court is to decide whether the election is void absolutely, or whether it ought to be held invalid on the ground stated in sect. 12, that the candidate was disqualified. I think we must hold this election void, and order another to be held.

Judgment accordingly without costs.

Solicitors for the petitioners, *Elwes and Sharpe*, for *George Rands*, Northampton.

Solicitors for the respondents, *Vizard, Crowder, and Co.*

EXCHEQUER DIVISION.

Reported by H. LIEKE and A. FAWSON, Esqrs., Barristers-at-Law.

Saturday, Jan. 29., 1876.

(Before KELLY, C.B. and POLLOCK and HUDDLESTON, BB.)

FORDER v. HANDYSIDE AND Co. (LIMITED).

Income tax—Traders—Return of profits—Deduction for depreciation of trade buildings and machinery, &c.—Addition to capital—5 & 6 Vict. c. 35, s. 100, schedule D, case 1, rule 3, and s. 159—Construction of.

A company carrying on business as ironfounders, in making a return of their annual profits and gains under schedule D for the purpose of assessment to the income tax, are not entitled to claim a deduction in respect of a sum of money annually set apart by them out of their net profits, in accordance with their articles of association, for "depreciation of buildings, fixed plant, and machinery," the amount so set aside being net profits and an addition to capital, and not a sum expended in repairs, and the deduction, therefore, being contrary to 5 & 6 Vict. c. 35, s. 100, schedule D, case 1, rule 3.

So held by the Exchequer Division (Kelly, C.B. and Pollock and Huddleston, BB.), approving the case of Addie v. the Solicitor of Inland Revenue (in the Scotch Court), 12 Scotch Law Rep. 274.

THIS was a case stated for the opinion of the court pursuant to the provisions of 37 Vict. c. 16, ss. 8 and 9, in the matter of an appeal of Andrew Handyside and Company (Limited), against an assessment to income tax under schedule D, made upon them by the commissioners for the district of

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Morlestown and Litchurch, in the county of Derby.

CASE.

For the year 1874-1875, an assessment under schedule D was made by the commissioners for the district above named upon Andrew Handyside and Company (Limited), a company carrying on the business of iron founders in the parish of St. Alkmine, in Derby.

The assessment made upon the company was 8642*l.*, the amount taken from their own report, and therein specified as net profits; but in this amount a sum of 1509*l.* 7*s.* 6*d.* is shown as "amount written off for depreciation of buildings, fixed plant, and machinery." (a) The company (the now respondents) on their appeal to the commissioners on the 29th June 1875, produced a balance sheet for the year ended on the 29th June 1874, being their first year of trading, and objected to the charge in respect of the sum of 1509*l.* 7*s.* 6*d.*; and contended that, inasmuch as such sum had no real existence, but was written off in the accounts in accordance with the articles of association, as the works must of necessity depreciate from year to year, and as the sum expended in repairs could not entirely replace such depreciation, they were justified in writing off that amount as a deduction. (b).

The surveyor (the now appellant) objected that the sum appealed against was a deduction in respect of capital, and as such was contrary to the provisions of the 3rd rule of section 100 of the 5 & 6 Vict. c. 35, that no allowance for depreciation was provided for in the said Act, and that sect. 159 prohibited any deductions being made except those expressly enumerated in the Act.

The majority of the commissioners, however, being of opinion that persons in trade were equitably entitled to write off from their profits each year a sum for depreciation, and that the amount claimed was fair and reasonable, decided in favour of the company.

The surveyor being dissatisfied with such decision, requested that a case for the opinion of the court should be stated.

The opinion of the court is therefore desired as to whether the appellants (the now respondents, the company) are justified in making and should be allowed the deduction of 1509*l.* 7*s.* 6*d.* claimed by them for depreciation.

The material parts of the Act of Parliament

(a) In the course of the argument it was admitted that the company had, as they might properly do, written off a certain amount for repairs actually done.

(b) The 138th article of the company's articles of association on which they relied as above mentioned is as follows: "The directors may from time to time, before recommending any dividend, set aside out of the net profits of the company such sum as they think proper as a reserve fund, for the purpose of meeting contingencies, or of purchasing, improving, enlarging, rebuilding, restoring, reinstating, or maintaining the works, plant, and other premises or property of the company, or the erection or construction of new buildings, works, or plant, or for equalising dividends, or for any other purposes connected with the business of the company, or in furtherance of any of the objects of the company; and the same may be applied accordingly from time to time in such manner as the directors may determine. The reserve fund, or such part thereof for the time being as is not invested as hereinafter provided, may be used for the general purposes of the company. The interest of the reserve fund shall be treated as annual profits of the company."

(5 & 6 Vict. c. 35) relied on by the Crown and referred to in the case and the judgment of the court, are the third rule to the first case in Schedule (D) sect. 100, of the Act, and sect. 159.

Rule 3 is as follows:

Third, in estimating the profits and gains chargeable under Schedule (D), or for the purpose of assessing the duty thereon, no sum shall be set against or deducted from, or allowed to be set against or deducted from such profits or gains on account of any sum expended for repairs of premises occupied for the purpose of such trade, manufacture, adventure, or concern, nor for any sum expended for the supply or repairs, or alteration of any implements, utensils, or articles employed for the purpose of such trade, manufacture, adventure, or concern, beyond the sum annually expended for such purposes according to an average of three years preceding the year in which such assessment shall be made; nor on account of any loss not connected with or arising out of such trade; nor on account of any capital withdrawn therefrom; nor for any sum employed or intended to be employed as capital in such trade, &c.; nor for any capital employed in improvement of premises occupied for the purpose of such trade, &c.; nor on account or under pretence of any interest which might have been made on such sums if laid out at interest; nor for any debts except bad debts proved to be such to the satisfaction of the commissioners respectively; nor for any average loss beyond the actual amount of loss after adjustment; nor for any sum recoverable under an indenture or contract of indemnity.

Sect. 159 enacts:

That in the computation of duty to be made under this Act in any of the cases before mentioned, either by the party making or delivering any list or statement required as aforesaid, or by the respective assessors or commissioners, it shall not be lawful to make any other deductions therefrom than such as are expressly enumerated in this Act, nor to make any deduction on account of any annual interest, annuity, or other annual payment to be paid to any persons out of any profits or gains chargeable by this Act, in regard that a proportionate part of the duty so to be charged is allowed to be deducted on making such payments; nor to make any deduction from the profits or gains arising from any property herein described, or from any office or employment of profit on account of diminution of capital employed, or of loss sustained in any trade, manufacture, adventure, or concern, or in any profession, employment, or vocation.

Pinder (with whom were the *Attorney-General* (Sir J. Holker, Q.C.) and the *Solicitor-General* (Sir H. S. Giffard, Q.C.), for the Crown, contended that the company were not entitled to the deduction which they claimed in respect of this sum of 1509*l.* 7*s.* 6*d.*, set aside by them to meet the expected yearly depreciation in their machinery and works. Admitting the company to be justified under their 138th article of association, in writing off this sum, the deduction is one which cannot possibly be allowed in law, being quite contrary to the express terms of the Act of Parliament: (see Rule 3, case 1, schd. D., sect. 100; and sect. 159 of the 5 & 6 Vict. c. 35). They have already claimed in their account and been allowed a sum for repairs; but this amount now claimed is no more or less than an addition to or an investment of capital. This precise point of depreciation was before the First Division of the Scottish Court in Feb. 1875, in the case of *Addie and Sons v. The Solicitor of Inland Revenue* (12 Scottish Law Rep. 274), and the short judgment of the Lord President (in which the three other Lords of Session concurred), is so completely in point, and so decisive of the present question, that I will read it as my argument on the part of the Crown on the present occasion. His Lordship said, "The appellants have been assessed under schedule D. in respect of profits from their busi-

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ness of ironmasters, and they claimed to have deducted from such profits two sums of 5525*l.* and 4435*l.*, as a percentage for pit sinking and depreciation of buildings and machinery, upon the ground that the sinking of new pits, though only an occasional thing, is still part of what may fairly be called the annual expenditure, necessarily incurred in realising the profits from their trade. There is, I think, only one point to be determined here, and not two, as represented, because the machinery and buildings connected with a pit appear to me to be just part of the pit itself. It is one compound structure necessary for the working of the mine, and the question is whether, under the special rules of the Income Tax Act, they are entitled to deduct something on account of the amount expended in making a new pit. Now I am quite clear that the making of a new pit in a trade of this kind is, in every sense of the term, just an expenditure of capital. It is an investment of money, of capital, and must be placed to capital account in every properly kept book applicable to such a concern. Now if that be so, it seems to me that the provision of the third rule under the first head of sect. 100 of the Property Tax Act, is conclusive upon the question before us, because it is there provided that in estimating the balance of profits and gains chargeable under schedule D., or for the purpose of assessing the duty thereon, no sum shall be set against, or deducted from, or be allowed to be set against, or be deducted from, such profits or gains on account of any sum employed, or intended to be employed, as capital in such trade. It seems to me that it is quite unnecessary to go beyond that one part of the statute. No doubt some support may be had also from the 159th section, but I think this rule is in itself perfectly conclusive. As soon as you ascertain that this is an expenditure of capital, there is an end to any proposal to deduct anything in respect of it, and on that simple ground I think the judgment of the commissioners right."

Grantham, for the respondents, the company, *contra*, was called on by the court.—This point has never been discussed or decided by any court except in the Scotch case now cited on the part of the Crown, and which I submit does not apply. In the case, as that was, of a mine, and a pit, and machinery for bringing up coal, where a new shaft is sunk or opened, it is a new concern, and an investment of new capital. But here, in these heavy ironworks, the wear and tear is great, and the actual work causes a very large depreciation in the machinery and works, &c., every year, which cannot be met by mere repair. [KELLY, C.B.—Were it not for the words of the Act of Parliament I should be inclined to think that the view of the matter would be in your favour.] No doubt the words of the Act are strong, but I submit the present is a very different case from the Scotch mining case. That was, no doubt, a question of capital; but the present case does not come within the provision of the Act which was intended to apply to capital. The depreciation here cannot be met in any other way, and if this is not to be allowed, all the capital would in a few years be gone. No doubt—as my friend has argued—if the entire machinery is worn out in course of years, and is replaced by new, that would be charged to capital; but here it has to be reinstated every one or two years, piece by piece as it were;

it is a depreciation going on constantly, and not occurring entirely at any one time, and a clean sweep made once for all. No average for three years can be arrived at. Now the company has only been at work some eighteen months, and they are entitled to make the deduction now claimed; and at the end of three years, when the average amount of the repairs can be correctly calculated, they can be surcharged for any that may have been wrongly deducted. The rule in the sixth case in Schedule (D) to section 100 is applicable to the present case, and the commissioners, who are well qualified to judge in the matter, have decided on a fair and equitable view of the matter, and that decision the court will uphold.

Pinder was not called upon to reply.

KELLY, C.B.—Whatever may be our opinion of the justice and fairness as regards commercial or manufacturing interests, of some parts of this Act of Parliament upon which there is no case now before the court, and upon which I do not feel myself at liberty at all to comment, it is perfectly clear that upon the 3rd rule in the first case in schedule D of the Act, the respondents, the traders, are not entitled to the deduction which has been claimed by them. It appears that in the 138th article of the company's articles of association there is a provision that a reserve fund is to be formed, and before recommending a dividend, and of course, therefore, before they pay any, the company, perhaps very prudently and properly, agree to set aside from their net profits a sum as a reserve fund for the purpose of meeting contingencies. But what are those contingencies? They are a variety of matters which the company have no more right to deduct from the net profits and say that the net profits are thereby diminished and that they have not really netted that amount of profit, than they would have a right to deduct a sum which they might spend upon the purchase of a house or a carriage. What they say is that it is "for the purpose of meeting contingencies, or of altering, improving, enlarging, rebuilding, restoring, reconstructing, or maintaining the works, plant, and other premises or property of the company. Now I leave out the word "repairing," because it is admitted that they are entitled to deduct, and they have deducted, a sum for repairs; and we must take it for granted, as there is no appeal against that deduction on the one side or the other, that it is a proper deduction according to the Act of Parliament. The article then goes on to say, "or the erection or construction of new buildings, works, or plant, or for equalising dividends, or for any other purposes connected with the business of the company, or in furtherance of any of the objects of the company, and the same may be applied accordingly from time to time in such manner as the directors may determine." The question, then, is, are the company entitled to claim a deduction in respect of that portion of the reserve fund which they have set aside for the purpose of applying, or which they may have applied, to any of the purposes above mentioned besides repairs. No doubt they are empowered by their articles to set the amount aside and to apply it to any of the many purposes mentioned; but the case shows clearly that such sum is net profit, and in my opinion it is clearly contrary to the Act of Parliament that the deduction claimed should be allowed.

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The Act is quite explicit, and admits of no doubtful or difficult question of construction. It says that in estimating the balance of profits and gains chargeable under schedule D, or for the purpose "of assessing the duty thereon, no sum shall be set against or deducted from, or allowed to be set against or deducted from, such profits or gains on account of any sum expended for repairs of premises, occupied for the purpose of such trade, manufacture, adventure, or concern, nor for any sum expended for the supply of, repairs, or alterations of any implements, utensils, or articles employed for the purpose of such trade, manufacture, adventure, or concern, beyond the sum usually expended for such purposes, according to an average of three years preceding the year in which such assessment shall be made." Now, just let us suppose that this business had been carried on for three or four years, and that the average sum actually expended for the necessary and usual repairs had been 500*l.* a year, the company, in that case, would be entitled to deduct from the amount of their net profits 500*l.* The average of the expenditure upon the repairs for the past three years would be about what they would expect to expend in repairs in the ensuing year, the year of charge in question, and that would be a fair and just deduction from their profit. But here it is said that the case is different, because the company have been in business only one year. But, there being no specific proviso in the statute applicable to that state of things, the result is that, if we are to take the average of three years to determine how much may be expected to be expended in repairs in the year to come, and if there are not three, nor even two years, but only one year, we must get the best information that we can, and must judge from what has been done during that one year what will be the probable amount expended in the ensuing year, and calculate the proper deduction on that footing. But the question here is, not what sum has been expended upon repairs, inasmuch as it is admitted that a sum has been set aside and allowed as a deduction from the net profits in respect of the repairs that have been effected, but it is, whether the respondents are entitled to deduct this entire sum of 1509*l.*, which may be applied anywhere, or at any time, and in any way they please, for a great variety of purposes, which are actually forbidden, directly as well as indirectly, by the provisions of the Act of Parliament? All that they are entitled to deduct they have already deducted, namely, the reasonably probable amount of repairs in the ensuing year, and no other deduction is allowed by the terms of the Act. Our judgment, therefore, in my opinion, should be for the Crown.

FOLLOCK, B.—I am of the same opinion. The only question here is whether the amount, 1509*l.* 7*s.* 6*d.*, written off for the depreciation of buildings fixed plant, and machinery, can be properly deducted in estimating the income tax payable by the company. Now, in my judgment, upon no construction of the Act of Parliament can that deduction be made. Strictly speaking, there is no difference between what is called an equitable construction of an Act of Parliament and any other construction. It appears to me that upon the most just and favourable construction of this Act of Parliament, as regards the respondents, they are not entitled to this deduction. There are

three modes in which this fund to meet the depreciation of machinery may be dealt with. One is by adding to the company's original capital what is called a depreciation fund; the second is by laying aside out of the annual profits, which would be otherwise divisible among the shareholders, a certain sum to meet the estimated depreciation; and the third is by waiting until the depreciation occurs, and then either repairing or reinstating the machinery, so as to make it of equal value and efficiency to that which it was before. There are many ways in which expenses accrue by reason of depreciation. There are cases where there is a renewal of machinery from week to week, and sometimes from day to day; and there are cases in which the machinery, or certain parts of machines employed, may cost many hundred pounds, and the depreciation of which does not occur actually from day to day, or is not appreciable from day to day, but comes in the shape of breakage or other accidental or occasional occurrences, and as to which there may be a statement from year to year. Now, the way in which that would practically be met under this Act of Parliament is this: Whether the depreciation were small or great, and the consequent reinstatement small or great, it would all, in the long run, supposing the concern to be a going concern, be met justly and fairly under this Act, when the money was actually expended; because the words of the 3rd rule, under the 1st case of schedule D are, "Nor for any sum expended for the supply of repairs or alterations of any implements, utensils, or articles employed for the purpose of such trade, manufacture, adventure, or concern, beyond the sum usually expended for such purposes." Therefore, where machines are employed which require new parts to be supplied every week, or every month, or at the end of a year, or when a breakage occurs and causes a large outlay to repair it, all that expense and outlay comes in in the average of three years, however large the amount may be. In that way perfect justice would be done between the parties, and the deductions which the company now claim would, in the long run, be allowed them. But it may be said that, supposing it is not a going concern, and there is a sale, then there would be a very great depreciation; but that depreciation does not affect any question arising under this Act of Parliament. A depreciation always takes place when a concern is sold, not as a going concern, but as one that has failed, or for some reason or other has stopped. The only question for our consideration is, whether this estimated amount, laid aside from year to year, or written off for the depreciation of buildings, fixed plant, and machinery, comes within the words of the section. I think it quite clear that it does not, and that therefore the commissioners in this case were wrong, and that consequently our judgment should be for the Crown.

HUNDLESTON, B.—I am of the same opinion. It is quite clear on reading this case that this sum of 1509*l.* is a sum which any prudent person would no doubt put by or lay aside for the purpose of meeting what may be called the expenses of renewal. The articles of association clearly contemplate that it should be carried into the capital account, and that the company might make use of the money, but if they did so it would be in the capital account, appearing on one side as drawn or

expended on the capital account; and it is quite clear that it would be treated for all purposes of bookkeeping, and for all usual purposes, as capital. The Scotch case, which has been referred to, clearly adopts that view, because, of the two sums, 5000*l.* was to have supplied the buildings necessary for the new pit, which would be capital, and 4000*l.* was there, as here, written off for the depreciation, and the Scotch court thought that that clearly would be capital. Then, if that be so, it clearly comes within the 3rd rule, and cannot be taken into account. And that 3rd rule is rendered still more imperative by the 159th section of the Act, which says that no deduction shall be made other than those expressly enumerated in the Act. This sum of 1509*l.* 7*s.* 6*d.*, therefore, ought not to be allowed, and the company will have to pay income tax upon 5,151*l.* 7*s.* 6*d.*, which is the sum which they enter as profits—namely, 8642*l.*, plus the amount (1509*l.* 7*s.* 6*d.*) which they claim to deduct, and which they otherwise have deducted. I therefore think that the judgment of the commissioners cannot be upheld, and that our judgment must be for the Crown.

Pinder.—Will your Lordships in this case give some directions with regard to costs?

KELLY, C.B.—I think that we can say nothing about costs in a case of this kind.

Judgment for the Crown.

Solicitor for the Crown (appellants).—*The Solicitor for Inland Revenue.*

Solicitor for the company (respondents).—*F. Stanley.*

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Reported by C. E. MALDEN, Esq., Barrister-at-Law.

March 14 and 21, May 29, and July 11, 1876.

(Present: the Right Hons. the LORD CHANCELLOR (Cairns), LORD HATHERLEY, LORD PENZANCE, SIR BARNES PEACOCK, and SIR MONTAGUE SMITH.)

MARSTERS v. DURST.

ON APPEAL FROM THE COURT OF ARCHES.

Ecclesiastical law—Ornaments of the church—Moveable cross—Retable.

A moveable cross of wood placed on a "retable," or wooden ledge, fixed to the wall at the back of the Communion Table, and close above it, so as to appear at a short distance to be one entire table, with the intention that it should remain there permanently, is forbidden by law.

Judgment of the court below reversed.

Westerton v. Liddell (Moore's Special Report) and Liddell v. Beal (14 Moo. P. C. 1; 3 L. T. Rep. N. S. 218) explained and followed.

THE appellant in this case, Saddleton Marsters, was the parishioners' churchwarden of the parish of St. Margaret's, in the borough of King's Lynn, in the diocese of Norwich.

The respondent, the Rev. John Durst, was the vicar of the parish.

On or about the 27th May 1875, the respondent of his own motion, without any faculty, and without the consent of the appellant, placed, or caused to be placed on a retable immediately behind and above the Communion Table of the church, a moveable cross made of wood, which was so placed there as to appear to form one of the ornaments of the Communion Table.

The appellant, in his capacity of churchwarden, subsequently removed the cross as having been placed on the retable without lawful authority, and as not being one of the church ornaments prescribed or allowed by law.

The respondent thereupon instituted criminal proceedings in the Court of Arches against the appellant, and filed articles against him for having so removed the cross, and prayed not only that he should be monished for removing the cross, but further that he should be admonished to restore the same to the retable.

The appellant filed a responsive allegation, wherein he admitted that he had removed the said cross, and in so far as he might have offended against ecclesiastical law therein submitted to the judgment of the court, but prayed the court not to require him to restore it to its former position, alleging in Article 4th as follows:

"That the defendant objects to an order being made as prayed by the promoter for the restoration of the said cross so removed by the defendant as in the fourth article alleged on the following grounds:

"(1) That the said cross, which is removed and made of wood, was on or about the 27th May 1875 introduced into the parish church by the promoter, and placed by him or under his authority, where it remained until removed by the defendant, on a shelf or retable at the back of and immediately above the Communion Table in the said church, without a faculty or other lawful authority.

"(2) That the said moveable wooden cross, before the same was removed by the defendant, was placed on the said shelf or retable, which is fixed immediately behind and above the Communion Table of the said church, and was so placed as to appear to form one of the ornaments of the Communion Table that such moveable cross, by reason of its not being one of the ornaments of the church prescribed in the rubrics or subservient in or subsidiary to the performance of the services of the church, is not a lawful church ornament, and cannot lawfully be replaced on the said retable.

"(3) That the restoration of the said moveable wooden cross on the retable would offend the conscientious feelings of a large number of the parishioners of the said parish who are members of the old Church of England."

The respondent objected to the admission of the 4th and 6th Articles of the Responsive Allegation.

Sir Robert Phillimore, the late Dean of the Arches, on the 20th Oct. 1875, by his interlocutory order or decree, rejected the 4th and 6th Articles of the Responsive Allegation with costs (L. Rep. 1 P. & D. 123).

The case came on for hearing in March last, but, as it appeared that there was no dispute as to the facts, their Lordships ordered them to be stated in the form of a special case.

May 29.—*J. F. Stephen, Q.C.* and *Dr. Tristram*, for the appellant, contended that this was an attempt to evade the law as laid down in the cases of *Westerton v. Liddell* (Moore's Spec. Rep.) and *Liddell v. Beal* (3 L. T. Rep. N. S. 218; 14 Moo. P. C. 1). The cross was not a mere architectural decoration, as it was moveable, and was therefore illegal, as not being an "ornament" prescribed

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by the rubric, or subservient in, or subsidiary to the performance of the services of the church:

Martin v. Mackonochie, 19 L. T. Rep. N. S. 508; L.

Rep. 2 P. C. 365;

Elphinstone v. Furchas, 23 L. T. Rep. N. S. 446; L.

Rep. 3 A. & E. 66.

A. J. Stephens, Q.C. and W. G. F. Phillimore, for the respondent, argued that to pronounce this cross illegal would be to interfere with the main principles of the decisions in *Westerton v. Liddell* and *Liddell v. Beal*, which were practically indistinguishable from this case. A distinction is to be drawn between things used in the services and things "inert," or not actively used. The "ornaments rubric" does not apply to furniture such as this cross, its legality consists in its inertness. They also referred to *Phillipotts v. Boyd* (32 L. T. Rep. N. S. 73; L. Rep. 6 P. C. 435), and the case of the Rev. Parkes Smith, decided by the Bishop of Exeter in 1847, and reported in Stephen's Laws of the Clergy, vol. 2, p. 1083.

J. F. Stephen, Q.C. in reply. *Cur. adv. vult.*

July 11.—Their LORDSHIPS gave judgment as follows: This is a criminal suit promoted in the Court of Arches against the appellant, who is one of the churchwardens of the parish of St. Margaret, in the borough of King's Lynn, for having removed from the church, without a faculty, a certain moveable cross of wood which had been placed on a ledge called a "retable," at the back of and above the Communion Table. The respondent is the vicar of the parish, and the cross was placed there by his authority, but without the sanction of a faculty. In the court below exception was taken to certain passages in the responsive allegation filed by the appellant, and they were ordered to be struck out. The present appeal is in form an appeal from that order, but on the case being opened it appeared to the parties that, as the facts were not really in dispute, it would save both expense and delay if they agreed to a statement of fact in the form of a special case, and took the decision of the Court of Appeal upon the merits of the case. Their Lordships consented to that course being pursued, and the case has been fully argued upon the special case so stated. The question which their Lordships are thus called upon to decide is the single one of the legality of a cross of this description in the place which it occupied when the appellant removed it from the church. The special case states that the cross is above three feet in height; that it is a moveable one; that it was placed by the respondent's orders on a structure of wood called a "retable," consisting of a wooden ledge at the back of the Communion Table, having a front of wood about eight inches deep, coming down to within five-sixteenths of an inch of the surface of the Communion Table, and that this structure is fixed to the wall by nails. A photograph is appended to the special case, from which, and the statements in this case, it is plain that the Communion Table and the "retable" would at a very short distance bear the appearance of one entire table or structure. It is further stated that the cross was placed on this ledge with "the intention that it should remain there permanently." On the part of the respondent it was contended that the cross was a moveable one, and constituted part of the church furniture; that it was not one of the "ornamental instruments" used in the church services; and that it fell within the category of

things "inert," which were mere architectural decorations. On the part of the appellant it was contended, amongst other things, that the case fell within the principle of the well-known decision in the cases of *Liddell v. Westerton* (Moore's Special Rep.) and *Liddell v. Beal* (14 Moo. P. C. 1); and as their Lordships are of that opinion, it will not be necessary to go again into the subject at large, or do more on the present occasion than point out what it was that those cases really decided, and give reasons for the conclusion that the present case cannot in principle be distinguished from them. The two cases in question concerned the church of St. Paul and the chapel of St. Barnabas. In both instances there had been placed on the Communion Table a cross, and in both instances these crosses were held to be illegal. It is important, therefore, to consider what the character of these crosses was, and on what grounds they were ordered to be removed. In the Chapel of Ease of St. Barnabas the things complained of were first a rood-screen and a cross thereon, which cross was held to be lawful; and secondly, "a stone table or altar with a metal cross attached thereto," and this cross was held to be unlawful. The cross complained of in the Church of St. Paul was attached to the Communion Table, and is thus described in the judgment at page 2:—"Their Lordships understand that this table, described as an altar or Communion Table, is made of wood, and is not attached to the platform, but merely stands upon it; that it is placed at the east end of the church, or the chancel, according to the ordinary usage as to Communion Tables; that at the end nearest the wall there is a narrow ledge raised above the rest of the table; that upon this ledge, which is termed 'super-altare,' stand the two gilded candlesticks, which are moveable, and between them the wooden cross, which is let into and fixed in the super-altare so as to form part of what is thus described as the altar or communion table." It will be observed that this description closely tallies with the description as given in the special case of the Communion Table in the present case. There is here, as there, a moveable table, and a ledge of wood raised above the table at the back of it, and on this ledge two candlesticks, and a cross between them. The differences are that in St. Paul's Church the ledge of wood was called a "super-altare," while in this case it is called a "retable;" in St. Paul's Church the ledge stood upon the table, while in this case it is fixed to the wall and does not quite touch the table, being separated by about a quarter of an inch from it; and finally, that in Saint Paul's Church the cross was "let into and fixed" in the ledge, while in the present case it was not fixed, but placed on the ledge, "with the intention that it should remain there permanently." It is upon these differences of structure that the respondent relies, and he points particular attention to a passage in the judgment relating to the cross in St. Paul's Church, which is as follows: "Next with respect to the wooden cross attached to the Communion Table at St. Paul's. Their Lordships have already declared their opinion that the Communion Table intended by the canon was a table in the ordinary sense of the word, flat and moveable, capable of being covered with a cloth, at which or around which the communicants might be placed in order to partake of the Lord's Supper;

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and the question is whether the existence of a cross attached to the table is consistent either with the spirit or with the letter of those regulations. Their Lordships are clearly of opinion that it is not; and they must recommend that upon this point also the decree complained of should be affirmed." It is argued by the respondent that their Lordships must have intended to have condemned only crosses which were "fixed" to a ledge standing on the Communion Table or to the Communion Table itself, and that the two circumstances in the present case, of the ledge being a quarter of an inch above the table, and the cross not fixed in the ledge but moveable, are sufficient to take it out of the principle of that judgment. Their Lordships are unable to accept or approve so narrow and limited a view of the conclusion arrived at in those important cases. It is hardly to be conceived that a distinction should have been intended to be drawn between a cross "attached" to the table (or the ledge above the table) and a cross occupying a "permanent" position upon it; and still less that the lawfulness or unlawfulness of the cross should be declared to reside in such a distinction. Upon such a view of the law further refinements would be inevitable; for, on the one hand, a cross might be "let into and fixed" in the "retable" in such a manner as to be easily removed if and when desired, and therefore practically moveable; and, on the other hand, it might be ponderous, not easily moved, and intended to remain permanently in its place, and yet not actually "fixed" in the sense of being fastened to the ledge or table on which it stands. To hold that such refined differences as these constitute the distinction between what is lawful and what forbidden by the law would be to give every importance to matters which are trivial and incidental, to the exclusion of those which are substantial and of serious import. To any stranger entering the church, the present structure is not perceptibly different from that which was presented to the eye in the Church of St. Paul. The flat table, the narrow ledge rising above it, the candlestick at either end of this ledge, and the cross in the middle, constitute the apparent structure in both cases. It would be only by a minute inspection, instituted close at hand, that any difference would be revealed between them. For those who attend the services in this church, therefore, these differences do not practically exist, and whatever objection attended the Communion Table with its cross in the case of St. Paul's Church is equally present here. When the judgment in the above cases is carefully considered, it is very apparent what that objection was; and why the crosses on the altar or the Communion Table in both cases were declared unlawful. Speaking of the altar in St. Barnabas, their Lordships said, "the question was, whether the structure was a Communion Table within the meaning of the law," and with respect to St. Paul's, "whether the existence of a cross attached to the table is consistent either with the letter or the spirit" of the regulations made by law. To answer these questions their Lordships inquired at length into the character and appearance of the Roman Catholic altar as it existed before the Reformation—the doctrines respecting the Holy Communion which that altar was designed to subserve, and to which it was intended to conform—the change in these

doctrines which was effected by the Reformation, and the consequent substitution of the plain flat moveable table of wood for the fixed altar with its super-altare, its crucifix, and candlesticks at either end. It was upon a careful review of these facts and considerations, and not upon any refined distinction as to the mode in which the cross was connected with the table, that their Lordships, construing the legal regulations bearing on the subject, came to the conclusion that a Communion Table such as that in the Church of St. Paul, was not warranted by those regulated by those regulations; and their decision, therefore, applies to and governs the present case, in which the structure complained of is, their Lordships think, in no substantial or essential feature distinguishable from it. Some additional light is thrown on the meaning and intention of the judgment above discussed by the subsequent proceedings in one of the cases (*Liddell v. Beal*) to which that judgment gave rise. It was thought by Mr. Beal that the monition of the court for the removal of the cross in the Chapel of St. Barnabas had not been complied with by removing the cross from the altar and placing it on the sill of the great eastern window of the church, immediately above the Communion Table, though at a distance of five feet from it, and he instituted proceedings complaining of this as an evasion. Their Lordships thought differently, and expressed themselves as follows: "Now there was formerly a cross which stood upon the stone table, and was in a sense at least affixed to it, which was objected to, and, as it appears, properly objected to. The stone table has been altogether removed, and with it the cross, but the cross has been placed in another part of the church, not in any sense upon the table which has been substituted for the stone table, nor in any sense in communication, or contact, or connection with it. It remains in the church as an ornament of the church . . . and does not conflict with the order contained in this monition." It will here be observed that no stress is laid on the fact that the cross was no longer alleged to be "fixed," which, if the respondent's view of the principal decision were correct, would at once have determined the question; but the retention of the cross in its new position is justified upon the ground that it was not "in any sense upon the table, nor in any sense in communication, or contact, or connection with it." It is plain, therefore, that, in the decision of the principal case, it was not to the cross itself that any objection was made, nor to the particular means or fastenings by which it was retained in its place, but to its connection with the Communion Table; and if, instead of removing the cross to a place several feet above the table, and quite unconnected with it, Mr. Liddell had simply made the cross a moveable one, and fixed a retable to the wall (such as in the present case) for it to stand upon, it is inconsistent with the language just quoted to suppose that their Lordships would have held the monition to have been complied with. Their Lordships are therefore of opinion that the cross in the position which it occupied while in the church is forbidden by law; and they will advise her Majesty that the present suit should be dismissed; but, as both parties have been in the wrong in acting without a faculty, without costs.

Proctor for the appellant, *W. G. Jennings*.Proctor for the respondent, *G. H. Brooks*.

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RHODES AND ANOTHER v. AIREDALE DRAINAGE COMMISSIONERS.

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Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT WESTMINSTER.

Reported by R. H. AMPLETT, and W. AFFLETON, Esqrs.,
Barristers-at-Law.

Tuesday, May 9, 1876.

(Before JESSEL, M.R., KELLY, C.B., MELLISH, L.J.,
and POLLOCK, B.)RHODES AND ANOTHER v. AIREDALE DRAINAGE
COMMISSIONERS.*Arbitration—Lands Clauses Act 1845—Power of
umpire to state special case—Compensation—
Evidence of damage—Common Law Procedure
Act 1854, s. 5.*

By the Common Law Procedure Act 1854, s. 5, an arbitrator upon any compulsory reference under the Act, or upon any reference by consent of parties, where the submission is or may be made a rule or order of any of the Superior Courts of law or equity at Westminster, may state his award in the form of a special case for the opinion of the court. K. was appointed an umpire in an arbitration under the Lands Clauses Act 1845 (8 & 9 Vict. c. 18), by which it is provided (sect. 25) that the appointment of an arbitrator by each party respectively "shall be deemed a submission to arbitration on the part of the party by whom the same shall be made," and that (sect. 36) "the submission to any such arbitration may be made a rule or order of any of the Superior Courts of law or equity at Westminster." Previous to K. being made an umpire, each party had appointed an arbitrator.

Held, reversing the decision of the court below (see 31 L. T. Rep. N. S. 59), that K. had power to state a special case for the opinion of a Superior Court, inasmuch as the arbitration was within the provisions of the Common Law Procedure Act 1854, s. 5, as to arbitrations by consent.

By the Airedale Drainage Act (24 & 25 Vict. c. 160) the defendants were authorised to execute certain drainage works, and it was provided that full compensation should from time to time after the passing of this Act, but not beyond twenty years from and after the completion of the cuts, embankments, and works, by this Act authorised, be made by the defendants to the owners, lessees, and occupiers of certain land, &c., for the time being, sustaining any damage by reason, or in any way consequential upon, the exercise of any of the powers of this Act, and that in case of dispute as to the amount of such compensation, the same should be settled by arbitration in the manner provided for the settling of questions of compensation by arbitration in the Lands Clauses Consolidation Act 1845.

The plaintiffs, who were occupiers of certain land, included in the provisions of the Airedale Drainage Act, claimed compensation for damage sustained by floods occasioned by the defendants' works. The matter was referred to K., as umpire, who found by his award that the defendants had altered certain tributaries of the river, had formed new cuts or channels, had removed shoals from the river formed therein by gravel soil and other materials, and also a weir, which latter, however, in no way affected the damage that was occu-

sioned. K. also stated that there was no sufficient evidence before him to enable him to determine whether the works, exclusive of the removal of the shoals and weir, caused the lands to be more damaged than they otherwise would have been.

K. awarded to the plaintiffs 110*l.*, who brought an action to recover it.

Held (reversing the decision of the court below), that the action was not maintainable, inasmuch as the compensation was awarded for damage caused by the removal of shoals, which were merely casual obstructions, and did not come within the provisions of the Act.

The word "damage" in the local Act includes any such damage as would have been actionable but for the passing of the Act.

Semble, where shoals have in course of time become part of the natural bed of a river, any damage caused by their removal would be the subject of compensation, such damage being actionable damage.

THIS was an action upon the award of an umpire appointed under the Airedale Drainage Act 1861 (24 & 25 Vict. c. 160), which incorporated the provisions of the Lands Clauses Consolidation Acts 1845 and 1860. The umpire (Mr. Kemplay) awarded to the plaintiffs the sum of 110*l.*, to recover which the action was brought. The first plea denied the validity of the award under the Airedale Drainage Act. The second plea set out the award of the umpire as follows: "If I have no power to state my award in the form of a special case for the opinion of the Superior Court, of which the submission to arbitration of the matters so referred as aforesaid may be made a rule, then I award and judge that the claimants, as occupiers of Morley Hall Farm, have sustained damages, by reason of and consequential upon the exercise by the commissioners of the powers of the Drainage Act, to the amount of 110*l.*, and are entitled to be paid compensation for the same to that amount; but if I have power to state my award in the form of a special case for the opinion of such superior court as aforesaid, then I hereby state my award of and concerning the matters so referred as aforesaid in the form of a special case for the opinion of such Superior Court, as follows, that is to say: Morley Hall Farm is a farm of 150 acres, adjoining the river Aire, and situate about one mile and a half below the lowest of the works executed by the commissioners under the powers of the Drainage Act as hereinafter stated. The claimants were occupiers of the farm as tenants to William Ferrand, Esq., in and during the years 1866, 1867, 1868, and 1869, and as such occupiers sustained damages from certain specified floodings of the said farm, which occurred in these years in consequence of floods in the said river. The claim for compensation so referred to arbitration as aforesaid was in respect of the damages so sustained by the claimants as aforesaid. All the said floodings occurred after works authorised by the Drainage Act had been executed by the commissioners under the powers of that Act. All the said works were above the said farm, and were executed at different points of the said river within a district beginning at a point about one mile and a half above the said farm, and extending up the said river for a distance (reckoned along the whole course of the river) of nearly fourteen miles. For the purposes of this case the said works may be divided into four clauses, first, the division and

alteration of tributaries of the said river whereby the said tributaries were made to flow into the said river differently from what they previously did and otherwise would have done; secondly, the formation of several cuts or channels for the said river at different points of the district last aforesaid, whereby the course of the said river was shortened nearly a mile and three quarters; thirdly, the removal from the said river of shoals formed therein by gravel soil and other materials, which from time to time had been brought down by tributaries of the said river and deposited in the said river near the confluences therewith of the said tributaries; and, fourthly, the removal of a weir, belonging to a mill about a mile and a half above the said farm, being the lowest work in the said river executed by the commissioners under the powers of the Drainage Act. None of the said works executed by the commissioners as aforesaid were executed by them in or upon land or other property of the said William Ferrand, Esq., or the claimants. All the said works had been executed and were in operation before and at the time of the occurrence of the said floodings of Morley Hall Farm, in respect of which the said claim for compensation arose, except the first of the said works, with the exception of one of the said cuts. Before the passing of the Drainage Act and the execution by the commissioners of any of the said works, Morley Hall Farm was more or less liable to be flooded by flood waters coming down the said river. The effect of making all the said cuts was to bring down the flood waters of the said river to Morley Hall Farm about twenty-six minutes earlier than they otherwise would have reached that farm, and the effect of making all the said cuts, except the said cut which was not in operation till after the first of the said floodings, was to bring down the flood waters of the said river to Morley Hall Farm about eleven minutes earlier than they otherwise would have reached that farm. From the evidence before me, I find that the claimants, as occupiers of the said farm, sustained damages on the occasion of the aforesaid floodings by reason of and consequential upon the execution by the commissioners of all the said works which were in operation at the respective times of the said floodings, to the amount of 110*l.* and that the damages so sustained by them would have been substantially the same if the said weir had not been removed. There was no sufficient evidence before me to enable me to determine either one way or the other, whether the said works, exclusive of the removal of the said shoals and weir as aforesaid, caused the said farm on the occasions of the said floodings, to be flooded to greater extents or for longer periods of time, or to be more damaged than it otherwise would have been."(*a*)

Third plea. That the sum awarded by the umpire included damages in respect of matters beyond his jurisdiction.

Fourth plea. That the plaintiffs had not sustained any such damage by reason of or consequential upon the circumstances of any of the powers of the Act, as entitled the plaintiffs to any compensation under its provisions or otherwise.

(*a*) This plea was demurred to on the ground that the umpire had no power to state a special case, and the demurrer was allowed: (See *Rhodes v. Airedale Drainage Commissioners*, 31 L. T. Rep. N. S. 59; L. Rep. 9 C.P. 508; 43 L. J. 323 C.P.)

It is unnecessary for the purpose of this report to set out the remaining pleas.

At the trial before Lord Coleridge, C.J., at the sittings in London after Michaelmas Term 1874, the plaintiffs simply put in the award of the umpire, and closed their case, and it was agreed that the umpire who was called should be taken as representing in the witness box the statements made in the special case appended to the award. No further evidence of damage was given by the plaintiffs. At the trial the verdict was entered for the plaintiffs for the amount of the award, leave being reserved to the defendants to move to enter a nonsuit or verdict for the defendants on the following grounds: That the plaintiffs gave no evidence of any damage for which they were entitled to compensation; that the award proved in evidence was not final, or such an award as stated in the declaration; that the award given in evidence shows on its face that the umpire gave compensation for matters on which he had no jurisdiction; and that the third plea was proved. The court had power to draw inferences of fact. The Common Pleas Division (Lord Coleridge, C.J., Archibald, J., and Amphlett, B.) were divided on the question whether the word "damage" was confined to damage which would have been actionable but for the Act, but were unanimously of opinion that it sufficiently appeared from the statements of the umpire in the award that the damage was properly the subject of compensation. Accordingly they gave judgment in favour of the plaintiff.

From this judgment the defendant appealed, which also involved an appeal from the decision reported in 31 L. T. Rep. N. S. 59.

Herschell, Q.C. and *K. E. Digby* for the defendants.—The action fails on two grounds. First, the decision of the court below on the demurrer was wrong. The umpire has power to state a special case, and if that be so there is no such award as is alleged in the declaration. The Common Law Procedure Act 1854, sect. 5, provides "that it shall be lawful for the arbitrator upon any compulsory reference under this Act, and upon any reference by consent of parties, where the submission is or may be made a rule or order of any of the superior courts of law or equity at Westminster, if he shall think fit, and if it is not provided to the contrary, to state his award as to the whole or any part thereof, in the form of a special case for the opinion of the court, and when an action is referred, judgment, if so ordered, may be entered, according to the opinion of the court." This is a "reference by consent" within the meaning of that enactment. Here an arbitrator was appointed on both sides, and the Lands Clauses Consolidation Act 1845 (8 & 9 Vict., c. 18, ss. 1, 25), expressly says that "every appointment of an arbitrator shall be deemed a submission to arbitration on the part of the party by whom the cause shall be made." And by sect. 36, "the submission to any such arbitration may be made a rule of any of the superior courts on the application of either of the parties." Therefore by the effect of those actions this arbitration is a "reference by consent" of parties where the submission is or may be made a rule or order of any of the superior courts of law or equity at Westminster," within sect. 5 of the Common Law Procedure Act 1854. The authority on which this case was decided in the court below (See

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31 L. T. Reports N. S. 59) was that of *Re Newbold and the Metropolitan Railway Company* (14 C. B., N.S., 405), as appears from the judgment of Lord Coleridge (*sup.*). In that case it is true Willes, J., appears to have entertained the opinion that an umpire appointed under the Lands Clauses Consolidation Act 1845 had no power to state a special case; but it was a mere *obiter dictum* on the part of that learned judge, and, indeed, the exact contrary has been decided by *Re Dare Valley Railway Company* (L. Rep. 4 Ch. 554), where the Lords Justices affirmed the judgment of James, V.C. This case was not brought to the notice of the Court of Common Pleas, or they would have doubtless acted upon it. In *Ex parte Harper* (L. Rep. 18 Eq. 589) Jessel, M. R., expressed a similar opinion; and, again, in *Re Harper* (L. Rep. 20 Eq. 39; 32 L. T. Rep. N. S. 214), after his attention had been called to *Newbold and The Metropolitan Railway Company* (*ubi sup.*), though the *Dare Valley Railway Company* case (*ubi sup.*) was not cited before him. Then, secondly, the action fails on the merits, because there is no such damage as will support the award. By the Airedale Drainage Act (24 & 25 Vict. c. 160, s. 25:

Full compensation shall from time to time, after the passing of this Act, but not beyond twenty years from and after the completion of the cuts, embankments, and works by the Act authorised, be made by the commissioners out of the rates to be levied under this Act to the owners, lessees, and occupiers for the time being sustaining any damage by reason of or in any way consequential upon the exercise of any of the powers of this Act, of the lands and hereditaments of Wm. Ferrand, Esq., situate in the parish of Bingley, in the West Riding of the county of York, or any part or parts thereof respectively; and in case of dispute as to the amount of compensation, the same shall be settled by arbitration in the manner provided for the settling of questions of compensation by arbitration in the Lands Clauses Consolidation Act 1845.

The word "damage" must, as pointed out by Amplett, B., in his judgment(a) be action-

(a) The following are the observations of Amplett B., on the construction to be put on the word "damage," together with the cases cited, which are referred to by Jessel, M.R., in his judgment (*see post*). "The first question which I think it will be convenient to consider in this case is whether the damage for which compensation can be claimed under sect. 45 of the Drainage Act, is confined to what we may call actionable damage, that is to say, damage in respect of acts for which an action might have been brought if the Drainage Act had not been passed. Now it could not be, and was not, in fact, denied on the part of the plaintiffs, that by a long series of cases, of which I need only mention, the *Caledonian Railway Company v. Ogilby* (2 Macq. 229), it is perfectly settled that the right to compensation under sect. 68 of the Lands Clauses Consolidation Act 1845, is limited to actionable damage. It is true that the language of the 68th section of the Lands Clauses Act, which speaks of lands 'being injuriously affected,' is slightly more favourable to the limited construction; but the courts have adopted the same construction in analogous cases, where the language used was practically identical with that of the clause we are considering, *New River Company v. Johnson* (2 E. & E. 455; 29 L. J. 73, M.C.) under the Waterworks Act (10 & 11 Vict. c. 12), where the words were 'that in the exercise of the powers conferred by the Act, the undertakers shall do as little damage as can be, and shall make full compensation to all parties interested for all damage sustained by them, through the exercise of such powers' (*Hall v. The Mayor, &c., of Bristol*, 15 L. T. Rep. N. S. 572; L. Rep. 2 C. P. 322), under the Public Health Act (11 & 12 Vict. c. 33), where the words were, 'that full compensation shall be made to all persons sustaining any damage by reason of the exercise of any of the powers of this Act.'

able damage to come within the statute; and, as regards this point, it is submitted that the learned Baron's observations on that part of the case are correct, and are supported by the authorities referred to in his judgment. There was here no evidence of any actionable damage. The court below has put an erroneous construction on the award. A riparian owner is entitled to remove shoals from a river, and there is nothing in the award to show that there has been any interference with the bed of the river.

Manisty, Q.C., and *L. Cave, Q.C.* (*Bidder, Q.C.*, with them) for the plaintiffs.—No notice of appeal has been given on the first point, but it is admitted that *Re Dare Valley Railway Company* (*ubi sup.*), is an authority to show that the umpire had power to state a special case. The substantial question is as to the right of the plaintiff to recover damages. The award is *prima facie* evidence that the plaintiff has sustained damage that is actionable. [JESSEL, M. R.—The umpire's award is evidence of the amount of damage but not of the facts contained in the award.] The umpire has found that the damage was caused by the removal of shoals, by which he meant shoals which had formed a part of the natural bed of the river. Lastly, it is contended that actionable damage is

I cannot but think, under the circumstances, that it would be very undesirable on light grounds to disturb this unanimity of decision upon a point constantly arising in practice, and which, with the single example of Lord Westbury, in *Rickett v. The Metropolitan Railway Company* (12 L. T. Rep. N. S. 75; L. Rep. 2 H. L. 201; 36 L. J. 205, Q. B.), has been approved of on general grounds by almost all the judges who had taken part in such decisions. But it was argued on the part of the plaintiff that the Legislature must have used the word 'damage' in a more extended sense in the 45th section, since otherwise that section would have given the owners and occupiers of the land mentioned therein no further protection than they would be entitled to under the Lands Clauses Acts. I think, however, there are two answers to that argument: first, having regard to the decision in *Re v. The Directors of the Bristol Dock Company* (12 East, 429), and the language of Lord Cranworth and St. Leonards in the *Caledonian Railway Company v. Ogilby* (*ubi sup.*), I think it would be an arguable question (and that is sufficient for this purpose), whether persons who have rights in respect of a public road or a public river, the same in principle, but different in degree from other people, could claim compensation under the Lands Clauses Act for damage either to one or the other which was authorised by Act of Parliament; and, secondly, the compensation given by the 45th clause of the Drainage Act is quite different from that given by the Lands Clauses Act. In the latter case compensation is given once for all; whereas in the former case it is to be given 'from time to time'; the reason for which no doubt was, that as the only damage that could accrue to the lower lands from the improved drainage of the upper would be at flood times, it would be impossible, or at least difficult to estimate the damage except when the floods happened. These reasons appear to me satisfactorily to account for the introduction of the special claim, without supposing that the Legislature intended to enlarge the subject-matter of compensation. Indeed, looking at the object of the Act, which was for the more effectual drainage of a large tract of country, which is expressly stated to be, as it manifestly was, for the public benefit, it is difficult to suppose that the Legislature intended that the commissioners in the execution of their duties should be hampered by claims for compensation in respect of acts which the riparian proprietors had a common law right to do with impunity; and if the Legislature had any such intention it is strange that they should have used language which had already at that time acquired by judicial decision a more limited sense. In my judgment, therefore, the first point ought to be decided, if it should be necessary, in favour of the defendants."

not necessary under the special Act. They cited the *Caledonian Railway Company v. Ogilby* (2 Mac. Sc. Ap. 229), and the *Duke of Buccleuch v. The Metropolitan Board of Works* (L. Rep. 3 Ex., 306; 18 L. T. Rep. N. S. 906; 37 L. J. 177, Ex.)

JESSER, M.R.—This is an appeal from the Common Pleas Division involving not only the decision in this case, but also a decision of the Court of Common Pleas on demurrer some time ago. In accordance with the power conferred on us by the Judicature Acts, it will be better to decide the question raised by the demurrer as if it were now before us upon appeal; and it is the more desirable because the same question is raised by the demurrer as by this appeal, so that it is impossible to deal with the one without dealing also with the other. Now the question on demurrer was in substance this, whether under the powers of the Lands Clauses Consolidation Act 1845, an arbitrator has power to state a special case for the opinion of a superior court. The Court of Common Pleas held that he had not. It is said that no such power is conferred under the Common Law Procedure Act 1854. The present question doubtless turns first on the construction of the Act, and, secondly, what has been done with reference to the construction put on the Act. No doubt under the words of the Common Law Procedure Act 1854, sect. 5, by which, if at all, the power is given, there is some difficulty, as it refers apparently only to arbitrations by direction of a court or judge, or by consent. But on the other hand it certainly would be remarkable that a large class of arbitrations should have been omitted; and if we can consistently do so we ought, I think, to bring these submissions within the purview of the enactment. I have already given my views on the subject in *Harper's case* (*ubi sup.*), and will not again repeat them. It is much to be regretted that the Court of Common Pleas in deciding this case were unaware of the *Dare Valley case* (*ubi sup.*), where the Chancery Court of Appeal confirmed the decision of James, V.C., that an arbitration under the Lands Clauses Consolidation Act 1845, was within the provisions of the Common Law Procedure Act 1854, sect. 5, as to arbitrations by consent. Against that decision we have really nothing but the decision of the Court of Common Pleas; therefore, as an authority, we ought to decide against the latter court, and follow the judgment of a co-ordinate court given in the *Dare Valley case* (*ubi sup.*), which last decision I was in ignorance of when *Harper's case* (*ubi sup.*) was before me. I do not intend to say that we are always bound to follow the decision of a co-ordinate court; still there must be strong reasons for disregarding it, and no such reasons, so far as I can see, exist here. The next point is one of great importance, viz., whether, having regard to the terms of the local Act, the damage for which a plaintiff is entitled to recover is for actionable damage only, or includes all loss whether actionable or not. Now the words of this particular section are really undistinguishable from the words of other sections, the construction of which has been established by a long chain of decisions. When I come to look at clauses 44 and 45, I find that they are what are termed landowners' clauses, that is to say, clauses put in by opposing landowners for their protection; and if the landowners could have induced the Legislature to give larger powers of compensation they would naturally (knowing as they did,

the decisions on the subject) have taken care to make the intention of clauses in their own favour clear. I will refer only to two of the decisions which are referred to by Amphlett, B., in the court below (*The New River Company v. Johnson*, 2 E. & E. 445; 29 L. J. 93, M. C.; and *Hall v. The Mayor, &c., of Bristol*, 36 L. J. 110, C. P.; L. Rep. 2 C. P. 322; 15 L. T. Rep. N. S. 572). In *The New River Company v. Johnson* (*ubi sup.*), which arose under the Waterworks Clauses Act (10 & 11 Vict. c. 17) the words were "that in the exercise of the powers conferred by the Act the undertakers shall do as little damage as can be, and shall make full compensation to all parties interested for all damage sustained by them through the exercise of such powers." In *Hall v. The Mayor &c., of Bristol* (*ubi sup.*) which was decided under the Public Health Act, the words were: "that full compensation shall be made to all persons sustaining any damage by reason of the exercise of any of the powers of this Act." In both these cases it was definitely decided that the right to compensation was limited to actionable damage, and that being so the question has been fairly decided, and I should have no doubt at all on the subject were it not that two of the learned judges in the court below appear to have arrived at an opposite conclusion. It is said, why then are these words inserted at all? I think there are two answers, one that the time is enlarged, the other that too much effect must not be given to mere repetitions. Next if the damage must be actionable, is there any such damage? No dispute arises as to the law. Riparian proprietors are entitled to remove casual obstructions as distinguished from the natural bed of the river. The only dispute is as to the construction of the award, and as regards that, I differ from the construction put on the award by all the judges, and am of opinion that that for which the arbitrator intended to award compensation, was damage caused by the removal of shoals. Now is that actionable damage? It was not disputed that riparian proprietors not only may, but are under a liability to remove such shoals; if, therefore, I am right as to the construction of the award, there is no actionable damage. The judgment of the Common Pleas must therefore be reversed. As regards costs, the costs in the court below and in this court will follow the suit; but as to the demurrer we think there ought to be no costs.

KELLY, C.B.—I am of the same opinion. The case comes before us in rather a complicated form. The action is on an award under the Lands Clauses Consolidation Act 1845. The case proceeded to trial, and a verdict was eventually entered for the plaintiffs for 110*l.*, the amount of the award, but leave was reserved to the defendants to move to enter a nonsuit or verdict for them. The question whether the judgment was right depends on whether the award is valid. That throws us back to the question whether the arbitrator had jurisdiction to make the award, and that again throws us back on the decision of the Court of Common Pleas upon the demurrer to the second plea. No appeal has been brought from that decision, but we deem it expedient, under the powers which we possess under the Judicature Acts, to consider whether or not the demurrer should be allowed. That question turns upon sect. 5 of the Common Law Procedure Act 1854. I may observe that, apart from the decisions, the arbitration seems to

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me to be, by the effect of sect. 25 of the Lands Clauses Consolidation Act 1845, an arbitration by consent, the claimants and the commissioners having each appointed an arbitrator, instead of the commissioners having exposed themselves to an appointment by the claimant singly; and the appointment of an arbitrator being, by the terms of sect. 25, a submission to arbitration on the part of the party by whom the cause is made. I should say, therefore, apart from the decisions, the arbitration was within sect. 5 of the Common Law Procedure Act 1854, and this view is confirmed by *Re Dare Valley Railway* (*ubi sup.*) This at once disposes of the first decision of the court below, which we are compelled to overrule. The question is still left open whether the demurrer having been set aside and overruled, the Court of Common Pleas were right in the judgment given on the special case; and we think it right, in order to avoid future litigation, to give our decision upon the special case. The question raised by the special case renders it necessary for us to look at the language of the award, and to see whether the plaintiff is entitled to judgment for the sum of 110*l.* That depends entirely on the nature of the damage which the plaintiff has sustained. Now by a long series of decisions it has been clearly established that the claim must be limited to damage which, but for the power conferred by the Act of Parliament, would be actionable. Is the damage done here actionable? It appears from the special case that the damage may have arisen from four different causes. [His Lordship referred to the special case already set out.] If the finding of the arbitrator had been that the damage resulted from all three causes, then, inasmuch as two of them would be actionable, were it not for the Act, the claimant would be entitled to recover. But if, on the other hand, it turns out that the cause of injury is confined to one species of damage only, namely, the removal from the river of the shoals, then the question will arise whether damage so occasioned is actionable. All that the arbitrator says is that damage was caused "by the removal from the river of shoals formed therein by gravel, soil, and other materials, which from time to time had been brought down by tributaries of the said river, near the confluence therewith of the tributaries." We all agree that if the bed of the river had been disturbed, it would have been actionable; but does the finding of the umpire amount to such a statement? I am clearly of opinion that no conclusion of this kind can be drawn. If the arbitrator had meant us to infer that the bed of the river had been disturbed, or that the shoals had become part of the river itself, why did he not expressly say so? Instead of that he has made use of language which, to my mind, is quite unambiguous. Then, lastly, was the damage caused solely by the removal of the shoals, or partly by the removal of such shoals and partly by other causes? I leave the weir altogether out of consideration, because no damage was caused by its removal. Now, the language of the award is to my mind clear as to how the damage was occasioned. The umpire has found that there was no sufficient evidence before him to enable him to determine one way or the other whether the said works, exclusive of the removal of the shoals, caused the farm on the occasion of the floodings to be flooded to a greater extent or for a longer period of time, or to be more damaged

than it otherwise would have been. What is the meaning of that? Why, that there is no sufficient evidence to enable him to determine whether the damage was occasioned otherwise than by the removal of the shoals; in other words, it amounts to an allegation that the removal of the shoals alone caused the injury, and that there was no evidence to satisfy him that any other cause or causes contributed. It must, therefore, be taken that the damage was solely caused by the removal of the shoals; and the law is well established that a riparian owner may remove shoals from a navigable river, so long as he takes care not injuriously to affect the navigation, without being liable to an action. I therefore come to the conclusion that the plaintiffs are not entitled to the compensation which has been awarded to them by the umpire.

MELLISH, L.J.—I am of the same opinion. With reference to the question whether an arbitrator, under the Lands Clauses Consolidation Act 1845, has power to state a special case, I should, if there had been no decisions, have thought it open to some doubt, but considering the authorities, there can be no doubt at all on the subject. The point was first raised before James, L.J., when Vice-Chancellor; his decision was that the arbitrator had such a power, and was affirmed, on appeal, by the Lords Justices. We, therefore, should not be justified in overruling it now. Had the decision in *Re Dare Valley Company* (*ubi sup.*) been brought to the notice of the Court of Common Pleas, I feel no doubt their decision on the demurrer would have been different. The arbitrator, therefore, having power to state a special case, I agree with Mr. Herschell that the defendants are entitled to have a verdict entered for them on the plea of no such award. But Mr. Herschell and Mr. Manisty both thought it proper that we should go on to consider the merits under the powers conferred on us by the Judicature Acts. The first question that arises is, whether, according to the construction of sect. 45 of the Aire Dale Drainage Act, the plaintiff is entitled to compensation for acts done whether actionable or not. My opinion is, that he is only entitled for acts done by causes which are actionable. The argument for the plaintiffs was based upon the difference of sect. 45 from sect. 43. I therefore took the opportunity of reading sect. 44. I find that that is a clause relating to Riddledown landowners, and in the main agreeing with sect. 45, but limited to actionable damage, the words being, "whether the lands injuriously affected be within or without" a certain area, the words "injuriously affected" being the very words which in sect. 68 of the Lands Clauses Act have been considered decisive of the question whether damage without legal injury can be considered the subject of compensation. I think it clear therefore that the plaintiff can only recover for damage which but for the Act would have been actionable. Then comes the question raised by the award, whether the removal of shoals is actionable? With all deference to the court below I have no doubt it is not. In course of time shoals may no doubt become part of the bed of a river, in which case it would be actionable to remove them; but so long as they continue in the shape of shoals they may clearly be removed. Such removal, therefore, not being actionable, has there been any damage in respect of any other matters?

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The umpire says, as to that, that there is no sufficient evidence to find one way or the other. That being so the judgment of the Common Pleas Division must be reversed.

POLLOCK, B.—As regards the first point, had the matter been *res nova*. I should have liked to have had it further argued; but the decision in *Re Dare Valley Railway Company*, (*ubi sup.*) is binding, and the convenience of that decision is shown by the case of the *Duke of Buccleuch v. Metropolitan Board of Works* (*ubi sup.*) As to the other point I agree with the rest of the court. *Judgment reversed.*

Solicitor for the plaintiffs, *Field, Roscoe, and Co., for Jeffery, Taylor and Little, Bradford.*

Solicitors for the defendants, *Phelps and Sidgwick for Brown, Skipton.*

Wednesday, May 10, 1876.

(Before JESSEL, M.R., KELLY, C.B., MELLISH, L.J., and POLLOCK, B.).

WRIGHT (clerk) v. DAVIES (clerk).

Ecclesiastical dilapidations—Statute 34 & 35 Vict. c. 43—Exchange of livings—Mutual releases—Simoniack contract.

After the passing of the Ecclesiastical Dilapidations Act of 1871 (34 & 35 Vict. c. 43) an agreement was entered into by the plaintiff and defendant for the exchange of the livings they then held, and one term of such agreement was that neither party should make any claim upon the other for dilapidations.

At the time the agreement was made it was stated by the defendant to the plaintiff that the necessary repairs would be about equal in amount for each of the benefices. This, however, proved otherwise, but there was no allegation of fraud.

It was now sought to set aside the agreement as being against public policy and in its nature simoniack.

Held (affirming the decision of the Common Pleas Division), that the agreement was not in contravention of the Ecclesiastical Dilapidations Act of 1871, also that the term in the agreement as to dilapidations was merely ancillary to the contract for the exchange, and that the contract, therefore, was not simoniack or invalid.

This case came before the court upon appeal from the Common Pleas Division.

The defendant was incumbent of Gisburn, in the county of York and the plaintiff was vicar of the parish of St. Mary's, in the county of Huntingdon, and subsequent to the passing of the Act of 34 & 35 Vict. c. 43, they mutually agreed to exchange livings. In 1874 the plaintiff found that the amount of dilapidations for the parish of Gisburn was 247*l.* 19*s.* 6*d.*, and for this amount he sought to make the defendant liable.

To a declaration to that effect the defendant pleaded the terms of the agreement for exchange of livings entered into with plaintiff.

To this plea the plaintiff in his replication said: That the repairs necessary for the parish of St. Mary's amounted to the sum of 32*l.* 10*s.*, and the plaintiff further says that at the time of making the said alleged agreement and exchange the defendant represented and stated to the plaintiff that the repairs of the buildings of his the defendant's said benefice of Gisburn were merely nominal, or equal in amount to the repairs of the

plaintiff's said benefice of St. Mary's, and the plaintiff further says that such agreement was made by the plaintiff on the faith and belief that such representation of the defendant was true and correct and not otherwise; whereas, in fact and in truth, the repairs of the defendant's said benefice of Gisburn amounted to the sum of 247*l.* 19*s.* 6*d.*, as the defendant knew or ought to have known, and such statement and misrepresentation and such alleged agreement was and is an evasion of and in contravention of the said Act.

This replication was demurred to by the defendant, and such demurrer was argued on the 20th Jan. 1876, and upheld by the court (Lord Coleridge, C.J., Brett and Denman, JJ.).

Against this judgment plaintiff now appealed. (The facts of the case and the judgment below will be found fully reported *ante*, p. 106, 33 L. T. Rep. N. S. 858).

Baylis, Q.C. (O. Orompton with him) for the appellant.—The plea in this case is bad and the replication good. The decision in the case of *Goldham v. Edwards* (16 C. B. 437; 25 L. T. Rep. O. S. 198; 24 L. J. 189, C. P.; 17 C. B. 141, Ex. Ch.) was prior to the Act of 1871. The plea in this case is copied from that one, but the law is now different. [JESSEL, M.R.—If you rely upon misrepresentation in equity it is an allegation of fraud which is sufficient to avoid the contract, or it is nothing at all. This is a contract which cannot be rescinded; it has no relation to equity.] It is only stated as an answer to the plea. The law before the passing of this Act was that an action on the case, and therefore one for damages, could be brought against the late incumbent or his executors, but debts would take priority over damages. But now this is changed into an action for debt against the late incumbent or his representatives. There were also two other methods of proceeding, by deprivation and by sequestration. [JESSEL, M.R.—Under the old law the new incumbent was liable to be sequestrated or deprived of his living, whether he recovered from the old incumbent or not.] Yes, and the Act was to amend this; whereas this agreement would put the parties into the position they would have been in prior to the Act, and it is, therefore, in contravention of the Act. The primary intention of the Act was to protect the benefice and secure the repair of the buildings. The preamble clearly shows that the position of the incumbent is merely that of a trustee for the living; if he receives any money he has to pay it over within a given time to the governors of Queen Anne's bounty; he cannot release the old incumbent in any way. [MELLISH, L.J.—The real question is whether the new incumbent is a trustee of the action or not; if he is, he could never compromise an action of this kind.] It is contended he is. [JESSEL, M.R.—Then he could never accept 10*s.* in the pound though he may be certain he could not get more. The Act does not say he is to be a trustee of the action, it merely says that if he recovers the money he must pay it over; he must pay the money himself, but the Act does not say he shall recover it from the old incumbent. To say "if you get money it shall be trust money" is different to saying "you shall be a trustee to get the money." Sect. 39 creates the trust. The 47th section would be rendered a dead letter by an agreement such as this; under sects. 40 and 60 the new incumbent is made liable if the old incumbent does not pay;

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but this is a new liability only coming into operation after six months. [MELLISH, L.J.—So long as the new incumbent pays, it matters to no one save himself who has provided the money.] I now proceed to the replication that the agreement was simoniacal. [JESSEL, M.R.—If there was any simony it was upon your side. To take a living plus a benefit is not simony, which is what you are complaining of. How can it be simoniacal to say, "I will take a living but won't pay." You allege that you gave about 200*l.* to get your living, which may be simony, but that cannot make the other presentation simoniacal.] In *Downes v. Craig* (9 M. & W. 166) Lord Abinger appears to suggest that an arrangement of this kind would be simoniacal. On both these grounds, therefore, the judgment of the court below should be reversed.

Gully and Crump, for the respondent, were not called upon.

JESSEL, M.R.—This is an appeal from the Common Pleas Division as to the effect to be given to an agreement entered into between plaintiff and defendant. The questions raised are two. It appears that an agreement was entered into by the parties for an exchange of livings, one term of which was "that no payment of any kind on either side should be made for dilapidations." Now it does not appear what the respective values of the livings were, but it is said that the defendant represented that the dilapidations for his benefice of Gisburn were merely nominal, or about the same in amount as for the plaintiff's benefice of St. Mary's, but there is no allegation in the pleadings that this agreement was made corruptly, nor is there anything to show that this arrangement as to dilapidations was anything but merely subsidiary to the contract for the actual exchange, and not itself the motive for the exchange. The plaintiff now finds that he has to pay 250*l.*, whereas the defendant was only to pay 30*l.*, whereupon he says, "I can recover the larger sum from you (the defendant), because my bargain to pay that sum for you is illegal, as it is against the policy of the Act of 1871. I was the bare trustee of the action for the Governors of Queen Anne's Bounty; I could not, therefore, release you from the action, so you are as liable as if no agreement had been made by us." Secondly, it is said that the bargain is a simoniacal one, and that therefore the plaintiff can avoid as much of it as is illegal without avoiding the whole. On the first point it is only necessary for us to consider the true meaning of the Ecclesiastical Dilapidations Act of 1871. Before that Act was passed there was an action for damages for the amount of the dilapidations, and it might have happened that the new incumbent might have recovered the whole amount and put it into his own pocket, and in that way the living might have wholly lost it. The new Act enables the bishop to have the dilapidations surveyed and to point out how the necessary repairs are to be made, and it also enables the new incumbent to bring an action for debt for the amount stated by the surveyor in his report against the old incumbent or his representatives. But when the new incumbent recovers the money he is to pay it over to Queen Anne's Bounty, and whether he recovers it or not, he is still liable to pay the amount within six months, and also to do the repairs, though when done he can get the money back; and even though the amount of repairs might exceed that stated in the surveyor's report, he

would be still liable. If he neglected to do the work, then the Governors of Queen Anne's Bounty might do it themselves. The result is that an easy remedy has been provided by the Legislature for insuring the necessary repairs, and the remedies, though themselves simplified, are not changed in substance. The 36th and 37th sections of the Act do not make the new incumbent a trustee of the action, but of the proceeds he may receive from the old incumbent, which is a totally different thing. A trustee of an action cannot release the debtor of a *cestui que trust* from the action; the person released would be still liable; but the question between the trustee releasing and the party released would be quite a different one. Such an interpretation of this Act would also very much interfere with the new incumbent making any compromise with the old one; he could only do it by an appeal to the court, which would be a most undesirable state of affairs. The words of the Act are plain; sect. 36 runs, "The sum stated in the order as the cost of the repairs shall be a debt due from the late incumbent, his executors or administrators, to the new incumbent, and shall be recoverable as such at law or in equity." The sum is to be a debt, and therefore the creditor can release it. The 37th section says, "The new incumbent shall, as and when he shall recover the said sum, forthwith pay the amount recovered to the governors; and if and whenever he shall recover any further part of the said sum he shall, in like manner, forthwith pay to the governors the further part so recovered." Now, I am of opinion it would have been much better if the same words had been used in the second clause of this section as in the first, for I am satisfied they mean the same thing, *i.e.*, that "if" and "whenever" mean the same as "as" and "when" in the first clause; neither of these sections says the new incumbent "shall sue," they lay no obligation upon him to recover the money. They make him trustee of the money he has received, and do no more. By the 40th section the new incumbent is bound to pay the balance to the governors, whether he gets it or not. Again, by the 42nd section the new incumbent is bound to have the repairs executed within eighteen months. Then the 47th section, which has been referred to in the course of the argument, depends entirely upon a final certificate having been given; if the new incumbent cannot get that certificate sect. 47 will not apply to him. As to the second point, it is not alleged in the pleadings that the contract is simoniacal; to make it so you must allege that the inducement for the exchange was the payment of money or money's worth, but there is nothing of the kind here, the arrangement as to the repairs is merely ancillary to the contract for exchange, and neither party looked upon it as an inducement or motive. Plaintiff certainly did not for he thought the dilapidations were about equal in amount, and still, even supposing the defendant had known of the difference, he would have been receiving and not giving a consideration. The expression that he "ought to have known" is so vague that it may mean anything; it may mean that he ought to have got a surveyor to make a long and careful examination for which he may have had even to take down part of the buildings, but it surely cannot mean that as a clergyman he ought to have known. The words are too vague and too general. A simoniacal agreement is a corrupt one and a corrupt one of a very

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bad kind. I do not think we can listen to a suggestion of anything of the kind upon these pleas. The appeal must be dismissed.

KELLY, C.B.—'This action arises from an exchange of livings, one of the terms of the bargain being that plaintiff should not call upon defendant to execute any repairs or make good any dilapidations. After this agreement had been entered into, with the assent of the respective patrons and bishops, an order was made specifying the amount of repairs necessary, which was between 200*l.* and 300*l.*, and this action is brought to recover that amount from the defendant. The latter says that the plaintiff is precluded from bringing his action by the above agreement. The case cited (*ubi sup.*) is decisive to show that such an action could not have been maintained prior to the late Act, but it is argued that now the case is otherwise, and that such an agreement as the above is against public policy, and it would be so if it had a direct tendency to violate the provisions of an Act of Parliament. But the effect of the new Act is merely that the new incumbent may maintain an action for debt against the old incumbent, and then there are a series of provisions as to what he is to do with the money he recovers. The Act also contemplates the possibility of this money not being recovered, and then the new incumbent is himself liable; that is done for the benefit of the parish. If the money is not recovered the law is not defeated and nullified, for the new incumbent may be compelled to do the repairs, and that is all the Act requires. In case he fails to do them he remains liable for the rest of his life; so there can be nothing against the policy of the law in releasing the old incumbent, when by the 43rd section the right against the new incumbent can be enforced by sequestration. A very clear and sound distinction has been taken by the Master of the Rolls—namely, that he is not trustee for the action, but only for any money he may have recovered from the old incumbent. If the new incumbent receives money he must pay it over; if he does not he remains liable himself, and in either case the law is satisfied. As to the second point that the contract is void for simony or fraud, the answer is clear, in either case the law requires that the charge should be precisely and expressly stated; here there is no express allegation of simony or fraud, and we cannot infer it from obscure language such as this. The judgment of the court below must be affirmed.

MELLISH, L.J. and POLLOCK, B. concurred.

Judgment affirmed.

Solicitors for the plaintiff, *Shaw and Tremellen.*

Solicitors for the defendants, *Norris, Allen, and Carter.*

Friday, June 16, 1876.

APPEAL FROM EXCHEQUER DIVISION.

(Before JAMES and MELLISH, L.JJ., BAGGALLAY, J.A. and QUAIN, J.)

WOOLER AND WIFE v. KNOTT.

Landlord and tenant—Lease of public-house—Tenant's covenant not to do any act "to affect the licence"—Construction—Conviction of tenant by justices for offences against the Licensing Acts—Convictions not recorded on licence—Breach of covenant—Forfeiture—Licensing Acts 1872 and 1874 (35 & 36 Vict. c. 94, and 37 & 38 Vict. c. 49, s. 13).

After the Licensing Act of 1874 came into operation the defendant became lessee of a public-house belonging to the plaintiffs, and by the lease (containing the usual clause of forfeiture for breach of covenant), the defendant covenanted "not to do, omit, or permit or suffer to be done or omitted, any act, matter, or thing whatsoever that can or may affect, lessen, or make void either or any of the licences for the time being granted to the said public-house." Defendant was convicted before the justices of having committed, on the same day, two offences against the Licensing Acts, but the justices directed, under sect. 13 of the Act of 1874, that neither of the convictions should be recorded on the defendant's licence.

Held (affirming the decision of the Court of Exchequer below), that the licence was not "affected" within the meaning of the covenant in the lease by such convictions, and consequently that there had been no breach of covenant, and no forfeiture.

This was the plaintiff's appeal from a decision of the Exchequer Division (Kelly, C.B. and Huddleston, B.) allowing a demurrer of the defendant to the plaintiff's statement of claim in an action of ejectment for breach of covenant.

The case below is fully reported in 34 L. T. Rep. N. S. 362, where all the facts are set out. They sufficiently appear, however, in the headnote above. By the Licensing Act 1874 (37 & 38 Vict., c. 49), s. 13:

Where any licensed person is convicted of any offence against the principal Act (1872), which by such Act was to have been, or might have been endorsed upon the licence, or of any offence against this Act, the court before whom the offender is brought shall cause the register of licences, in which the licence of the offender is entered, or a copy of the entries therein relating to the licence of the offender, certified in manner prescribed by sect. 58 of the principal Act, to be produced to the court before passing sentence, and after inspecting the entries therein in relation to the licence of the offender, or such copy thereof as aforesaid, the court shall declare as part of its sentence whether it will or will not cause the conviction for such offence to be recorded on the licence of the offender, and if it decides that such record is to be made the same shall be made, &c.

Morgan Howard, Q.C. and Willis for the plaintiffs.—An act affecting the licence was complete, and the covenant in the lease was broken directly anything was done, which could be the ground of a conviction which might be recorded on the licence. Under the Act of 1872 every conviction was endorsed, and there was no discretion left in the justices as to whether they would or would not endorse a conviction on the licence. Directly an act, which might lead to a conviction, was done, the lessee had done all that she could do to endanger the licence. The act itself is the thing to look at, and not what the justices may do in dealing with it. [JAMES, L.J.—I grant that; but three indorsements are necessary to forfeit the licence, and can you say that an act or acts that will cause one or two indorsements—and are therefore, in some sense, on the road to the forfeiture of the licence—can be said to "affect" the licence in a sense involving forfeiture of the lease?] Then it is submitted that, by the operation of other sections of the Act of 1872, the licence has been "affected." Sect. 36 of that Act says a register shall be kept in which things affecting the licence shall be entered; and (sect. 55, sub-s. 3) that convictions shall be entered on the register. [MELLISH, L.J.—The words are "such conviction."

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That means a conviction that has been indorsed on the licence.] [JAMES, L.J.—Sect. 56 shows that repetition is the offence Parliament had in view.] The licence is a form of property, and the value of it to the landlord would be affected by a conviction. [JAMES, L.J.—The lease does not say "affecting the value of the licence;" you are really reading it as if the covenant were that nothing should be done against the licensing laws. [It can scarcely be denied that the prospects of renewal are worse than they were; and, if so, how can it be disputed that the licence is "affected?" The very object of this covenant was to protect the renewal of the licence—it is for the benefit of the landlord. [MELLISH, L.J.—But the words are "the licence for the time being," and a licence never lasts longer than a year.] Suppose the action of ejectment had been brought the same day, it could not have been said that the landlord must wait till it is seen what the justices will do.

Cave, Q.C. and *Heath*, for the defendant, were not called upon.

JAMES, L.J.—I am of opinion that the decision of the court below was right and must be affirmed. It is argued here as if this covenant was equivalent to a covenant that no offence against the Licensing Acts should be committed. If that had been the intention it would have been very easy to say so; but that has not been said. The words are, nothing shall be done "that can or may affect, lessen, or make void either or any of the licences for the time being." An act, repetition of which, under certain circumstances, if followed by certain other acts, might "affect" the licence, is not itself an act "affecting" the licence. It is not to be presumed that the person will do the further acts and offences. It is not enough that it is possible or probable that the other acts will be done. An act which may affect the minds of the justices on a future occasion, as when they have to consider whether they shall renew the licence or not, cannot be said to be an act "affecting" the licence.

MELLISH, L.J.—I am of the same opinion. If the justices had ordered these two convictions to be recorded on the licence, then, I think, the licence would have been affected, for then its renewal would have been greatly endangered. As to whether one conviction recorded would have been enough I am in doubt, and will say nothing; but if none is recorded, I am clearly of opinion that the licence is not affected, so that a forfeiture must follow. I think the covenant does not relate to affecting the chance of renewal, but the existing licence.

BAGGALLAY, J.A. — Nothing would have been easier than to have made a forfeiture clause extending to all offences against the Licensing Acts. But that has not been done; and it is impossible to put such a construction on these words, occurring as they do, in a forfeiture clause, and, therefore, demanding a construction favourable to the lessee.

QUAIN, J. — These acts, and the conviction following upon them, do not affect the licence. They may affect the character of the tenant, but they do not affect the property of the landlord through the licence. That is as good as ever it was. If there had been any endorsement on the licence then, no doubt, a serious question would have arisen, but there has been none, and the

licence is as good as if there had been no convictions. The covenant does not relate to the chance of renewal, but to the existing licence.

Judgment below confirmed. Appeal dismissed.

Solicitor for the plaintiffs, O. B. Wooler.

Solicitors for the defendant, *Iliffe, Russell*, and *Iliffe*, for *Barron*, *Darlington*.

SITTINGS AT LINCOLN'S INN.

Reported by H. PRAT and E. STEWART ROCHE, Esqrs.,
Barristers-at-Law.

Monday, March 27, 1876.

(Before JAMES and MELLISH, L.JJ., and
BAGGALLAY, J.A.)

ATTORNEY-GENERAL v. CORPORATION OF SUNDERLAND.

Powers of municipal corporations—Public walks and pleasure grounds—Council chamber and offices—Museum, library, and conservatory—Public Health Act (11 & 12 Vict. c. 63), s. 74.

Land was vested in a corporation in trust and to the intent that the same might be used only as and for public walks or pleasure grounds for the use of the inhabitants of the borough. The land having been laid out as a public park, the corporation proposed to erect on part of it a council chamber and offices and a museum, library, and conservatory. An information at the relation of some inhabitants and ratepayers prayed that the corporation might be restrained from appropriating any portion of the park as a site for the erection of any town buildings, or of any building which was not needed for or incidental to the maintenance of the park as a public pleasure ground.

Held (affirming the decree of V. O. Malins) that the case turned on the 11 & 12 Vict. c. 63, s. 74; and that the erection of the council-room and offices was unlawful; that a portion of the land might be appropriated to the erection of a museum and conservatory, and (varying the decree of the Vice-Chancellor) that the erection of a free library as well as a museum and conservatory, was allowable as tending to promote the convenient use of the grounds.

THIS was an appeal by the defendants from a decree of Vice-Chancellor Bacon, raising the question whether a corporation could appropriate as a site for the erection of a council chamber and offices, and of a public library, museum, and conservatory, any part of a public park and recreation ground which had been vested in them in trust to be used as and for public walks or pleasure grounds for the use of the inhabitants of the borough. In the year 1844 a scheme was got up for making a park and recreation ground on Building-hill in Sunderland, and on an application by the corporation and certain inhabitants of Sunderland to the Treasury for a grant in aid, they were informed by their Lordships that they approved of the proposed scheme and were prepared to make a grant of 750*l.* for the purpose on the usual conditions, viz., "that the money will be issued if the ground when purchased is legally and permanently saved as a place of recreation for the people." The grant having been duly made, a piece of land containing fifteen acres was purchased in 1852, and in the purchase deed the corporation covenanted that the land "shall be used only as and for public walks

or pleasure grounds for the use of the inhabitants of the borough of Sunderland, and that no messuage or other buildings shall hereafter be erected thereon other than the walls, or seats, or summer houses, or any building or buildings for a museum, or other public purpose of a like nature, or for the abode of the parties attendant upon and connected with such walks, pleasure grounds, and buildings, but no part of the said lands and hereditaments shall be used as a cemetery, or burial ground, nor shall any school, penitentiary, hospital, or lunatic asylum, or the like, be built on any part thereof." This land was laid out and completed as a park accordingly and became known as "the Sunderland park." In 1863 the North-Eastern Railway Company offered to sell to the corporation three sites contiguous to the park, containing together about ten and a half acres, for 10,000*l*. The corporation being the local board of health in Sunderland deemed it desirable to purchase this land as an addition to the park, and in April 1863 made a formal application to the Home Secretary for his approval of a proposal "to purchase the ground and to maintain, lay out, and plant it as public walks and pleasure grounds, as an addition to and extension of the present park in accordance with the 74th section of the Public Health Act 1848." This application was made under the Borough of Sunderland Act 1851, with which was incorporated the Public Health Act 1848, the 74th section of which latter Act authorised local boards of health, with the approval of the general board, to provide public walks and pleasure grounds. In Aug. 1863 the Home Secretary returned an answer which, after referring to the application and the report of an inspector on the subject, continued: "Now, therefore, I, having made inquiry into the application, do hereby under my hand sanction the purchase, by the said corporation as acting as such local board of health, of land as described in the aforesaid application and report for the extension of the existing Sunderland park under the powers and authority of the Public Health Act 1848, incorporated in the Borough of Sunderland Act 1851; and I do hereby further sanction their borrowing at interest the sum of 11,000*l*. to defray the cost of such purchase and laying out the said land for the aforesaid purpose, on the credit of the Sunderland district rates." The land was purchased accordingly and conveyed by a deed of April 1864 which declared that the land was to be used only for public walks and pleasure grounds. Shortly afterwards the newly purchased grounds, with the exception of about a quarter of an acre at their north-western extremity, were laid out as pleasure grounds and thrown into the original park. The land was purchased and laid out by means of 11,000*l*. borrowed upon the security of the general district rates. In 1875 the corporation determined to employ this quarter of an acre as a site for the erection of town buildings, including accommodation for a museum and library and public offices, and on the 8th April in that year they issued an advertisement for plans, specifications, and estimates for the erection on this land of a council chamber and offices, museum, and library.

In May 1875 an information was filed at the relation of three inhabitants and ratepayers of Sunderland, praying that the corporation might be restrained from appropriating any portion or portions of the park as sites or a site for the erection of any town buildings or for any erection

or buildings which was not needed for or incidental to the maintenance of the said park as public walks or pleasure grounds.

At the hearing in the court below it was admitted that part of the plan of the corporation was to erect a winter garden or conservatory, and to establish a school of art as well as a library. The Vice-Chancellor, in his judgment, after stating the facts, continued: It is plain that these lands were vested in this corporation for a public purpose. It has been argued over and over again that a discretion was given to the corporation. But more than ten years ago this land was granted to be used "only as and for public walks or pleasure grounds for the use of the inhabitants of the borough," and that trust has been executed by the corporation ever since. Acts of Parliament have been referred to, which give very extensive powers to corporations. They give, amongst other things, powers to build offices; but they do not give powers to build offices upon other peoples' land or to take other peoples' land for that purpose. Now, these lands have been made into a park, which is intended only for the recreation and healthful exercise of the people of Sunderland. It has been argued that these statutes may, by a circuitry, be brought round to give to the corporation power of constructing buildings for other purposes, provided such purposes are not inconsistent with public use and benefit. But I am of opinion that buildings which are intended for purposes not connected with public walks or pleasure grounds are plainly unlawful. As to the museum and conservatory, it is a totally different thing. I think the building of a museum is entirely within the original trust. Such a building may be erected on any suitable spot within the discretion of the defendants. This the corporation are able to do; but they are not able to transport their municipal offices to the park from some other portion of the town of Sunderland. There will be an injunction, therefore, to restrain the defendants from erecting any municipal or other building in the park, except a museum or conservatory. I am also against the defendants in the matter of the erection of a library and school of art. The corporation must pay the costs of the suit."

A decree having accordingly been made restraining the corporation from appropriating any part of the park as a site for the erection of any town buildings, or any erection or building which erection or building should not be needed for or incidental to the maintenance of the said park as public walks or pleasure grounds, other than a museum or conservatory, and from applying any rates to such prohibited purposes, the corporation appealed.

Sir H. Jackson, Q.C. and Owen, for the appellants.—The question was simply one of law—whether this piece of land was or was not affected with a trust which prevented its being employed by the corporation in the manner proposed? They denied there was any dedication of the land in trust for the purposes of a park only; and contended that whatever dedication there might have been was subject to the discretion of the corporation, and that the proposed buildings were not inconsistent with the purposes of a park. The effect of the Treasury minute of 1844 was to give a discretion to the corporation, who were acting for the public benefit, and were, in fact, no

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other than a committee of the ratepayers generally. The land was to be used as a place of recreation for the people, but the manner of such recreation was left to the decision of the ratepayers. They would not contend that express authority was to be found for the proposition that land vested in a corporation for the purpose of a public park might be used for building a town hall; but they contended that corporations generally were empowered by statute to do by circuitry what the Sunderland corporation were proposing to do, and therefore that the court would not interfere with their doing it directly. By the 35th section of the Public Health Act 1848 (11 & 12 Vict. c. 63) the local board must provide and maintain necessary offices, and by the 35th section of the Labouring Classes Lodging Houses Act 1851 (14 & 15 Vict. c. 34), the council or the local board might appropriate for the purposes of the Act, in the borough or district, any lands vested in them respectively. The 33rd section of the Literary and Scientific Institutions Act 1854 (17 & 18 Vict. c. 112) defined the institutions to which the Act applied, and included institutions for the promotion of science, literature, and the fine arts, libraries, and public museums. The Public Libraries Act of 1855 also authorised the application of a part of the land as a site for a public library. They, therefore, submitted that this land might be treated in the way proposed.

Kay, Q.C. and Caldecott in support of the decision of the Vice-Chancellor.—The words of sect. 18 of the Public Libraries Act 1855 could not be construed so as to include a council chamber and offices. They did not object to the erection of a conservatory, but a museum and library were clearly not within sect. 74 of the Public Health Act on which the case must turn. The object of that Act was to provide an open air place of enjoyment and recreation for the people and no building except one incidental to a garden ought to be allowed. If buildings had been intended they would have been mentioned in the Act.

JAMES, L.J.—As regards the first point decided by the Vice-Chancellor, I am of opinion that the order is clearly right, the corporation having no more authority to use any of this land as the site of a town hall than to use it for erecting shops. The original park was appropriated as "a place of recreation," and, according to the Act under which the land now in question was acquired, it must be used "as public walks or pleasure grounds." These words are not to be construed too narrowly. It is admitted by the information that some buildings are allowable, and the prayer is, as it seems to me, quite correct. The corporation is in the position of a trustee, and the question is whether, in building a museum and library, it is improperly executing the trust. The primary object of the trust is to provide a place of enjoyment and recreation; nothing is improper which conduces to that object, and we ought not to quarrel with anything which the corporation in a reasonable exercise of their discretion consider conducive to it. It is admitted that the erection of a conservatory is allowable, and it is an erection which you would expect as a matter of course to find in first rate pleasure grounds. The erection of a free museum containing botanical specimens and other curiosities appears also to be unobjectionable. A library into which people may turn if

the weather becomes unfavourable also seems allowable if *bonâ fide* intended for the use of persons frequenting the grounds, as it will tend to promote the convenient use of the grounds. I think, therefore, that the exception in the order ought to be extended, so that the erection of a free library may not be prohibited.

MELLISH, L.J.—I am of the same opinion. The question is whether the corporation is guilty of a breach of trust in employing any part of this ground for purposes other than those mentioned in the information. I am of opinion that the ground was purchased for the purposes of the Public Health Act, s. 74, and can only be applied for such purposes as are authorised by that Act. I am of opinion, therefore, that no part of it can be used as the site of a town hall and offices. Can, then, any part of it be applied as a site for a museum, library, and conservatory? If the corporation were to acquire land for those purposes only, I think that such a purchase would not be within the Act; but public walks and pleasure grounds having been laid out on a piece of land containing twenty-five acres, it is proposed to apply a quarter of an acre for the erection of those buildings. The question then arises whether this application of a small portion of the ground is not reasonably incidental to the main object, and whether it will not improve the grounds in their character of public walks and pleasure grounds. I am of opinion that it will, and may induce more persons to frequent the grounds. I think that we ought not to put a narrow and strict construction upon the words, but that we ought to see whether the trustees, in what they are proposing to do, are *bonâ fide* carrying out the object of the trust.

BAGGALLAY, J.A.—I am of the same opinion. The land purchased from the railway company is vested in the corporation for the purposes mentioned in the 74th section of the Public Health Act 1848, and the corporation has power to use it in any way which will effectuate those purposes. The purposes of the section are that the land should be used for public walks and pleasure grounds, and I should much regret to be obliged to hold that applying a small portion of it for a museum, library, and conservatory, was inconsistent with this purpose. I cannot conceive anything more likely to conduce to the enjoyment of the walks and pleasure grounds than the having these erections attached to them, and I agree with the Lords Justices that the order should be varied to the extent mentioned. But we only remove the prohibition as to using the land for the site of these buildings; we say nothing as to the funds out of which the expenses of their erection are to be paid. The decree as varied would restrain the defendants from appropriating any portion of the park as a site for the erection of any town buildings, or for any erection or building which should not be needful for or incidental to the maintenance or use of the park as public walks or pleasure grounds, the injunction not to extend to a free library, museum, or conservatory, open for the use, convenience, and recreation of the persons frequenting such walks and pleasure grounds.

Solicitors: *Shum, Crossman, and Crossman*, for *Kidson, Son, and McKenzie*, Sunderland; *Bell, Brodrick, and Gray*, for *W. Snowball*, Sunderland.

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ELLIS v. THE LOCAL BOARD OF BROMLEY.

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Saturday, April 29, 1876.

(Before JAMES and MELLISH, L.JJ. and BAGGILLAT, J.A.)

ELLIS v. THE LOCAL BOARD OF BROMLEY.

Enclosure Act—Right to dig gravel from existing pit—Lateral extension of pit—Mode of working gravel pit—Destruction of surface.

By a private Act of Parliament, passed in 1764, for the purpose of extinguishing the right of common over certain commonable lands in the parish of Bromley, it was enacted that it should be lawful for the surveyors of highways of the parish at all times thereafter to cut, dig, gather, take, and carry away any quantity of gravel, or other materials for repairing roads, out of and from any pit or pits then in the possession of the lessees of the lands subject to the rights of common, to be made use of for and towards the making, laying out, or repairing any highway or road lying and being within the said parish, without paying anything for the same; and the surveyors were thereby required to fence in the said pits, and to repair the said fences as occasion should require.

One of the pits mentioned in the Act was situated in a field containing upwards of nine acres. This field had become vested in the plaintiff, who filed a bill to restrain the local board, in whom the powers of the surveyors had become vested, from extending the area of the pit in a lateral direction, and from digging gravel so as to injure the surface of the field. There was no evidence as to the condition of the pit at the date of the passing of the Act, but it was proved that in 1826 the extent of the pit was one and a half acres, that it had been enlarged to two acres in 1862, and that since that time it had been further enlarged, such enlargement being made by destroying the surface and digging out the gravel.

Held (reversing the decision of Jessel, M.R.), that the Act gave power to get the gravel in the ordinary mode of working a gravel pit, and that, as the evidence showed that this gravel pit had been usually worked by extending its area, the defendants were entitled to continue working the pit in that way, although the surface was thereby destroyed.

THIS was an appeal from a decision of the Master of the Rolls.

By a private Act of Parliament passed in 1764 (4 Geo. 3), entitled "An Act for extinguishing the rights of common in, over, and upon certain commonable lands and grounds within the manor and parish of Bromley, in the county of Kent," after reciting that there were within the manor and parish of Bromley certain commonable lands and meadow grounds, whereon the freeholders and inhabitants of the said parish had right of common and pasture from the 10th Oct. to the 5th April in every year; that the Lord Bishop of Rochester was, in right of his bishopric, lord of the manor, and that William Scott was, by virtue of a lease granted by the said bishop, possessed of all the said commonable lands and meadow grounds; and that the said lands and grounds in their then situation, were incapable of improvement, and it would be advantageous to the said William Scott, and to all persons having right of common or common of pasture in, over, and upon the said lands and grounds, if the said right of common

or common of pasture was extinguished, and a proper recompense and satisfaction was made to the said persons for their right of common or common of pasture thereon; it was enacted that from and after the 24th June 1764, all rights of common or common of pasture in, over, and upon the said commonable lands and meadow grounds, should cease, determine, and be for ever extinguished; and that the yearly rent of 40*l.* should be issuing and going out of all the said commonable lands and meadow grounds, to be payable and paid by the said William Scott, and all and every other person and persons who should or might be possessed thereof, to the churchwardens or overseers of the poor of the said parish of Bromley for the time being, in lieu and satisfaction of, and full compensation for, such rights of common. And the Act contained the following enactment: "That from and after the 24th day of June 1764, it shall and may be lawful to said for the surveyor or surveyors of the highways of and for the said parish of Bromley for the time being, from time to time and at all times thereafter, to cut, dig, gather, take, and carry away, or cause to be cut, dug, gathered, taken, and carried away, any quantity or quantities of gravel, or other materials for repairing of roads, out of and from any pit or pits now in the possession of the said William Scott, and lying and being within the said parish, to be made use of by him or them, or as he or they shall direct, for and towards the making, laying out, or repairing any highways or road lying and being within the said parish, without paying anything for the same; and such surveyor or surveyors is and are hereby required effectually to fence in the said pits, and to repair the said fences, as occasion shall require, or cause the same to be done, in such manner as to prevent any mischief or accident happening therein."

One of the pits mentioned in the Act was situated in a field containing upwards of nine acres, and called the Great Page Heath Field, over the whole of which a stratum of gravel thirty feet thick extended.

By an award made in 1826 under the provisions of the Bromley Enclosure Act of 1821, this field and the gravel pit therein were allotted by way of exchange to one Wells, of whom the plaintiffs in the present suit were the successors in title.

The plaintiffs filed their bill against the Local Board of Bromley, in whom the rights and duties of surveyors of highways for the parish of Bromley had become vested under the provisions of the Local Government Act 1858, which were adopted by the parish in 1867.

The bill prayed that the defendants, their servants, workmen, and agents, might be restrained from further extending the area of the said gravel pit in Great Page Heath Field in a lateral direction, and from digging, cutting, gathering, taking, or carrying away any gravel or other materials for repairing of roads from or out of the said pit in such manner as to break up, destroy, or injure the surface of any part of the adjoining lands belonging to the plaintiffs.

There was no evidence as to the condition of the gravel pits at the date of the passing of the Act of 1764, but a comparison of the award of 1826 with the Ordnance survey in 1862 showed that the area of this pit had been extended from 1*a.* 2*r.* 12*p.* in 1826 to 2*a.* 0*r.* 9*p.* in 1862.

The effect of the evidence as to usage is suffi-

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ciently stated in the judgments of Jessel, M.R. and Mellish, L.J., *infra*.

The cause came on for hearing before the Master of the Rolls on the 21st Feb., when, after a protracted argument, his Lordship, without calling for a reply, delivered the following judgment: This case has been argued in such a manner and by such eminent counsel, that I cannot help suspecting that what is very plain is very difficult to understand. Had it not been for the argument, I should have thought it very clear indeed. A pit means a hole; and when I say so, I have before me the only general Act of Parliament which had been passed relating to supervisors of highways taking gravel or materials for road-making from gravel pits. I allude to the Act of the 5 Eliz. c. 13, which gives power to the supervisors of highways to get stone out of open quarries, and, if there are not open quarries, to dig for gravel and other materials on the lands next to the highways, not being houses, gardens, orchards, or meadows. Then it says: "It shall not be lawful to any such supervisor or supervisors by virtue of this Act to cause any rubbish to be digged out of any quarry or quarries, but only shall extend to such rubbish as shall be found there ready digged by the owner or owners of the said quarry or quarries, or otherwise by his or their licence and commandment; (2) nor shall not extend or give authority to any supervisor or supervisors to dig or cause to be digged any gravel, sand, or cinders in the house, garden, orchard, or meadow of any person or persons; nor that it shall be lawful by this Act to any such supervisor or supervisors to cause any more pits to be digged for gravel in any several and enclosed ground than one only; and that the same pit or hole so digged for gravel as is aforesaid shall not in any way be in breadth or length above ten yards over at the most: (4) and that every such supervisor as shall cause any such pit to be made and digged for gravel, sand, or cinders as is above said, shall within one month next after any such digging or pit made, cause the same to be filled and stopped up with earth, at the costs and charges of the parishioners." If not, he shall pay five marks to the owner. Here I have an Act of Parliament *in pari materia*, and it describes a pit as being a hole. That is my understanding of the word "pit." Then we have the particular Act of Parliament in question in the present suit, which is an Act of Parliament passed in 1764. It recites that the Bishop of Rochester, in right of his see, or as rector of the parish, is entitled to the manor; that in that manor there is a large quantity of Lammas land; that one William Scott is lessee under the bishop—no doubt he was lessee of the manor, although he is called lessee of the lord;—that the freeholders have a right of common over the land from October to April in every year, and that it is very desirable to get rid of the right of common; and it enacts that the right of common shall cease, and that a rent of 40*l.* a year shall be paid to the parishioners in compensation for the loss of the right of common, which makes the whole a fee simple in the bishop, subject to the lease to Scott. And then it enacts: [His Lordship read the clause above set out, giving the surveyors power to get gravel from the pits, &c., and continued:] Now, as the law then stood under the Act of Elizabeth which I have mentioned, this being land in the neighbourhood of a

road, the surveyor had a right to dig for gravel. It was not an orchard, or a house, or a garden, or a meadow, and he had a right to dig for the gravel subject to restrictions: he could only dig for a month, and he was to pay five marks if he did not fill in the pit or hole next after the expiration of one month. That was his position. Now what the Act of 1764 says is this: Instead of being limited to a month, he is to dig as long as he likes, that is, as long as the gravel will last, and, instead of paying for it, he is to take it for any period he likes without paying anything for it. Instead of being limited to making a hole ten yards across in each way, he is to take it out of any of the pits now in the possession of William Scott. That is all. Now I was gravely asked to say that this power to take gravel out of Scott's pits empowered the surveyors, if the gravel failed in the pit, because they had dug down to the bottom, to dig laterally in the neighbouring land which adjoins it, and to take gravel at their will and pleasure, without any limit, from the sides of the pit. And they actually say that the only possible limit is the extent of the field, which happens to be 9½ acres, or thereabouts. All I can say is that, if I understand language, there is no foundation for any such contention. The right to take gravel or other materials out of a hole means to take it out of a hole, and not to make the hole larger by taking it out of the neighbouring land, so that, although it may contain a part of the old hole, it is a new one. The Act empowers them to take gravel out of the hole then in the possession of William Scott; but the hole they have formed was not in his possession, but is another hole. It appears to me that there is no doubt and no ambiguity in the Act of Parliament. But the Act does not stop there, for it goes on in this way: "And such surveyor or surveyors is and are hereby required effectually to fence in the said pits"—to fence in the pits in the possession of William Scott. If I put a fence round a hole at the top of it, when it is fenced in the hole is defined, and there is no doubt what the extent of the hole is. There is no power to take down that fence—which is the theory of the other side—and make a new fence; it is quite true that they are "to repair the said fences as occasion shall require, or cause the same to be done in such manner as to prevent any mischief." What is the mischief? It is to prevent animals and people from falling down into the pit: that is what the fencing is for. It does appear to me that that requires the surveyor before he digs anything to fence in the pit; he is not to dig until he has fenced in "the said pits now in the possession of William Scott." I must say, to me it is remarkably plain. But I have sometimes thought things very plain on points of construction, and I have found other judges differ from me, and it may be so in this case; but I do think it plain beyond any controversy, as far as I am concerned, that the right to dig gravel out of a hole in William Scott's possession does not mean out of any hole which the people who have a right to take gravel may choose to make. Then I was asked to assume that the gravel was all worked out of the hole when the power was given. I must say that is too absurd. I cannot assume anything of the kind. No doubt there was plenty of gravel. The stratum of gravel was thirty feet thick, and even now it is not worked out, although it is not so good or so easy to work lower down, and it may

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be more expensive to get it. As I understand, there are several feet of gravel at the lowest part of the hole remaining unworked, and no doubt there was a great deal there at the time of the passing of the Act of Parliament. To my astonishment—and it is not the least marvellous part of the case—there is a prescription pleaded, that under the Prescription Act the surveyor of highways has a right to take the gravel out of the enlarged hole. Mr. Bagshawe said that there was an ambiguity in the Act of Parliament, and that, therefore, evidence of usage was admissible to explain it. I do not see the ambiguity; and, in the second place, I have no evidence of contemporaneous usage. The evidence only goes back to just before 1830; and, as I understand it, what has happened has been this. The owners of the soil have themselves worked the gravel, and in working it have enlarged the hole, and all that has ever been done has been, as far as I can see, for the surveyors of highways to take some gravel out of this enlarged hole. The right to enlarge it independently does not seem to have been claimed. Then it is said that the surveyors must have gravel to repair the roads. The answer is that they cannot have it longer than it exists. The owner may work out all his gravel at once if he pleases. It cannot be said that it will last one year, or ten years, or fifty years. The surveyors are limited: they can only take what is necessary for repairing and maintaining the roads. The owner's right is unlimited, and therefore the surveyor's right may be of a very temporary character, and of little value. Then it is said that they have in fact enjoyed this right without dispute. What does that mean? If they have done this without right, that will not give them a right by prescription. It is not an unknown thing for surveyors of highways to act in this way. They take gravel from commons or waste places without anybody interfering. The whole right comes to this, that they have done it without being remonstrated with. There was no attempt, and there could be no attempt, to carry this usage back to 1764. The fact that they have done this for 30 years does not show that they had any consent to do it before. This is not a case where usage from time immemorial is presumed from usage for a period of 20 or 30 years, for this could not be from time immemorial. As to contemporaneous practice, there is no evidence. It appears that the theory of interpreting an ambiguous document by contemporaneous practice does not apply when you have no evidence of contemporaneous practice. This practice may have existed in 1827 or 1828, but I cannot help observing that there is no old inhabitant called to carry the practice back further. As far as I can see, the defendants have no case whatever, for I think their right does not go beyond the Act of Parliament, and the Act of Parliament restricts their right to the particular pit or pits in possession of William Scott. I have one more observation to make. It has been said that this pit has been worked ever since 1764. There is no proof of that. I can see from the Act of Parliament that there were several pits, I do not know how many, in the possession of William Scott at the time the Act passed. The words of the Act are, "out of or from any pit or pits," which seems to me to show that there were more than two; the word is not "either," but "any," pit or pits. It

is known that there were two, and it looks as if there were more than two; but I cannot tell whether the other pit or pits have not been worked, and perhaps they did not have recourse to this pit until comparatively lately—30 or 40 or 50 years ago. What is the limit to the claim here? In this case it is the $9\frac{1}{2}$ acres of which the field consists. But what is to happen to the other pits? I have no evidence about the boundary of the other pits on the enclosed lands. It is not sufficient to say, We can suggest a boundary for this pit, because this happens to be a field of $9\frac{1}{2}$ acres. What do you say to the other pits? Where are your boundaries there? As I said before, the case appears to me plain, therefore I shall grant an injunction.

From this decision the defendants appealed.

Bagshawe, Q.C. and *Speed*, for the appellants.—The words of the Act empowering us to take the gravel are very wide and do not restrict us in any way, except that we can only use what we take for making or repairing highways or roads within the parish. The words are "cut, dig, gather, take, and carry away;" and they clearly authorise us to take the gravel in a lateral direction. The evidence shows that we are only working the pit in the way in which it has been worked as far back as living memory extends; and *Waterpark v. Fennell* (7 H. of L. Cas. 650) shows that, if there is any ambiguity in the words of the Act, evidence of usage is admissible to explain them.

Davey, Q.C. and *O. P. Ilbert* for the plaintiffs.—The defendants claim a right to destroy the surface of our land, and they must prove an express grant of such a right. In *Bell v. Wilson* (14 L. T. Rep. N. S. 115; L. Rep. 1 Ch. 303), where a conveyance reserved to the grantor all mines and minerals, it was held that the term "minerals" included freestone, but that the grantor had liberty only to get the freestone by underground mining, and not by working in an open quarry; and yet the conveyance reserved to the grantor very full liberty to "dig, bore, work, lead, and carry away" the minerals; and there was evidence that the usage of the country was to work freestone by open quarry. Therefore that is a strong case in our favour. In *Wakefield v. The Duke of Buccleuch* (23 L. T. Rep. N. S. 102; L. Rep. 4 E. & I. 377) the House of Lords held that the lord of the manor had power to let down the surface on making compensation; but it was only because the conveyance there contained a provision as to compensation for destruction of the surface that the House of Lords held there was a right to let down the surface. In *Hext v. Gill* (27 L. T. Rep. 291; L. Rep. 7 Ch. 699) Mellish, L. J., in delivering the judgment of the court, said with reference to *Wakefield v. The Duke of Buccleuch*: "I think that no one can read the judgment without coming to the conclusion that, if the provision as to compensation had not been there, the House of Lords, notwithstanding the strength of the other words, would in all probability have come to a different conclusion." That is also strongly in our favour; but the words of the Act which require the surveyors "to fence in the said pits and to repair the said fences as occasion shall require" conclusively show that it was intended that the area of the pits should not be enlarged beyond their limits at the time of the passing of the Act. [JAMES, L.J.—That does not seem so to me, for the words "as occasion shall

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require" may apply to the fencing as well as to the repairing of the fences.]

F. Stevens, for a defendant in the same interest as the appellants, took no part in the argument.

Without calling for a reply,

JAMES, L.J. said: With all proper deference to the opinion of the Master of the Rolls, I confess I do not agree with his decision. The gravel pits which are the subject of this appeal are expressly referred to in the Act of Parliament which was passed in 1764 for the purpose of extinguishing the right of common over commonable lands within the manor of Bromley. When this Act was passed, gravel had been dug from parts of the manor for the repair of the roads and for other purposes. The terms of the Act referring to these pits are as follows: "From and after the 24th day of June 1764, it shall be lawful for the surveyor or surveyors of the highways of the said parish of Bromley for the time being, from time to time and at all times thereafter, to cut, dig, gather, take, and carry away any quantity or quantities of gravel or other materials for the repairing of roads out of and from any pit or pits now in the possession of the said William Scott, and lying and being within the said parish, to be made use of by him or them, or as he or they shall direct, for and towards the making, laying out, or repairing any highway or road lying and being within the said parish, without paying anything for the same; and such surveyor or surveyors is and are hereby required effectually to fence in the said pits and to repair the said fences as occasion shall require, or cause the same to be done in such manner as to prevent any mischief or accident happening therein." That is, they are to be at liberty to get out of and from any of the pits gravel or other materials. That really seems to be the true meaning of the section of the Act which says that they may cut, dig, gather, take, and carry away gravel. To "cut" implies something more than digging out of a hole. The Master of the Rolls seems to have been of opinion that a pit must be something in the nature of a hole in the ground which can be worked by means of a shaft or well; that they must go down by the shaft and work out the gravel, or whatever it may be, by mining operations. In my opinion it is not working by shaft or well that is intended to be referred to here by the word "cut." If you turn the words used into Latin-English, the meaning of the Act is plain enough, and that is that they are to be at liberty to excavate gravel or other materials out of and from an existing excavation. It is, of course, utterly impossible to take gravel from an existing excavation without either deepening it or enlarging it laterally. I am not aware of any principle of our law, or of anything arising out of the natural fitness of things, which would require the gravel to be taken from the north, or south, or east, or west side of the pits, or to be taken vertically or laterally. It appears to me that what was intended by the Act of Parliament was that the pits should be worked or excavated in the ordinary and reasonable manner in which they had, at the time the Act was passed, been done. The persons who have given evidence on the part of the defendants have given evidence showing that the usual mode of working such pits is by a roadway being made into the pit, for a cart to go down and gather up and take away the gravel. In the ordinary course of such opera-

tions, carried on for a number of years, the pit is necessarily either deepened or extended laterally. There is nothing, either in the bill or in the evidence, to show that anything has been done by the defendants otherwise than they were entitled to do according to the ordinary mode of user of a gravel pit. Reference was made by counsel to those cases which show that, in mining or excavating minerals and things of that kind, the persons who do so must leave a support to the surface. That, however, has application only to mining properties, and not to gravel pits, which must ordinarily be entirely open from the top to the bottom. I am, therefore, of opinion that the defendants have done nothing but that which they were authorised to do by the Act of Parliament.

MELLISH, L.J.—I am of the same opinion. It seems to me that the whole question in dispute really turns upon this, What is the meaning of the words of the Act which say that "it shall be lawful for the surveyor or surveyors of the highways of the said parish of Bromley for the time being from time to time and at all times thereafter, to cut, dig, gather, take and carry away any quantity or quantities of gravel or other materials for the repairing of roads out of and from" certain pits? Upon these words the question arises, What is the meaning of cutting, digging, and taking away gravel? My understanding of the working of a gravel pit is that the gravel may be taken either from the bottom or from the sides of the pit. Gravel taken from the sides of the pit is just as much gravel taken from the pit as gravel taken from the bottom of it. I think it is impossible to draw any distinction between the one mode of taking it and the other. The Master of the Rolls, in my opinion, put too narrow a meaning upon the word "pit." What is the natural and ordinary meaning of a gravel pit? I take it to be this, that it merely means an excavation from which gravel may be got. Whether the gravel is taken from the pit laterally or vertically, it is still a gravel pit within the meaning of the Act. It was said in the course of the argument that no express power was given by the Act to take gravel from the surface. But, even if no express power be given to take away the surface of the soil under which the gravel is, yet it was said, on the other side, if a right to take that gravel is granted, that is as strong as a power to take the surface, and I quite agree with that. If the right were given to take the gravel which was in the pit, and which extended absolutely, as I understand, up to the top of the ground, except in so far as it was covered by a mere surface of mould, it necessarily follows that the right of affecting the surface of the soil, in so far as necessary, was also given. Then, with regard to the evidence as to the mode of user, if it had been found that in working this gravel pit for a series of years after the passing of the Act, say up to the year 1860, the gravel has always been worked without enlarging the area of the pit, but that then in and from 1860, because the roads in the parish of Bromley had largely increased, and more gravel was consequently required, the surveyors of the parish, or the defendants, had begun to enlarge the area, then an argument might arise as to whether the mode in which it is now worked by the defendants is different from that in which it was worked in 1764. What sort of argument, however, is met by the evidence which has been given

on the part of the defendants, which certainly goes to show that, so far back as living memory extends, the gravel of the pit has always been got in the same manner as it is now—namely, by digging and by enlarging the area. That is proved by what is called the evidence of the oldest inhabitant. If evidence is given, say, by a man who says he is seventy years of age, and that he has always lived in the parish, that gravel has always within his memory been got from the pit in the mode in which it has been got since, say the year 1860, by the defendants, such evidence points to the conclusion that the mode in which the gravel has been got since 1860 is the same as the mode in which it was got by the owner previous to the passing of the Act, and afterwards by the surveyors. I think that the evidence shows that the gravel pits were not worked in any different manner in 1860 from that in which they had been worked at any time previously, and my opinion is that the defendants have a right to take the gravel in the ordinary way, even if doing so does enlarge the area of the pit. I think the limit, and the only limit, is as to the means in which gravel is ordinarily got. For instance, I do not think they could, if the gravel were exhausted at one part of a pit, by tunnelling or mining go through a hundred yards of earth to get to the gravel which was known to be under a different part of the surface. My opinion, therefore, is that, so far as they can get it, and until they come to the end of the gravel, they may work it in the ordinary way.

BAGGALLAY, J.A.—In my opinion it has not been established that the Bromley Local Board have acted in excess of their powers which are derived under the Act of 1764. What was the purpose for which the power of taking gravel from the pits was conferred? Not only to enable the surveyors of the parish of Bromley to repair the then existing highways and roads, but also to make new highways and roads in the parish. Since the passing of the Act the roads and the highways in and about Bromley have been largely increased, and now amount to a length of twenty-seven miles in the aggregate. By the terms of the Act I think it was to be a perpetual right to take the gravel for this purpose for all the time during which the gravel would last; otherwise the Act would have stated to what extent it was intended that the gravel should be taken. The next thing to consider is what is the effect of the right conferred by the Act of Parliament. It is true that the pits referred to were situated on land which was Lammas land, over which there were common rights. I think, however, that the words of the Act giving the power of digging gravel from the pits which were then in existence, show that it was intended to confer the right to take gravel sufficient for the purposes indicated by the Act, and that this appears by the words "cut" and "dig." These words not only give the right to carry the pits lower down, in order to get the gravel which was there, but also to take gravel from the pit's side, and by so cutting the gravel at the side to enlarge the area of the pits. But, of course, this was a right which was to be exercised in a proper and reasonable, and not in an oppressive, manner. There is no suggestion that what the defendants have been doing has not been done in a fair manner, assuming of course that they have the right to extend the area of the pits.

An argument has been raised upon the terms of the clause in the Act with reference to fencing the pits. It has been contended that the provision in the Act requiring the surveyors to effectually fence in the pits and repair the fences as occasion should require, in such a manner as to prevent any mischief or accident happening, pointed to a fencing in of the pits as they existed at the date when the Act was passed; that the repairs were confined to the fences which had been put up in the first instance, and that those words therefore precluded the enlargement of the pits. But I read the words of the Act of Parliament as requiring this fencing to be done as occasion should require, these words equally applying to new fencing to be thereafter put up, as to keeping in repair the fences already existing; that is, that the new fencing was to be kept in repair exactly as the previous fencing was. It has been suggested, also, that the construction of the words of this clause of the Act for which the defendants, the surveyors, contend, has the effect of placing an unreasonable burden upon this small piece of land, and that in process of time, if the surveyors' contention were right, three acres out of the nine acres of land in respect of which this question has arisen might be taken up for the purpose of supplying gravel for the repair of the roads in the parish. But when this right of taking gravel was conferred it must be borne in mind that the portion of land in which the pit is situated was not nine, but 300 acres or land. The bill must, therefore, be dismissed with costs.

Appeal accordingly allowed.

Solicitors for the appellants, *Stoneham and Legge*, agents for *Latter and Willett*, Bromley.

Solicitors for the respondents, *Ellis and Ellis*; *Stevens*.

SITTINGS AT WESTMINSTER.

Reported by B. H. AMPLETT, and W. APPLETON, Esqrs., Barristers-at-Law.

May 15 and 16, 1876.

THE ATTORNEY-GENERAL v. THE MUTUAL TONTINE WESTMINSTER CHAMBERS ASSOCIATION (LIMITED). (a)

Inhabited house duty—Buildings let out in flats—Assessment—Valuation list—48 Geo. 3, c. 55, schedule B, rr. 4, 6, 14—The Valuation (Metropolis) Act 1869—32 & 33 Vict. c. 67, ss. 45, 76.

The defendant association are the owners of the Westminster Chambers, consisting of seven blocks of buildings, having seven principal entrances. Each block internally is structurally divided into different tenements or suites of rooms, which are let and occupied separately as offices or residences. Each suite of rooms contains within itself the usual conveniences of a house, and has an outer door opening on to a common staircase. There is no communication between the different suites except by this staircase. The outer door of each block is kept locked at night, and a porter, appointed by the defendants, and who lives in a distinct set of rooms in the basement of each block, has the care of, and access to, by means of a duplicate key, the suites of rooms therein, and acts as servant (free of charge) to the occupiers of the suites, under regulations made by the association. The Commissioners, under the Westminster Improvement Act 1853, of

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whom the defendant association are assignees of the seven blocks, have power to demise or sell any set of apartments separately. None of the suites of rooms have been sold, but the greater number have been demised for terms of years under agreements containing the following (amongst other) terms: The lessors are to pay all rates, &c. The lessees are to repair—not to commit waste, not to alter the arrangement of the premises, and not to underlet or assign, the lessors to have power to enter and view the interior of the premises, and a power of re-entry on non-payment of rent within twenty-one days after it becomes due, and for breach of covenant.

In the valuation list, prepared under the 32 & 33 Vict. c. 67, each suite of rooms was treated as a separate hereditament, and valued as such. In assessing the property for the inhabited house duty, the seven blocks were treated as seven inhabited houses, and the duty was assessed upon the defendants as occupiers thereof under rule 6 48 Geo. 3, c. 55, schedule B, in the sum of 548l. 17s., that sum representing the aggregate amount of the values in the valuation list before mentioned, of the suites of rooms (117 in number) comprised in the seven blocks.

Held (affirming the judgment of a majority of the Court of Exchequer below), First, that the seven blocks of buildings were properly assessed to the inhabited house duty as seven separate inhabited houses, in the occupation of the defendant association itself. Secondly, that the value upon which this assessment was made was properly represented by the sum of the values, inserted in the valuation list for the time being in force under the Valuation Act (Metropolis) 1869, of the 117 separate tenements comprised in the seven blocks.

This was an appeal from a decision of the Court of Exchequer upon a case stated for their opinion as to the proper mode of charging on the defendant association house duty under the facts stated in this case. The Court of Exchequer (Bramwell and Cleasby, BB., Kelly, C.B. dissenting) upheld the assessment made on the defendants, and from this decision they now appealed.

The case in the court below will be found fully reported *ante* vol. 9, p. 574; 33 L. T. Rep., N.S. 180.

The facts are sufficiently set out in the head note to this report, and in the judgments. The material sections and rules of Acts of Parliament referred to in argument are set out *in extenso* in the judgment (*post*) of Jessel, M.R.

Manisty, Q.C. and *Poland*, for the defendant association.—The seven buildings are not properly assessed as seven dwelling-houses belonging to the association as occupiers. They should have been assessed as 117 separate dwelling-houses in the occupation of the tenants. These suites of rooms are similar to chambers in one of the Inns of Court, which by rule 4 of Schedule B to 48 Geo. 3, c. 55, are subject to duty as inhabited houses, and the occupiers charged. [JESSEL, M.R.—That is a special provision inserted in the Act for the protection of particular objects. It does not do away with the other general provisions of the statute, if those are plain.] For the purposes of rating, voting, or settlement, actual occupation constitutes a separate dwelling-house. These suites are in fact separately occupied. [Lord COLERIDGE, C.J.—It does not follow that they are inhabited houses for the purpose of being charged with house duty.] Under the statute 43 Eliz.,

c. 2, which is the foundation of local taxation, it has been a universal construction that an occupier of a severed portion of a house is an occupier of a "house" within the meaning of the statute. Then, by 48 Geo. 3, c. 55, the Legislature intended to put the charge upon occupiers in respect to imperial in the same way as had been done in respect to local taxation. The Queen's Bench in *The Mutual Tontine Westminster Chambers Association (Limited) v. St. George's Union Assessment Committee* (25 L. T. Rep. N.S. 696; L. Rep. 7 Q. B. 90), have held that these very sets of rooms were "houses" for the purpose of being rated to the poor. It is submitted that they are also "houses" for the purposes of the inhabited house duty. [JESSEL, M.R.—Sect. 4 and rule 6 of 48 Geo. 3, c. 55, refer to a "tenement" and a "tenement in a house." How does a tenement in a house differ from these suites of rooms? I do not see any structural difference between one of these blocks and an ordinary dwelling-house.] Rule 6 means that the occupier of rooms let out separately is not rateable, not being the occupier of the house, and that the landlord is rateable. That being so, rule 14 becomes necessary to apply to a case like the present. These are "distinct properties" within the meaning of the rule; as to the construction which has been put upon the word "house," there is *Evans v. Finch*, (Cro. Rep. Car. 473), where it was held that chambers in the Temple were *domus mansionalis* of the occupier, and that burglary could be committed by breaking into them. In *Reg. v. Inhabitants of Usworth* (5 A. & E. 261), where one rented and occupied the middle floor of a house, it was held that the premises he so rented were "a separate and distinct dwelling-house" within the 5 Geo. 4, c. 57, for the purposes of settlement, and in *Henrette v. Booth* (15 C. B. 500), it was held that the occupation of "part of a house" might confer a right to vote for a borough under 2 Will. 4, c. 45, s. 27, if there was independent occupation and actual severance from the rest of the house. Secondly, under sect. 45 of the recent Valuation (Metropolis) Act, the valuation list made under that Act is to be conclusive evidence both of the gross and rateable value of the several hereditaments included therein, and of the fact that everything required to be inserted therein has been inserted. Then the 76th section says that where (amongst other things) for the purposes of the Acts relating to house duty, it is necessary to make a separate valuation of any hereditament by reason of its not having been separately valued in any valuation list, then the value of such hereditament is to be ascertained in the same manner as if the Act had not passed. In the valuation list for the poor rate each of these 117 sets of rooms has been valued as a separate hereditament, and the seven blocks of buildings are now assessed for house duty at the aggregate values of the 117 separate hereditaments. There has been no valuation of each block as "houses," and if they were so held to be, each block should be valued as a separate hereditament apart from the Valuation (Metropolis) Act. It is not a fair valuation as it stands. The decision in the *Mutual Tontine, &c. Society v. St. George's Union Assessment Committee* (*ubi sup.*) is simply that the owners of each flat are occupiers to be rated as such for the poor rate, not that the aggregate value of all the 117 flats is to be taken to be the value for all purposes of the blocks as houses.

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The *Solicitor-General* (with him *Pinder*), for the Crown, was not called upon.

JESSEL, M.R.—This is an appeal from a judgment of a majority of the judges in the Court of Exchequer, deciding what is the true construction of the statute 48 Geo. 3, c. 55, as to the mode of charging duty upon inhabited houses. There is also involved the construction of the recent Valuation Act for the metropolis. The contention for the appellants is that certain flats or suites of apartments ought to be treated as separate houses, and valued and rated as such. The circumstances are peculiar. There are seven blocks of buildings, divided into flats, and built by the appellants, the Westminster Chambers Association. They differ, no doubt slightly in construction from an ordinary dwelling house, for although they are externally exactly the same, internally they are divided in this way: Each set of apartments has one door opening on to a common staircase, and each suite of apartments is, as it were, self contained with all the necessary conveniences to enable persons to inhabit it as a place of business, but with these exceptions, and with the exception of its size, each block does not differ from an ordinary London building. The first point is, how would you, in ordinary language, describe one of these blocks? Without doubt or question you would call it a house. In either its legal or common sense there is no doubt about the meaning of the word "house," and it has not been contended either here or in the court below that either in its legal or ordinary sense the word house would not sufficiently describe one of these blocks. Now the rule is, that in construing a legal instrument, whether it is an Act of Parliament or not, it is the duty of the court to give every term used in the instrument its ordinary and legal meaning, unless there is something either in the contract, or in the nature of the subject matter of the instrument, to compel the court to alter that meaning. Therefore, it is for those who say that a term used in a particular Act or instrument ought not to be received in its ordinary or legal acceptation to show something bringing it within one of these grounds of exception. Now, so far from finding anything in the Act of Parliament we are considering to alter the ordinary and legal meaning of the word "house," I find a great deal to confirm my opinion that the word is there used in its ordinary sense. It was argued for the appellants that in construing other Acts of Parliament, and other legal instruments, the courts, with another context, and with a different subject matter, had attached a different meaning to the word "house," and had held that a separate occupation of a portion of a house, perhaps two rooms, might constitute a "house" within the meaning of those other Acts of Parliament or instruments; but it appears to me that, unless you show something in the instrument we have to construe now relating to or connected with those other instruments, you cannot construe "house" in this Act by reference to the construction which has been put on the word in other Acts. The argument was also weak on another ground. The authorities referred to only show that in some cases a portion of a "house" may be described as a house; but no authority was produced, nor does any exist to show that an entire building could not properly be described as a house, although a portion of it might also fulfil

that description. The two propositions are not inconsistent; a part of a house is constantly described as a "house." In this Act of Parliament we find not only a dwelling-house, which is the main thing, but we find a "coach-house," and a "wash-house" and a "warehouse" and a "counting-house," all of which are, and have been considered by the framers of this Act of Parliament, not separate buildings, but portions of buildings, and to be treated as portions of a dwelling-house for the purposes of this Act. Therefore you may have the word "house" properly used, first of all, as describing the whole of a dwelling-house; and, secondly, some or one of its parts; and because you can describe part of the building as a "house," it does not follow that you may not describe properly the whole as a "house" also. There is another instance, familiar at all events to lawyers—each Inn of Court is called, as we all know, a "house," yet it includes a great many separate buildings and a great many separate houses. Take, again, the Charterhouse, which is still called the Charterhouse, although it includes many separate houses. The main fact, therefore, that a separate portion of a building may be called a "house," does not show anything for or against the aggregate or entire building being called so too. A good illustration of that is afforded by the old case cited for the appellants (*Evans v. Finch, ubi sup.*). There a man was indicted for having broken into *domum mansionalem Hugonis Audley*, and I suppose the question was, whether Audley's chambers in the Temple were correctly described as his dwelling-house, and it was decided that the description was correct. Nobody decided and nobody suggested that the premises might not have been as well described as a house in a Court of the Inner Temple. It was not suggested that the total number of the sets of chambers in the Inn might not have been described as a house. That was not the point; the only point was, whether the one set of chambers was sufficiently described, and it is quite plain that the other point was not thought of as arguable, because Audley's chambers are talked of as part of a house. They say, "but that divers persons were in the hall and in other places of the house." Whether that meant the hall of the Inner Temple, or the hall of the building which comprised the set of chambers, is uncertain, but they had described the chambers as the dwelling-house of Audley, and the only point was, whether they satisfied that description. That being so, it does not appear that the point suggested there has any direct bearing on the point we have to decide. The two Acts of Parliament referred to were, first, the well-known statute of Elizabeth relating, it must be remembered, to the rating of occupiers in respect of the rating, not only of "houses," but of "houses and land," the word land being a word of wide meaning in English law, and including not only any house, but any building which may stand on the land. The questions which have been decided, therefore, under that statute have been, whether or not there was a separate occupation. How far the land being in juxtaposition with the house influenced the judges in their decisions upon that statute, and how the fact of mere occupancy being the test point also influenced them, it is immaterial to inquire. It is enough to say that there you had a different subject-matter and a different context.

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A similar observation applies to the cases cited on the construction of the Settlement and Voting Acts. There a totally different set of words were used, words relating to severance and occupancy, and these words again received a different construction in reference to a different subject-matter and a different context. I now come to the real point we have to decide; what is the meaning of the word "house" in the statute before us, and is there any reason for altering the general meaning of the word with respect to this statute and these particular buildings? It may be that there is. It might be found that the Legislature had described these particular buildings in a different way, but the only legislative definition we can find relating to one of these buildings describes it as a "house." That definition is not wanted; because, as I said before, you must construe the word in its ordinary and legal meaning, even without the legislative direction. These buildings are described in the Westminster Improvement Act, which is of course as much an Act of Parliament as any other, and about which there is this additional remark to be made, that the Act of Parliament being one promoted by the appellants' own association, it contains their own description of their own property, and it is a description which, therefore, cannot very well be refused by the appellants. The description is this: It is enacted "that where any house built on land of the commissioners shall be occupied or intended to be occupied by different persons in distinct sets of apartments, the commissioners, their successors, or assigns, may, if they shall think fit so to do, demise or sell any set of apartments separately from the rest of the said house." Nothing can, therefore, be plainer than that, as regards these particular buildings, the Legislature has described each of them as a "house." It has described the apartments as part of the house which may be sold away separately from the rest of the house, and the commissioners themselves have so described the property in question, showing that they took the same view as to the meaning of the word applied to these buildings as I am disposed to do on the general principles of construction. Next, is there anything in the Act of Geo. 3 to cut down the meaning of these words? It seems to me to be all the other way. The first rule says that the duty shall "be charged annually on the occupier or occupiers for the time being of every such dwelling-house" in a certain way. The second is "every coach-house, stable, wash-house, laundry, wood-house, bake-house, dairy, and all other offices, &c., belonging to and occupied with any dwelling-house shall, in charging the said duties, be valued together with such dwelling-house, &c." Then several houses are mentioned which might be separate, and if held separately and occupied separately, then might be separately valued, but they are charged, according to the legal meaning of the words, "together with the dwelling-house." Then there is, at the end of r. 21, a restriction showing that the framers of the Act knew the meaning of the words: "Provided no more than one acre of such gardens and pleasure-grounds shall in any case be so valued;" a "house" in law including any land which is so found. Then there is this, "all shops and warehouses which are attached to the dwelling-house, or have any communication therewith, shall, in charging such duties, be valued together with the

dwelling-house." Certain exceptions follow, and the next rule (4) is "every chamber or apartment in any of the Inns of Court," &c., being severally in the tenure or occupation of any person or persons, shall be charged thereto as an entire house, and on the respective occupiers thereof." I do not think that bears very strongly either way; if it has any bearing at all, I think it tends to show that chambers, being expressly excepted, would not have been otherwise so charged. But the important rule in this case is rule 6: "Where any house shall be let in different stories, tenements, lodgings, or landings, and shall be inhabited by two or more persons or families, the same shall nevertheless be subject to, and shall in like manner be charged to the said duties, as if such house or tenement was inhabited by one person or family only, and the landlord or owner shall be deemed the occupier of such dwelling-house, and shall be charged to the said duties." Then there is a provision that in case he does not reside within the limits of the collector, the occupier shall be charged, and if the house or any part of it is actually let out in "different stories," the tenants are to deduct the duty from their rents. Now it is contended that these blocks of buildings are not, in the language of the Act, "let out in different stories, tenements, lodgings, or landings;" but I think that no words in the English language could better describe the case of these buildings. They are actually let out in "different stories." They are let out in "different tenements," and they are certainly let out to "two or more persons or families." It exactly bears out my view that each block is a large house let out in the way described in the Act. It is said to be a hardship so to construe the Act; without expressing an opinion upon that—and I have no right to do so—it is what the Legislature has directed to be done in the case put, where the house is let in different stories. If one story only is let out of a number, it is expressly enacted that payment is to be made for the whole house, even although five-sixths of it is uninhabited. Nothing can be plainer than that this is so, and it cannot be any greater hardship where the house is one house in every sense of the term, and is let in separate tenements, as is the case here. The hardship, if any, is the same in both cases, and it is plain that the Legislature intended, for fiscal reasons, that in some cases, although five-sixths of the house might be uninhabited, yet the whole tax should be paid. That, I think, is an answer to the suggestion of hardship made in argument. It is necessary to read the next rule (7) for another reason. The rule is, "No dwelling-house or other such premises as aforesaid, shall be estimated or rated at any less annual value than the rent or value at which the same premises stand charged in the last rate made on or before the time of making the assessment for the relief of the poor in the same parish or place." Then the 14th rule says, "Where any dwelling-house shall be divided into separate tenements, being distinct properties, every such tenement shall be subject to the same duties as if the same was an entire house, which duty shall be paid by the occupiers thereof respectively." It was argued in the court below that this rule applied to the present case, although it was not so argued to day, and I give the appellants the benefit of a repetition of the argument for whatever it may be

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worth. The meaning of rule 14 is, I think, very plain indeed. It says, "different tenements being distinct properties," and it therefore contemplates the possibility of there being tenements which are not distinct properties. Then the question is, Is one of these blocks a dwelling-house divided into "different tenements being distinct properties?" because, if it is, it should be otherwise rated. What is the meaning of "distinct properties?" Here again you apply the ordinary rule of construction. Distinct properties are the properties of different owners, but in the case before us it is plain that there are not different owners. There is only one landlord for every one of the tenements, and only one tenant below him for each of the tenements. The landlord lets directly to the tenant below him. What would have been the case if a tenement had been sold I offer no opinion upon, nor do I say what would have happened if there had been a demise of one of them, because then the intermediate tenant might in a sense be said to be the intermediate owner. This, however, is not the case here. This is a single letting. It is plainly within the 6th rule, because it is plainly a letting in "different tenements." It is not within the 14th rule, because in no sense can these flats or suites of apartments be said to be distinct properties—there being but one landlord throughout. There is another suggestion as to "distinct properties," which I cannot quite follow. It has been suggested that the word "property" may be used, not in its ordinary sense as showing ownership, but as describing the structural character of the buildings. I do not think that can be the true meaning of the word, but if it were, looking at the words "divided" and "distinct," I should say that these tenements were not within the 14th rule. First of all, I cannot find that the houses were divided internally in the way of structural division, nor do I see that the properties are distinct in the sense of any physical severance which everyone could see. I am therefore of opinion, taking the Act of Parliament and these rules together, and for the reasons I have given, that these seven buildings are properly described and charged as houses within the stat. 48 Geo. 3, c. 55. Then comes the second question. The tenements have been rated to the relief of the poor under the Valuation (Metropolis) Act as separate tenements. The separate value is set upon each, so that there are 117 annual values; and now comes the question, how are you to estimate the value for the purpose of the house tax? That must depend upon the Valuation Act, and the object and meaning of that Act is plain; it is to make one assessment for local taxation as far as possible. Therefore, that being the object aimed at by the Legislature, you are not to go out of your way to defeat that object. The words of sect. 45 are, "The valuation list for the time being in force shall be deemed to have been duly made in accordance with this Act, and the Acts incorporated therewith, and shall, for all or any of the purposes in this section mentioned, be conclusive evidence of the gross value and of the rateable value of the several hereditaments included therein, and of the fact that all hereditaments required to be inserted therein have been so inserted." So that if the valuation stood upon that section alone it would be conclusive. The valuation list is to be conclusive for the purpose of the house, not only of the value, but of the fact that everything required to be inserted therein has been

inserted therein. Then the 76th section says, "Where, for the purposes of the Acts relating to the duty on inhabited houses, &c., it is necessary to make a separate valuation of any hereditament by reason of its not being separately valued in any valuation list, the value of such hereditament shall be ascertained in the same manner as if this Act had not passed." It is said that under those words, inasmuch as you have to value the house, and the house itself as such is not valued, though each tenement comprising the house is valued, that it is necessary to make a separate valuation of the house as one hereditament which is not separately valued in the valuation list. Of course, one answer to that would be that the words "separately valued" mean that when you cannot otherwise ascertain its separate value you must do so from the valuation list, by adding up the value of all the tenements. That seems to have been the view adopted by Mr. Justice Blackburn, that it is for this purpose to be separately valued, because, without going beyond the list, you can ascertain the total separate valuation of the hereditament. That is one answer, but there is another pointed out by the Lord Chief Justice, which to my mind is quite conclusive. Rule 7 of the 48 Geo. 3 c. 55 is that "No dwelling-house or other such premises as aforesaid" shall be valued at less than the poor-rate value. Now the poor-rate value of this house is the total value of all the tenements, and that has been decided by the Queen's Bench. The meaning of the 7th rule, then, is that whatever value you put on the house for the purpose of this Act, it shall not be less than the poor-rate value; and it is admitted by the appellants that the poor-rate value is not too little. They complain, on the contrary, that it is too much. It is not, therefore, necessary to make the separate valuation for the purpose of the house duty, because, having the poor-rate value ascertained, that must be sufficient to enable you to assess the house tax, which is all that you are required to do. I am of opinion, therefore, on both points, that the decision of the majority of the judges in the court below was right, and must be affirmed.

LORD COLERIDGE, C.J.—This case has been so fully discussed by the Master of the Rolls that I have little to add to his judgment. I will simply say that the point is substantially whether a house being let in different flats, stories, or suites, the 6th rule of Schedule B, of 48 Geo. 3, c. 55, does or does not apply to the subject-matter of the rating. The question appears to me to be conclusively answered by reference to sect. 69 of the Act by which the appellant society were created, and under which they hold their premises, because that section enables them to do certain things with a "house" erected on their land, and occupied or intended to be occupied, in different sets of apartments by different persons. The appellants, therefore, have an Act of Parliament under which they erect what the Act itself calls a house occupied by different persons in distinct sets of apartments. That Act was passed in 1853, and the question is, are we to construe the words there in any different sense from those used in 1808 (Geo. 3, c. 55), "house let in different stories, tenements, lodgings, or landings?" The words, though certainly not quite identical, are as nearly so as words can well be, and I think that where the construction of the appellants' Act is plainly that in referring to houses occupied by different persons in distinct sets of apartments

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the very subject matter of the rating is meant, we cannot torture words in the Act of 1808, and make them mean something entirely different from what they mean in the Act of 1853, which is the Act under which these blocks of buildings were erected. The Master of the Rolls has clearly put what seems to me the right answer to the second point, and I have nothing to add upon it. I will just say, however, that the case quoted from Croke's Reports (*ubi sup.*) does not appear to me to have any bearing one way or the other on the present case. It only decides that the offence of burglary can be committed in chambers in the Temple, and I do not see how in any way it decides what is a "dwelling house" for the purposes of this case.

POLLOCK, B.—Giving every effect to the appellants' argument, I cannot come to any other conclusion than that the decision of the court below was right and must be affirmed. I was impressed with Mr. Manisty's argument that where there is a series of statutes *in pari materia*, it is extremely desirable to give them the same construction as far as possible, but in this argument I think two points have been overlooked. In the first place I am not certain that the statutes are *in pari materia* in the sense that the Legislature may not have intended to make the incidence of taxation fall differently with regard to one imperial tax than with regard to another. But I think it is erroneous, when a series of Acts of Parliament have been passed, to necessarily apply the same construction of language to both the earlier and the later Act. I believe the true rule of construing Acts of Parliament to be that which the Master of the Rolls has stated to-day, and which was first laid down by Mr. Justice Burton, in Ireland, and has repeatedly been spoken of with commendation. Therefore, in dealing with the first Act of Geo. 3, and taking into account the knowledge the Legislature then possessed, I find the word "house" first used in the enacting part of sect. 1, where the words are, "and upon inhabited houses as set forth in the schedule to this Act." Now, no one at that time could have had any doubt what an "inhabited house" meant generally. Then, taking rule 6, upon which this case almost entirely turns, the words are, "Where any house shall be let in different stories, tenements, lodgings, or landings, and shall be inhabited by one or more persons or families." These seem to me to be the proper and fit words in which to describe a house let as this one is let, and the same language is imported into the appellants' own Act. I have nothing to add upon the second point. Rule 7 appears to me to exactly meet the present case.

Judgment for the respondent; Judgment below affirmed.

Solicitor for the appellants, Burchell.

Solicitor for the respondent, The Solicitor to the Inland Revenue.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Reported by F. GOULD and H. L. FRASER, Esqrs.,
Barristers-at-Law.

(Before Vice-Chancellor BACON.)

June 30, July 4, 5, 7, 11, 12, 14, 17, and 27, 1876.

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Private Act of Parliament—Dedication of lands for purposes of—Proposed roads, streets, and squares—Adverse possession—Statute of Limitations—Injunction.

In 1830 A. projected the formation of a seaside town, to be built on his lands, and a plan was prepared which showed the sites of various streets, roads, and squares, proposed to be made and formed on such lands. In June 1833 a private Act of Parliament was obtained by which the lands described on the plan were made a distinct parish for the purposes of the Act, and by which commissioners were appointed in whom were vested all roads, streets, and ways, then made and used by the public, or thereafter to be made and adopted by the commissioners as public ways under the Act. The Act also conferred plenary powers on the commissioners with regard to the paving, lighting, draining, and repairing, of such streets, roads, and ways.

In Feb. 1833 A. had sold and conveyed to B., who was one of the principal promoters of the Act, and one of the First Commissioners appointed thereunder, several of the plots of land described on the plan and on which were delineated the sites of certain of the proposed roads, streets, and squares. Previously and subsequently to the Act numerous houses had been built, and some of the roads, streets, and ways shown on the plan had been wholly or partially formed, and had been adopted by the commissioners, but no houses were at any time erected on the lands conveyed to B., and the same (including such parts as comprised the sites of the proposed roads, streets, and squares) were from 1833 to 1867 uninterruptedly held and enjoyed and cultivated as arable and pasture lands by B. and his lessees.

In 1868 the commissioners gave B.'s devisees notice of their intention to take possession of the sites of the proposed streets, roads, and squares shown on the plan, and in 1871 they proceeded to mark, grip up, and stump out such sites on the ground that the same had been dedicated to the purposes of the Act by the promoters of the Act, and that they were acting within their statutory powers. On bill being filed to restrain the commissioners from so doing,

Held, that although there might have been a dedication of their lands by the promoters of the Act, such dedication was not complete until the intended streets and roads had been used and adopted by the public; and that, there having been no such use and adoption for upwards of forty years, the proposed sites were not within the statutory powers of the commissioners, and an injunction granted accordingly.

Held, also, that the powers of the commissioners were only to be exercised in respect of roads which were made or which should be made consequent on the erection of buildings to which such roads would be applicable and useful, but that

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no rights, statutory or other, could be acquired so as to prevent the exercise of the powers given by the Act to require and compel the formation of roads and streets whenever and wherever the state of circumstances requiring such roads and streets should come into existence.

In the year 1830 Sir Henry Oxenden, who was the owner of an estate of considerable extent at Herne, in the county of Kent, considered that a part of his estate was suitable for the formation of a seaside watering place, and accordingly procured a plan to be made by a local surveyor of a portion of the estate which he severed from two of his farms, the one called Underdown Farm and the other Sea-street or Ashbee's Farm, and which he offered for sale in lots. The plan so made had described upon it streets, roads, and squares, a plantation, a parade, a terrace, and a pier, none of which then existed, as indicated on the plan, but which were put upon the plan for the purpose of showing to purchasers the use which might be made of the lands.

In and prior to the month of Feb. 1833 Sir H. Oxenden sold and conveyed to one John Brough and others in fee several of the plots of lands described upon the plan. Some of these plots of land comprised the sites of certain of the proposed roads, streets, and squares shown on the plan, and called Oxenden-square, Hanover-square, Brunswick-square, King's-road, Clarence-street, Montague-street, &c.

In the month of June 1833 a private Act of Parliament, 3 & 4 Will. 4, c. 105, was obtained, by which the lands comprised in and described by the above plan were formed into a district parish for the purposes of the Act, under and by the name of "The Town of Herne Bay." The preamble of the Act was as follows: "Whereas a certain portion of the parish of Herne, near or adjoining to the pier at Herne Bay, in the county of Kent, hath of late years increased in houses and other buildings, and may become a place of considerable resort, and many houses and buildings are now being erected there, and it would tend greatly to the accommodation, safety, and convenience, not only of the inhabitants of such portion of the said parish but of all persons resorting to and passing through the same, if the roads, streets, ways, lanes, and other public passages and places now formed and made, and hereafter to be formed and made, within the said portion of the said parish were properly paved, lighted, cleansed, watched, and improved, and all nuisances, annoyances, encroachments, projections, and obstructions therein removed and prevented, and if an efficient police were established therein; and whereas it would greatly facilitate the purposes aforesaid if the said portion of the said parish were separated for such purposes from the remainder of the said parish, but the above purposes cannot be effected without the aid and authority of Parliament; and whereas a map or plan has been made of the said portion of the said parish so intended to be separated for the purpose of more clearly ascertaining the boundaries of the same, which map or plan has been deposited in the Parliament office and a duplicate thereof has also been deposited with the parish clerk of Herne aforesaid, which said boundaries are on the map or plan described by a dotted line," be it enacted, &c.

By the 3rd section of the Act certain named persons and their successors were appointed com-

missioners for the purposes of the Act to be a body politic and corporate, under the name of "The Commissioners for Improving the Town of Herne Bay," and by that name to have perpetual succession and a common seal.

The material sections of the Act were—

Sect. 27.—That all the present roads, streets, ways, lanes, and other passages and places now used by the public within the said town, and all carriage or footways or passages which shall hereafter be made or adopted by the commissioners as public ways or passages under or by virtue of this Act, and the pavements, flagstones, curbstones, stones, gravel, and other materials belonging thereto respectively, and also all lamps, lamp-irons, lamp-posts, watchboxes, watchhouses, and other houses and buildings hereafter to be erected or fixed up or purchased by virtue of this Act . . . shall belong to and be the property of, and the same are hereby vested in the said commissioners. . . .

Sect. 28.—That it shall be lawful for the said commissioners, and they are hereby authorised and empowered to open, form, set out, and make a new and commodious road not exceeding in width 40ft. . . . which said road when made shall be, and the same is hereby vested in the said commissioners, and from time to time to cause the said road, and all the present roads, streets, ways, lanes, and other passages and places now used by the public, and all future roads, streets, ways, lanes, and other passages and places which shall be adopted by the said commissioners under this Act within the said town or any part thereof, as well as the carriage as footways to be repaired, made, formed, amended, paved, flagged, or otherwise sustained, and the same, and the pavements, flagging, and other materials thereof to be taken up and relaid, and with such materials and with such drains, gutters, sinks, or watercourses . . . as the said commissioners shall think fit. . . .

Sect. 30.—That no person shall at any time make or cause to be made any alteration in any paved, pitched, or stoned public foot or carriage way, before, behind, or at the side of his house, building, ground, or land without the consent or licence in writing of the said commissioners first had and obtained.

Sect. 33.—That it shall be lawful for the said commissioners, and they are hereby required to cause all such parts of the roads, streets, ways, lanes, and other public passages, and places within the said town which are now in the estimation of the said commissioners sufficiently built upon but not finished, paved, flagged or otherwise put in good order and condition, and all such roads, streets, ways, lanes, and other public passages and places as are now making or may hereafter be made within the said town or any part thereof, although fully built upon, to be made, paved, flagged, repaired, and cleansed with such gutters, sinks, common or main sewers, drains, or watercourses, and with such materials and in such manner as the said commissioners shall deem meet and necessary. . . .

Sect. 36.—That if the said commissioners shall cause any road, street, way, lane, and other public passage and place within the said town to be paved, flagged, or otherwise put into good order or condition, or make any such gutter, sink, common or main sewer, or watercourse, under, through, along, above, below, or about the same road, street, way, lane, and other public passage and place, before the said road, street, way, lane, and other public passage and place are made and built upon, then and in every such case the owner or occupier of any ground abutting or adjoining to any such road, street, way, lane, or other public passage and place not built upon or attached to any house or building, shall not be liable to pay any part of the expenses and charges of such paving, flagging, or making any such road, street, &c., until such ground shall be built upon or attached to some house or building, when and not before such owner or occupier of such house or building shall be liable to pay such and the same expenses and charges, to be recoverable in manner provided.

Sect. 37 empowered the commissioners to adopt any new road, street, &c., within the town of Herne Bay, all such roads, streets, &c., so adopted, to be thenceforth deemed and taken to all intents and purposes as public highways.

Sects. 86 and 87 empowered the commissioners to purchase lands within the town of Herne Bay for the purposes of the Act, but not without the consent of the owners thereof.

Sect. 96 enacted that every person (occupier, owner, or mortgagee), in possession of any hereditaments which should be purchased or taken for the purposes of the Act, should deliver up possession of such premises to the commissioners upon having six calendar months' notice from the commissioners to quit the same.

Sect. 109 empowered the commissioners to raise, from time to time, the moneys necessary to defray the expenses of carrying the several powers and purposes of the Act into execution by levying a rate, to be called "The Repairing, Lighting, and Watching Rate."

This Act was passed with a view to carry out the wishes of Sir H. Oxenden, and a large number of the inhabitants and landowners within the new district of the "Town of Herne Bay," and to provide that the "Town of Herne Bay" should be laid out and built upon in accordance with the plan. After the passing of the Act numerous plots of land were divided and set out with reference to such plan, and were sold and built upon.

No houses, however, were at any time erected on any part of the lands which had been conveyed to J. Brough, nor were any of the proposed roads, streets, and squares ever formed or laid out on such lands; but the same lands, which previously and at the time of the passing of the Act had been used as arable and pasture lands, continued to be occupied and cultivated in the same manner with the adjoining lands, and were exclusively held and enjoyed uninterruptedly and as of right by John Brough and his undertenants and lessees until the year 1867.

In February 1867 John Brough died, having by his will devised his real estates upon trust for Sarah Mackett, the wife of George Mackett, for life, with remainder to John Mackett in fee.

In March 1868 the commissioners held some meetings, and discussed the question of taking possession or of marking out the boundaries of the sites of Hanover and Oxenden-squares, and certain of the proposed streets and roads, including King's-road, Clarence-street, and Montague-street, and accordingly caused the following printed notice to be served upon George Mackett and others:

"I am requested by the Herne Bay Pavement Commissioners to inform you that boundary posts will be put down marking out the various streets, ways, lanes, squares, and public passages belonging to the said commissioners within the town of Herne Bay, according to the map or plan of the town deposited in the Parliament Office 28th June 1833; and further take notice that you are hereby required to remove all obstruction from the said streets, ways, lanes, squares, and public passages now occupied by you on or before 29th Sept. 1868, nor are you to cultivate any of the said street, ways, lanes, squares, and public passages after the above date."

In pursuance of this notice the commissioners caused to be gripped up and stumped out a part of the lands belonging to the devisees of John Brough, and which formed the western extremity of the proposed site of King's-road, and which was then in the possession and cultivation of their tenants. Thereupon the solicitors for the devisees and trustees of John Brough's estate caused the following notice to be served on the commissioners:—

To the Commissioners for improving the Town of Herne Bay.

Gentlemen,—It having been intimated to us as solicitors for the trustees and devisees of the real estate of John Brough, late of Herne Bay, in the county of Kent, Esquire, deceased, that you, the above-named commissioners, have entered upon certain land of the said deceased at Herne Bay aforesaid for the purpose of stumping out or making a certain pretended street called King-street, Herne Bay, in the county of Kent, the land of which pretended street forms part of the real estate of the said John Brough, deceased, and such entry having been made by you without any authority from the said trustees or devisees. We hereby give you notice on their behalf to refrain from entering upon the said land or upon any other land at Herne Bay aforesaid, the property of the said John Brough, deceased, now the property of his said trustees and devisees, and that in the event of any further entry being made by you upon the said lands, after this notice you will be considered as trespassers, and such proceedings will be taken against you as the circumstances may require and our clients be advised. We further give you notice that a suit (*Mackett v. Mackett*) is now pending in the Court of Chancery for the administration of the real estate of the said John Brough, deceased.—Dated this 16th day of February, 1869.

Nothing further was done by the commissioners until the month of Oct. 1871, when they resolved "to take possession of the roads and squares as shown upon the plan of the town on which the Act of Parliament was obtained," and Mr. T. W. Collard, a surveyor, was appointed to mark out the boundaries of the roads and squares according to the plan.

On the 11th Dec. 1871, the solicitors of the trustees and devisees under John Brough's will, hearing of the contemplated action of the commissioners, served them with the following notice:

We beg to call your attention to the previous letters herein, and to inform you that we cannot allow any trespass to be committed by the commissioners or their servants upon lands belonging to this estate, and that, if any such trespass be committed, we shall take such proceedings against the parties as may be necessary for the protection of our clients' interests in the property, and hold the commissioners responsible for all damages and costs.

On the 20th Dec. 1871, and following days, T. W. Collard and other persons, acting under the direction and with the authority of the commissioners, entered upon the lands of J. Brough, which formed the sites of the proposed streets, roads, and squares called Hanover-square, Oxenden-square, King's-road, Clarence-street, Montague-street, and John-street, and gripped up a considerable quantity of the land at the sides of such alleged streets, roads, and squares, broke down and carried away the fences placed on the same lands wherever they intersected the alleged sites of such proposed streets, roads, and squares, and damaged and destroyed the growing crops there, and otherwise acted as if they were absolutely entitled to such lands.

In the meantime the suit of *Mackett v. Mackett* had abated by reason of the death of parties, but was revived as soon as practicable, and ultimately, in July 1872, leave was obtained to commence the present suit.

The plaintiffs charged that the commissioners had no power to take or purchase compulsorily the lands in question, or to acquire any rights or control over the same unless and until the same were duly formed, laid out and dedicated as roads, streets, and squares, and were adopted as such by the commissioners, which the same had never

been; that the commissioners had no right or power to compel or require the making or formation of any of the proposed roads, streets, or squares, or to interfere with or control the sites of the same until the same were laid out or constructed by the owners, and were actually adopted by the commissioners pursuant to the Act; that the sites and the proposed roads, streets, and squares had been comprised in the conveyances to J. Brough, and, having been held and enjoyed uninterruptedly by him and his lessees for more than thirty years adversely to the rights of the commissioners and all other persons, had become absolutely vested in him at the time of his death; and the plaintiffs prayed for a declaration that the commissioners had no right, title, estate, or interest under the Act, or otherwise over the lands being the sites of the proposed streets, roads, and squares, except so far as the same had been duly laid out and formed by the owners of the soil, and had been adopted by the commissioners in accordance with the provisions of the Act; for an injunction to restrain the commissioners from entering upon, gripping up, marking out, or in any way taking possession of, or interfering with, the sites of the said proposed roads, streets, and squares; and for damages.

The commissioners by their answer stated that John Brough was a solicitor, and a resident of considerable local influence in the town of Herne Bay, previously to and at the time of the passing of the Private Act, of which he was one of the principal promoters; that the Act could not have been passed without good evidence having been afforded to the Houses of Parliament that the promoters thereof had dedicated such of their lands as were described in the deposited plan for the purposes of the Act; that an instrument of dedication was in fact executed by the landowners, promoters, and supporters of the Act, but such deed was believed to have been burnt in the fire by which the Houses of Parliament were consumed in the year 1834; that J. Brough, Sir H. Oxenden, and others, by their conduct as such promoters precluded themselves and their successors from afterwards disputing the dedication of their estates, so far as necessary for the purpose of the Act; that the sites of the proposed roads, streets, and squares claimed by the plaintiffs were either never vested in J. Brough, or were vested in him subject to all the statutory provisions in the Act; that J. Brough was one of the first-named commissioners under the Act, for more than thirty years took an active and principal part in all their proceedings, that he was from time to time re-elected, and was frequently chairman of, and nearly always present at the meetings of the Commissioners, and that he never assented or pretended that he had any right or title to hold his lands so as in any manner to interfere with the provisions of the Act. The Commissioners also alleged that shortly after the passing of the Act all the roads, streets, and squares delineated on the plan were actually marked or laid out, and the position thereof defined by boundary marks; that many of the roads, streets, and squares were unmade at the date of the passing of the Act, and that many had since been made and had become highways; that to allow the claim of the plaintiffs would be to render the future building of the town according to the plan impracticable, and would also intercept,

rent off roads and communications, and destroy easements which had been relied on by many purchasers of land, and on the faith of which many houses had been built and many plots of land had been sold; that the sites of the proposed roads, streets, and squares were in fact dedicated and adopted as such by them, and that they had full power to do so, and that the same were vested in them for the purposes of the Act; and that none of such sites had been used, occupied, or enjoyed in the manner contended for on behalf of the plaintiffs and their predecessors in title, but only upon sufferance of the commissioners and under circumstances, which precluded the acquisition of any adverse statutory title, and that such possession and occupation had always been subject to the rights of the commissioners and of the public to such sites under the Act and to the extent thereby provided. The commissioners also relied on sect. 138 of the Act, which enacted that no action or suit should be commenced or prosecuted against any person for anything done in pursuance or under the authority of the Act after the expiration of three calendar months next after the fact committed or the cause of action has ceased or determined.

The other material facts and the arguments are sufficiently noticed in the judgment.

Kay, Q.C., Everitt, and Bullen appeared for the plaintiffs.

Hemming, Q.C., Colt, and Anderson appeared for the defendants.

The following authorities were referred to in the course of the arguments:

Berridge v. Ward, 10 C. B., N. S., 400;

Lord v. Commissioners for the City of Sydney, 12 Moo. P. C. 473;

Poole v. Huskinson, 11 M. & W. 827;

Corporation of Healy v. Bailey, 1 L. Rep. 19 Eq. 375;

Roberts v. Karr, 1 Camp. 262 (n);

Rez v. Inhabitants of Cumberworth, 3 B. & Ad. 108;

The Attorney-General v. Bishop of Manchester, 15

L. T. Rep., N. S. 646; L. Rep. 3 Eq. 436;

North British Railway Company v. Dodd, 12 Cl. & F. 722;

The Attorney-General v. The Great Eastern Railway Company, 23 L. T. Rep. N. S. 344; L. Rep. 6 E. & I. App. 367;

Cubitt v. Lady Masse, 29 L. T. Rep. N. S. 244; L. Rep.

8 C. P. 705;

Beckett v. Corporation of Leeds, L. Rep. 7 Ch. 421;

Squires v. Campbell, 1 My. & Cr. 459;

Barraclough v. Johnson, 8 A. & E. 99.

The VICE CHANCELLOR.—The plaintiffs, who claim to be owners of the several parcels of lands particularly mentioned in the pleadings, and which are situate at Herne Bay, in Kent, complain that the defendants, who are the "Commissioners for improving the town of Herne Bay," and who are appointed under a local Act of Parliament of 3 & 4 Will. 4 (1833), c. 105, did, in the month of December 1872, enter upon the plaintiff's lands, that the defendants gripped up and carried away a considerable quantity of the soil, broke down and carried away the fences, damaged and destroyed the growing crops, and acted as if the defendants were absolutely entitled to the lands, and as if the plaintiff had no right or interest therein, and further, that the defendants did these things under the pretence that they were authorised by the statute I have mentioned. The plaintiffs thereupon prayed for a declaration that the defendants are not entitled, either under the statute or otherwise, to enter upon any part of the

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plaintiff's lands, being the proposed sites of certain streets, roads, or ways, except so far as any public street, road, or way has been duly made and laid out and adopted by the commissioners in accordance with the provisions of the Act, and for an injunction restraining the defendants from entering upon or taking possession or interfering with the lands claimed by the plaintiffs, and that the defendants may be ordered to pay to the plaintiffs such damages as the court shall assess, together with the costs of the suit. The defendants admit that the several acts complained by the plaintiffs were done by the order of the commissioners, and they justify such acts upon two grounds: first, that the plaintiffs have no title to the lands in question, and, secondly, that if they had, whatever has been done by the commissioners has been done in exercise of the powers conferred upon them by the statute. These issues would seem to be in their nature by no means complicated or difficult, the facts relating to them being once ascertained; nevertheless, many days and much paper have been occupied by the statements of the evidence, and by the long cross-examination of witnesses on both sides, and by the arguments of counsel, embracing an immense quantity of details, a very large proportion of which have been by no means necessary for the decision of the questions submitted to the court; but inasmuch as the defence is mainly rested upon those details, and upon the objections which have been raised upon them by the defendants, it is necessary that they should be considered to some extent. [His Lordship then referred to the circumstances which gave rise to the passing of the private Act of Parliament and to the title of John Brough to the lands in question, and continued.] In the description of the parcels in the several conveyances to J. Brough, it is clear that the vendor and also the purchaser had in contemplation that roads were intended to be or might be made. No express mention of or reference to Sir H. Oxenden's then existing plan is made, but the land conveyed is mentioned as abutting upon or being bounded by roads "intended to be made," or "agreed to be made"—the phraseology is different in the several deeds—but in no instance is any mention made of an actually existing road. The purport and meaning of these expressions are obvious when the then construction of the land and what must be considered to have been the intention of the parties dealing for the sale and purchase of plot of "building land" is borne in mind. Nothing is reserved or excepted by the vendor, but he carefully stipulates that "if and when" any road shall be made he shall not be under any liability as to its maintenance or repair. Upon the words I have referred to, the defendants have argued that there was a complete dedication by Sir H. Oxenden of so much of his land as would form the roads upon which the land he conveyed to the several purchasers abutted. But although this may well be, so as to prevent any claim by him or his successors, I am of opinion that to make the dedication complete to the extent and for the purposes of the defendant's contention, there must also be evidence of the use and adoption by the public of the intended roads, and that after the lapse of forty years, during which there has been no such use and adoption, the lands in question in this suit are, within the statutory

powers conferred on the defendants, not as existing roads, but liable to be made roads, and if when the prescribed conditions shall be found to have been complied with by which alone they can be brought into existence as public roads. The evidence establishes the fact that from the periods of the several conveyances I have mentioned, the several lands claimed by the plaintiffs have been in actual and undisturbed possession of the several purchasers, and especially of the late J. Brough, from the time when his title accrued; that he was the ostensible and reputed owner; that the lands were cultivated as arable and pasture land; that, as to the land comprising what is called Hanover-square, it was effectually fenced in, and the exclusive possession of it was preserved; and that, although it is proved that some persons occasionally made a way for themselves across the land, they could only effect this by getting through or over the gates and fences which the owner had put up for the protection of his property. The like proof is given of the possession and cultivation of the land forming part of what on the plan is called Oxenden-square, and which extends up to the King's-road; and, although upon one occasion, in the year 1854, the commissioners put down posts which would prevent the passage by carts across a part of this land, the then tenant cut down one of the posts (his right to do so not being disputed) so as to preserve the free passage for his carts which he had up to that time enjoyed and used, and which use and enjoyment were continued until the commissioners asserted the right now complained of. At its southernmost end the land last mentioned abuts upon the grass pathway which runs on the northern side of Sea Street Farm. Along this, in the direction of King's-road, and at a distance of thirty or forty feet the commissioners caused a grip to be cut, but the tenants of this land continued to cultivate it in the usual manner and ploughed through the grip. King's-road appears to be in the same state as it was when the Act passed, except that recently some rubbish has been shot or laid there by the commissioners, and it was and is rough and unformed. Another of the parcels of land adjoins what is called on the map John-street, and this has been tilled and cultivated in like manner by the tenants of Mr. Brough. A part of John-street, extending from the sea to High-street, has been long formed and made under the Act, and is, not in question, but the extension of that street southward has always remained and still remains in grass with no road formed or made, or indicated in any other manner than that some trees have been planted along the sides, and that some posts were once set up across it—the only use of which would seem to be to prevent the passage of carriages, and which posts have since rotted away. At a part of this land where it adjoins what is called Clarence-street, on the deposited plan, several years ago a blacksmith's forge was erected, as it appears, with the consent of Mr. Brough, and the only suggestion that this was ever used by the public is that horses were brought to this shed to be shod; but it is clear that no road or roadway there was at any time formed. And during the whole period Brough and his tenants have been in the occupation, cultivation, and enjoyment of all the lands in question, without dispute or interference by any person or authority; and during the same period

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the poor's rate, the town rates, and the tithes, have been paid in respect of the ownership and occupation of the same lands. During the same period no act has been done or attempted by the authority of the commissioners from which it can be inferred that they claimed to be entitled to the roads in question, nor has any house been built, nor are any projected or begun upon any part of the lands abutting upon or bounding the intended roads, or for which it could answer any useful public purpose that roads should be made. Upon the first question, then, it appears to me that upon the evidence the plaintiffs have established a sufficiently clear title as owners of the land in question to lay a ground for their complaint against the defendants, who, upon a claim and colour of title, entered upon the plaintiff's lands, prostrated the fences, seized the crops, and committed acts of unquestionable damage. In so far as the evidence of the plaintiffs tends to establish a possessory title for more than twenty years, the defendants not only dispute it in fact, but they insist that such a title would be ineffectual against them—their powers conferred by the statute not being affected by any prescriptive adverse right. In this latter contention I think the defendants are justified; but then it becomes necessary to consider what is the nature and what the extent of their statutory authority. The defendants did at one time claim to be entitled in fee simple to the roads, but that claim was given up at the bar as untenable, and the question appears to depend upon the terms of the statute. In 1833 several plots of land, including those I have mentioned, had been sold and houses had been built, and it was then thought expedient to apply to Parliament for an Act separating the land comprised in the plan from the remainder of the parish of Herne. Accordingly an Act was obtained (3 & 4 Will. 4, c. 105) which received the royal assent on the 28th June 1833. The preamble, which shows conclusively the grounds upon which and the purpose for which it was passed, is in these terms [his Lordship read it]. The map or plan there mentioned is identical in outline with the plan which had been made for Sir H. Oxenden, and appears to have been traced from the latter, and it shows that some, but not a great number of houses had then been built. The only purpose for which the plan mentioned in the statute is referred to is to point out the boundaries of the new district over which the provisions of the Act were to extend and apply, and which was thenceforth to be as it has ever since been and is called "the town of Herne Bay." The Act proceeds to appoint commissioners, and to confer upon them certain powers incident to their office. It is in the form which at the time of its passing was that universally adopted, and it does not differ in any substantial respect from the numerous other statutes for paving, lighting, and watching specified districts which had been passed before the Lands Clauses Consolidation Act, and the other Consolidation Acts, by which, among other useful purposes, the needless repetition of provisions and clauses of universal and necessary application is avoided by reference to the terms of those statutes. The ground upon which the commissioners, the defendants, justify the acts complained of, and which they admit, is to be found in the provisions of this statute, and this must needs be so since it is clear beyond dispute that they can have no power or authority

whatever, save what is conferred upon them by this statute. It becomes therefore necessary to consider what is the actual extent or limits of that power or authority. [His Lordship then read the material sections of the statute.] By the same statute the commissioners are empowered to make a new and commodious road from the southern extremity of Brunswick-street to the spot where Herne Common abuts upon the turnpike road from the town to Canterbury, and for this purpose the usual powers of compulsory purchase from the owners of lands are conferred upon the commissioners, but excepting as relates to this particular road, no powers whatever are conferred upon the commissioners enabling them to purchase or acquire any lands whatever. It is impossible to doubt that if it had been the intention of the promoters of the Bill to take powers to make roads generally they would have asked for such powers. It is equally impossible to infer that any such extensive powers are contained in, or to be implied from, the provisions of the Act. It has been suggested, in the course of the arguments for the defendants, that, inasmuch as the purpose and policy of the Act and its tendency are for the improvement of the town of Herne Bay, and for what has been called the development of the town, the Act ought to be construed in this sense, and ought to be read as conferring upon the commissioners such powers as will best tend to accomplish that purpose and policy. I do not, however, think that the statute can be read otherwise than according to its precise and plain expressions. The policy and purport are, in my judgment, very clear and explicit. The powers which it confers upon the commissioners, and the duties which it prescribes, are that the existing public roads and ways already formed shall be preserved for the use of the public, and that by degrees, and when and as often as other public passages, to be formed and made after the passing of the Act, shall be so made and formed they shall be properly paved, lighted, watched, and improved. To accomplish these objects, and to establish an efficient police, the commissioners are empowered to levy upon the inhabitants a rate called the "Repairing, Lighting, and Watching Rate," on the occupiers of all buildings and lands within the town, not exceeding 3s. in the pound, and when levied upon such land or houses as shall not be lighted or watched, or shall not abut upon any part of the roads or passages which shall be lighted or watched, a rate not exceeding 1s. in the pound. This distinction between the amounts of the rate to be levied must be borne in mind in construing the Act, for if the rate were to be single and uniform it would be competent to the commissioners to levy the rates indiscriminately upon the owners of all lands and houses within the town, whether they did or did not enjoy the advantages to be procured by the expenditure of the moneys which the commissioners are authorised to raise by means of the rates. That the construction I have mentioned as the true and only construction of the statute was put upon it by the commissioners themselves, is clear, from the manner in which they applied and dealt with it for many years after its operation commenced, as is evident by the extracts from the minutes of the proceedings set out in their answer. Not only do those minutes contain no exercise or assertion

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of right over any roads which had not been built upon or were adjacent to such roads, nor any staking out or authority over them, although the roads which had been made and publicly used were from time to time repaired by the commissioners, but in 1857 the commissioners appointed a committee consisting (among other persons) of two of the witnesses for the plaintiffs to find out all the public roads and ways, and to mark and stump the same to their proper width according to the Act of Parliament. What report was made upon this subject does not appear. That the question of the right of the commissioners over the roads had been raised is apparent from the minutes of the 4th Oct. 1858, in which it appears that it had been resolved to take counsel's opinion respecting the roads and squares of the town; but it would also seem that the question had been in some way disposed of since by a resolution of the 1st Nov. following. It was not only determined that counsel's opinion should not be taken, but that the question should not be re-opened without giving fourteen days' notice of a special meeting for that purpose; and there is no trace of the subject having been further discussed. Trees have been at various times planted in and about the town, but it seems that this was for the purpose of ornamenting and improving the appearance of the place, and not with a view of acquiring or asserting any right over any of the roads. But what is of greater importance in considering the manner in which the commissioners exercised their rights is that, with respect to a street leading from the south to the sea (called Beach-street on the deposited plan), the owner of the land at that end built upon it so as wholly to close the northern end; and that, as to another street (without a name on the plan) leading from William-street and part of the estate of Mr. Brough, a church has been built on the greater part of that site, and this without any claim or objection on the part of the commissioners. The expectations which may have been entertained at the passing of the Act have not been realised. Several houses have been since erected, but the larger part of the town remains unbuilt upon, and there are no buildings whatever abutting on any of the roads or ways claimed by the commissioners and the subject of this suit. [His Lordship then stated the facts which gave rise to the present suit, and proceeded.] The defendants, among other things, have insisted on the provisions of the statute 4 & 5 Will. 4, c. 105, s. 138, prohibiting any action or suit for anything done in pursuance or under the authority of the Act after the expiration of three months next after the act committed or the cause of action has ceased. Considering the nature of this case, the title set up, and the claim made by the commissioners in the first instance, although that has now been partially disclaimed, and the effect of the protests and notices given on the part of the plaintiffs, I do not think they are barred of their suit, the main object of which is to obtain a declaration of right and to prevent the commissioners from interfering with that right, nor can I doubt that this court has jurisdiction to determine the questions which have been raised upon the record. It is not suggested by the defendants that they were induced to take the proceedings complained of for any public present purpose, or that the safety or convenience of the public or the inhabitants of the town required their interference,

but, insisting that under the Act of Parliament the roads and streets were vested in the commissioners for the purposes of the Act, they submit that it was proper for them in the exercise of their public duty to prevent any persons from acquiring statutory rights over the roads, streets, and squares which had been and remain effectually dedicated to the purposes of the Act. It is, moreover, abundantly clear that no rights, statutory or other, can be acquired so as to prevent the exercise of the powers given by the Act to require and compel the formation of roads and streets whenever and wherever the state of circumstances requiring such roads and streets shall come into existence. The defendants would seem to have considered that the statute gave them plenary powers over all the roads and squares described upon the deposited plan; but the purpose for which and the terms in which the deposited plan are referred to are so clearly expressed in the statute as to show that the powers of the commissioners are only to be exercised in respect of roads which were made, or which should be made, consequent upon the erection of buildings to which such roads would be applicable and useful. And it has now been very conclusively decided that whatever representation may be made on a plan deposited and referred to in an Act of Parliament is of no effect, unless the representation is incorporated in the Act: (*North British Railway Company v. Dodd*, 12 Cl. & F. 722; *Attorney General v. The Great Eastern Railway Company*, 23 L. T. Rep. N. S. 344; L. Rep. 6 H. L. 367.) Under these circumstances I am forced to the conclusion that the defendants have misconceived and misused their powers, and that they have unlawfully invaded and damaged the property of the plaintiffs. The decree, therefore, must be that the plaintiffs are entitled to a declaration in the terms of the first two paragraphs of the bill, and that the plaintiffs are entitled to be paid by the defendants the damages which the plaintiffs have sustained by the wrongful proceedings of the defendants, for which purpose an inquiry must be directed in the usual form, and that the defendants pay to the plaintiffs their costs of this suit.

Order accordingly.

Solicitors for the plaintiffs, *Fielder and Sumner*.

Solicitors for the defendants, *Lumley and Lumley*.

Saturday, April 8, 1876.

Re PRYOR'S SETTLEMENT TRUSTS.

Lands Clauses Act—Settled lands taken by local board—Dividends of invested purchase money—Defective order for payment of—Subsequent order—Costs—Practice.

Where the purchase-money of settled lands taken by a local board was paid into court and invested, and the dividends, on the petition of the trustees of the settlement, ordered to be paid to them by name, or one of them, and both the trustees died, the court, on the petition of the new trustees for payment of the dividends to them, declined to order the local board to pay the costs of the second petition.

This was an application for payment of the dividends arising from a sum of 394*l.* 7*s.* Reduced 3*l.* per Cent. Annuities.

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The annuities represented a sum of 366l. 5s., the purchase moneys of lands subject to the trusts of the marriage settlement of Mr. and Mrs. Pryor, which had been taken by the Bristol Local Board of Health for the purposes of their Act, with which was incorporated the Lands Clauses Act.

On the 11th June 1870, an order had been made on the application of the then trustees of the settlement, that the interest to accrue on the bank annuities should be paid "to them or one of them" until further order.

Both the trustees had since died, and new trustees had been appointed. The new trustees now applied that the dividends from time to time to accrue on the bank annuities might be paid to them or the survivor of them or other the trustees or trustee for the time being of the settlement.

Romer, for the petitioners, asked that the respondents might pay the costs of the application, and referred to

Re Gee's Estate, 24 L. T. Rep. O. S. 152.

E. S. Ford, for the Bristol Local Board of Health, contended that as a defective order had been made on the first petition, the respondents ought not to be ordered to pay the costs of the present application. He cited

Re Audenshaw's Trusts, 1 N. R. 255;

Ex parte Hordern, 2 De G. & Sm. 263;

Re Byron's Trusts, 7 W. R. 367.

Romer, in reply.

The VICE-CHANCELLOR.—Assume that both parties are equally to blame in not seeing that a proper order was made on the first occasion, why should I make one pay the costs of this application more than the other? The petitioners are entitled to their order, but I can make no order as to costs.

Solicitors for petitioners, *Clarke, Woodcock, and Rylands*.

Solicitors for respondents, *Warry, Robins, and Burgess*.

QUEEN'S BENCH DIVISION.

Reported by M. W. McKELLAR, J. M. LELY, and R. H. AMPELWY, Esqrs., Barristers-at-Law.

Friday, May 12, 1876.

HARRIS v. JAMES AND SENHOUSE.

Landlord and tenant—Nuisance—Necessary result of demise—Liability of landlord.

A landlord who lets premises for a fixed and definite purpose is liable for any nuisance that arises naturally and of necessity from the use of such premises as contemplated by the demise.

Rich v. Basterfield (9 L. T. Rep. 356; 4 C. B. 783) commented upon.

This case came before the court upon a demurrer to two paragraphs in the statement of claim.

It appeared that the defendant, William Senhouse, is the owner of a field called Kirkcross, in the parish of Brigham, in Cumberland, which is full of limestone, and has been let to the defendant, Ferdinand James, by the defendant, William Senhouse, for the purpose of being worked as a lime quarry, and upon this field Ferdinand James has erected limekilns for the purpose of burning limestone taken from the said field.

The 5th and 6th paragraphs of the statement of claim which were demurred to by the defendant, William Senhouse, were as follows.

5. The smoke and vapours arising from this kiln spread over the lands of the plaintiff, and have injured the herbage and lessened the value of the land. This injury is partly the natural and necessary result of limekilns being used in the said field called Kirkcross, and partly the result of the improper manner in which the kiln has been worked.

6. The said quarry is worked by means of blasting, and in the process of blasting quantities of dirt and stone are from time to time thrown on the plaintiff's lands, whereby it is unsafe for the plaintiff or his men to work on the said lands. This is partly the necessary result of working a quarry in the said field, and partly of the negligent and improper manner in which the quarry has been worked by the said defendant Ferdinand James.

Crompton, in support of the demurrer, argued that as Senhouse was only the reversioner, he could not be held liable for a nuisance, and cited *Rich v. Basterfield* (*ubi sup.*), the marginal note to which was as follows: "Although the owner of property may, as occupier, be responsible for injuries arising from acts done upon that property by persons who are there by his permission, though not strictly his agents or servants, such liability attaches only upon parties in actual possession." In giving judgment in that case, it seems clearly to have been considered that the landlord was only liable for any nuisance existing at the time of the demise. This judgment is cited in *Gandy v. Jubber* in the Exchequer Chamber (9 L. T. Rep. N. S. 801; 5 B. & S. 485), and in a judgment that was prepared by the judges but never delivered (9 B. & S. 15), where *Rich* and *Basterfield* is considered. The case of *Rees v. Pedley* (1 A. & E. 822) is there discussed, and Cresswell, J., in delivering judgment, p. 804, states his view of Lord Denman's judgment, then of that of Littledale, J., and he says that learned judge "seems to have rested his judgment on the principle that the landlord was not to let the land with the nuisance upon it; and he proceeds, 'here the periods are short, so that there has been a reletting, and that has taken place after the user of the buildings had created the nuisance. He, therefore, assumes that there was an existing nuisance at the time of the letting which had not afterwards been removed.' To his judgment on that ground we entirely assent." Then on p. 805, he proceeds, "If *Rees v. Pedley* is to be considered as a case in which the defendant was held liable because he had demised the buildings when the nuisance existed; or because he had relet them after the user of the buildings had created a nuisance, we think the judgment right. . . . But if it is to be taken as a decision that a landlord is responsible for the act of his tenant in creating a nuisance, by the manner in which he uses the premises demised, we think it goes beyond the principle to be found in any previously decided cases, and we cannot assent to it." The same view appears to have been taken by Blackburn, J., in the Court of Queen's Bench in *Gandy v. Jubber* (9 L. T. Rep. N. S. 801; 5 B. & S. 91), where he says, "It must be shown that there has been a demise or redemise of the land with the nuisance existing upon it; and the nuisance must be, if I may so term it, a normal one—not such, for instance, as a cellar with a flap, which may or may not be a nuisance." He then goes on to refer

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to *Rich v. Basterfield* (*ubi sup.*) [BLACKBURN, J.—That case appears to have been not quite correctly reported in Best and Smith, for I seem to speak of *Rich v. Basterfield* as being a sensible judgment, whereas for long before that time I was of opinion it was desperately refined.] It would seem a sound principle of law that the landlord should only be liable for a nuisance existing at the time of demise, otherwise he would be at the mercy of his tenant. Here he authorises the tenant to build limekilns, but he does not authorise him to commit a wrong against anyone else; no nuisance existed when the premises were let, and therefore the landlord can be in no wise liable.

Bompas, contra, was not called upon.

BLACKBURN, J.—The question we have to decide is raised by the 5th paragraph of the statement of claim. Now, where one person authorises and requests a person to do certain things, he is liable for any consequences that arise therefrom. If the authority is given in a lease, the person who gives that authority is no less liable on that account. I do not think the lessor can be said to require everything the occupier may do; for example, if a man devises certain land on an agricultural lease, and requires that it should be cultivated in the best manner possible, and the tenant, exercising his discretion, brings on to the farm an enormous quantity of most odoriferous manure so as to create a nuisance to the neighbourhood, I don't think it is a case of that kind that the landlord would be liable, because I do not think that he could be said in any way to request or authorise what had been done. So, too, in the case of a lease of building land, the lessee might so build as to obstruct a neighbour's lights, but the lessor would not be liable, for although he may have enabled the lessee so to build, he did not request him to do it. But in the case before us the lime field was let for the very purpose of burning lime. No doubt, for any mischief arising from a careless or negligent use of the field, the landlord would not be liable, but for any mischief that arises from the natural and necessary result of what the landlord authorised and required, or even authorised and did not require, I think the landlord must be held liable. In *Rich v. Basterfield* (*ubi sup.*) the Court of Common Pleas came to a conclusion of fact which, if true, justifies their decision. It was an action for alleged nuisance arising from a certain chimney, and it appeared that when the fires were lighted, as the tenant did light them, then the nuisance arose, but evidence was given that a previous tenant made the fires of coke, and when that was the case there was no nuisance, and in their judgment the court proceed to say, "It being quite possible for the tenant to occupy the shop without making fires, and quite optional on his part to make them or not, or to make them with certain times excepted, so as not to annoy the plaintiff, or in such a manner as not to create any quantity of smoke that could be deemed a nuisance, it seems impossible to say that the tenant was in any sense the servant or agent of the defendant in doing the acts complained of. The utmost that can be imputed to the defendant is that he enabled the tenant to make fires if he pleased." Assuming that that evidence was correct, the nuisance there was not the necessary result of the tenancy. But in this case there is a demise for the express purpose of burning lime, and the natural result of it at burning lime is the

nuisance complained of. On this point the demurrer cannot be upheld. As to the 6th paragraph, I do not think the landlord is responsible for what has been negligently and improperly done. If the demise of the quarry is on such terms that the tenant must work it by blasting, that should be stated. The plaintiff may amend that paragraph, and we give him leave so to do.

LUSH, J.—I am of the same opinion. I have always looked upon the judgment in *Rich v. Basterfield* (*ubi sup.*) as one of great refinement. There the premises were let to be used as a coffee shop. I therefore think it must have been contemplated that the tenant should burn ordinary fuel, and that I think would have rendered the landlord liable. This case is different, however, for here the defendant lets land for the erection of limekilns, from which smoke must of necessity rise; so the act of the tenant is clearly that of the landlord.

Demurrer to 5th paragraph over-ruled. Leave given to plaintiff to amend 6th paragraph.

Solicitors for plaintiff, *Bischoff, Bompas, and Bischoff*, for E. and E. L. Waugh, Cockermouth.
Solicitors for defendant, *Speckly and Co.*

COMMON PLEAS DIVISION.

Reported by P. B. HUTCHINS and CYRIL DODD, Esqs.,
Barristers-at-Law.

Monday, July 17, 1876.

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Municipal election—Delivery of nomination paper
—38 & 39, Vict. c. 40 s. 1 sub-sect. 3, 4—22 Vict. c. 35 s. 8.

The provision in the Municipal Elections Act 1875 (38 & 39 Vict. c. 40 s. 1 sub-sect. 3), that nomination papers shall be delivered to the town clerk by the candidate himself, or his proposer or seconder, is imperative, not directory, and the paper must be delivered by the candidate, or proposer or seconder, personally.

Therefore, where petitioner's nomination paper was delivered by an agent,

Held, that an objection to the nomination paper was rightly allowed.

THE petitioners petitioned against the return of the respondents as councillors for the several wards of the borough of Wigan. By order of QUAIN, J., a special case was stated, which, so far as it is material to the point decided by the court, was as follows:

1. The municipal borough of Wigan, in the county of Lancaster, comprises wards as follows, that is to say, No. 1, or Scholes' Ward; No. 2, or St. George's Ward; No. 3, or Queen-street Ward; No. 4, or Swinley Ward; and No. 5, or All Saints' Ward. Each of the said wards is entitled at the ordinary municipal elections holden on the 1st Nov. in each year, to be represented by two councillors to be then elected by the duly qualified burgesses.

2. In 1875 the town clerk of the said borough, pursuant to the statute 38 & 39 Vict. c. 40, duly and in due time gave public notice that the last day for delivering nomination papers for the nomination of candidates at the then ensuing election of councillors, was Friday the 22nd Oct. 1875.

3. Upon the said 22nd of Oct. in due time nomination papers nominating the respective petitioners

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as candidates respectively for the respective wards in the said petition mentioned, were delivered to the said town clerk by one Thomas Scott, being then the agent of the said petitioners and their respective proposers and seconders, authorised by them in that behalf; but the said nomination papers were not otherwise delivered to the said clerk by the respective petitioners, or their proposers or seconders respectively.

4. The said town clerk forthwith, on the same day, sent notices to the petitioners that they had been nominated. . . .

7. The mayor of the said borough, under the said Act of Parliament in that behalf, appointed the 23rd day of Oct. aforesaid, between the hours of two and four of the clock in the afternoon, for the reception of any objections to nomination papers, and the said mayor attended . . . for the purpose of hearing and deciding upon any objections that might be made to any nomination paper. . . . The respondent, Peter Jackson, delivered to the said mayor an objection in writing to the nomination paper of the petitioner, Elisha Hodkinson Monks. . . . The said mayor received the said objection, and proceeded to hear and adjudicate upon the same. . . .

8. Copies of the said objections in writing are annexed hereto, and are to be taken as part of this case. The numbers in the margin have been inserted for the purposes of this case.

9. The said mayor reduced to writing his decisions in the premises and copies of such written decisions are annexed hereto, and are to be taken as part of this case.

10. The said mayor afterwards duly, by public notice in that behalf, declared the respective respondents to have been respectively returned as councillors for the said borough, and the respondents have since acted, and claim to act, as such councillors. . . .

12. The court to have power to draw inferences of fact.

13. The petitioners are to be at liberty, on the argument of this case to contend that the mayor had no power to decide upon or to allow the said grounds of objection numbered 5, and that the respondents cannot on these petitions raise the question whether such objections are good.

The questions for the opinion of the court (so far as material here) were as follows:—

3. Whether the said decisions of the said mayor were erroneous and ought to be reversed.

4. Whether the respondents were respectively duly elected.

The court to make such order in the premises and in the matters of the said petition as to the court may seem right.

The objection of the respondent Peter Jackson to the nomination paper of the petitioner, Elisha Hodkinson Monks, was made on several grounds, of which the following alone is here material:

5. That such paper writing was not delivered by the said Elisha Hodkinson Monks himself, or his proposer or seconder, to the town clerk of the said borough seven days at least before the said day of election, excluding Sundays, and before five o'clock in the afternoon of Friday, the 22nd Oct. 1875, such last-mentioned day being the last day upon, and five o'clock in the afternoon of the same day being the time or hour before which, by law, such paper writing ought to have been delivered to the said town clerk at or for the said election."

The decision of the Mayor on this objection was as follows:

"I, the undersigned mayor of this borough, do hereby allow the objection of Mr. Peter Jackson to the nomination paper of Mr. Elisha Hodkinson Monks for No. 1 or Scholes' Ward.

JAMES BURROWS, Mayor."

The following are the clauses on which the decision turned:

38 & 39 Vict. c. 40 (Municipal Elections Act 1875), s. 1, sub-sect. 8, "Every nomination paper subscribed as aforesaid shall be delivered by the candidate himself, or his proposer, or seconder, to the town clerk seven days at least before the day of election, and before five o'clock in the afternoon of the last day on which any such nomination paper may by law be delivered." . . .

Sub-sect. 4: Sect. 8 of the Act 22 Vict. c. 35, "so far as the same is now in force shall apply to nominations of councillors, auditors, and assessors duly made and allowed under this Act."

22 Vict. c. 35, s. 8: "At any election of councillors to be held for any borough or ward: (1) If the number of persons so nominated shall exceed the number to be elected, the councillors to be elected shall be elected from the persons so nominated, and from them only."

M'Intyre, Q.C. (*Bigbam* and *W. Hardy* with him), for the petitioners.—It must be conceded that if the fifth objection to the nomination paper of the petitioner Monks can be sustained the petitioners cannot succeed. But it is not really an objection to a nomination paper, and therefore ought not to have come before the mayor, and cannot be entertained by the court on appeal from the mayor's decision. [Lord COLERIDGE, C.J., referred to *Northcote v. Puleford* (L. Rep. 10, C. P. 476; 44 L. J. 217, C. P.; 32 L. T. Rep. N. S. 602).] The first clause of 38 & 39 Vict. c. 40, s. 1, sub-sect. 3, is directory only, not imperative. [Lord COLERIDGE, C.J.—*Houes v. Turner* (*ante*, p. 58), shows that it is imperative.] The words, "shall be delivered by the candidate himself," &c., only means that the candidate or his proposer or seconder shall see that the paper is delivered, but they need not do so with their own hands; delivery by an authorised agent is sufficient. 35 & 36 Vict. c. 60, s. 15, sub-sect. 2, which allows the respondent to give evidence that the petitioner was not duly elected, only applies where the office is claimed by the petition, which is not the case here.

Herschell Q. C. (*Chandos Leigh* and *Geary* with him), for the respondents.—By 38 & 39 Vict. c. 40 s. 1, sub-s. 4, 22 Vict. c. 35 s. 8, applies to these elections, and the words "so nominated," in that section, must mean nominated in the manner directed by 38 & 39 Vict. c. 40, s. 1, sub-s. 3. [He was stopped by the court.]

Lord COLERIDGE, C.J.—I am of opinion that our judgment ought to be for the respondents. Mr. M'Intyre has very fairly admitted that if one point is decided against him it becomes useless to discuss the others, because in that case the election of the respondents cannot be questioned. 38 & 39 Vict. c. 40, s. 1, sub-s. 3, directs that every nomination paper shall be delivered by the candidate himself or his proposer or seconder to the town clerk, seven days at least before the day of election, and before five o'clock in the afternoon of the last day on which any such nomination paper may by law be delivered. The petitioners were persons who complained of the way in which the election was conducted, because they were nominated as candidates,

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and yet they were prevented from going to the poll. It is true that they were not prevented by any objection to the delivery of a nomination paper; but still they have questioned the election, and we have to determine if the respondents are duly elected. Paragraph 3 of the case states that "upon the said 22nd day of Oct. in due time nomination papers nominating the respective petitioners as candidates respectively for the respective wards in the said petitions mentioned were delivered to the said town clerk by one Thomas Scott, being then the agent of the said petitioners and their respective proposers and seconders, authorised by them in that behalf, but the said nomination papers were not otherwise delivered to the said clerk by the respective petitioners or their proposers or seconders respectively." The case, therefore, shows that the petitioners were not duly nominated, and had no right to go to the poll, and if they had been elected their election must have been set aside. I am clearly of opinion that the first part of sub-sect. 3 of 38 & 39 Vict. c. 40, s. 1, is imperative, and not merely directory; and there is also the section to which Mr. Herschell very properly called attention, 22 Vict. c. 35, s. 8, incorporated by 38 and 39 Vict. c. 40, s. 1, sub-s. 4, by which, if the number of persons nominated exceed the number to be elected, the connoisseurs shall be elected from the persons so nominated, and from them only. Therefore, if these petitioners were not duly nominated it was the duty of the mayor to declare that they were not entitled to go to the poll. It appears on the face of the case that the petitioners were not duly nominated, and therefore there is no ground to question the election of the respondents, and our judgment must be for them.

ARCHIBALD, J.—I am thoroughly of the same opinion. The facts show that the petitioners were not entitled to go to the poll. 38 & 39 Vict. c. 40, s. 1, sub-s. 3, provides that "Every nomination paper subscribed as aforesaid shall be delivered by the candidate himself, or his proposer or seconder, to the town clerk," &c. How the statute could more clearly indicate that the candidate himself, or his proposer or seconder, must deliver the nomination paper I cannot conceive. It is clear that it was not intended that the paper should be delivered by an agent or any other person. This being so the petitioners were not qualified, and on this short ground I am of opinion that judgment should be for the respondents.

Judgment for the respondents.

Solicitors for the petitioners, *Chester, Urquhart, Mayhew, and Holden*, for *Darlington and Sons*, Wigan.

Solicitors for the respondents, *Morris, Allen, and Carter*.

Feb. 5, 7, and 11, 1876.

ALDRIDGE (pet.) v. HURST (resp.).

Parliamentary election petition—Amendment—Striking out—Claim to seat.

After the expiration of the twenty-one days after the return, within which, by 31 & 32 Vict. c. 125, s. 6, a Parliamentary election petition must be presented, the petition cannot be amended by striking out a paragraph which claims the seat for the petitioner.

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A PETITION had been presented by Major Aldridge against the return of Mr. Hurst as member of Parliament for the borough of Horsham, and claiming the seat for the petitioner. After the petition had been signed by the petitioner, an application was made on his behalf to Quain, J. for leave to amend the petition by striking out the paragraph which claimed the seat for the petitioner, and also certain other paragraphs relating to a scrutiny. The application was supported by an affidavit of the petitioner denying the existence of any collusion, and stating that the application was made *bond fide*, and was not the result of any corrupt arrangement; and that the petitioner was not apprehensive of any recriminatory charges being brought against him.

The learned judge declined to make an order permitting the amendment, but referred the matter to the court.

Feb. 5 and 7.—*A. L. Smith* for the petitioner.—After the expiration of the period of twenty-one days, within which, by the Parliamentary Elections Act 1868 (31 & 32 Vict. c. 125), s. 6, the petition must be presented, it cannot be amended by adding any fresh matter, but it may be amended by striking out part: (*Stevens v. Tillet*, L. Rep. 6 C. P. 147; 23 L. T. Rep. N. S. 622.) The object of this application is only to save unnecessary costs, and the affidavit of the petitioner negatives all possibility of collusion, and no objection is made on behalf of the sureties. The affidavit also states that the petitioner is not apprehensive of recriminatory charges, and moreover, if the claim to the seat is abandoned, the reason for allowing recriminatory charges ceases to apply, for that reason is only to prevent improper persons getting seats in the House of Commons. There is no authority against the proposed amendment. In *Maude v. Lowley* (L. Rep. 9 C. P. 165) when the court refused to allow a municipal election petition to be amended, the amendment which it was desired to make was an addition to the petition as it already stood.

O. S. C. Bowen (F. H. Scott with him), for the respondent, opposed the application.—If the object is to save unnecessary costs, the petitioner can attain that object by abstaining from delivering the list of votes to be objected to, and heads of objection required by Rule 7 of the Rules of Michaelmas Term 1868. The part of the petition claiming the seat is in effect a separate petition, and the petitioner is not entitled to withdraw. He has laid himself open to recriminatory charges by claiming the seat, and the respondent may insist on his right to have an opportunity of bringing forward such charges. This was the law before the passing of the Parliamentary Elections Act 1868 (31 & 32 Vict. c. 125).

Coventry case, 1 Peckwell, at p. 99;

Wareham case, 1 Wolferstan & Dew, at p. 95;

Clare County case, Wolferstan & Bristows, at p. 143.

By sect. 26 the old practice is to be observed as to cases not provided for by the Act or Rules. Formerly a petition could only be withdrawn according to the provisions of the statutes on the subject (*Rogers on Elections*, edition of 1865, p. 423), and since the jurisdiction to try petitions has been transferred to the Judges, a Judge at Chambers can have no power to waive the conditions imposed by the Legislature (31 & 32 Vict. c. 125, ss. 35, 36) and prescribed by the Rules of Michaelmas Term 1868, 45 to 49. Rule 44 does not give a judge

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more power than the court has. The respondent could not withdraw from the contest and resign his seat, for personal bribery might be charged, which would disqualify him from afterwards sitting; if he resigned the petition must still proceed, and the rule is the same in the case of a petitioner claiming the seat; for by 31 & 32 Vict. c. 125, s. 53, the respondent may give evidence "in the same manner as if he had presented a petition." Before the Act cases of bribery were inquired into notwithstanding withdrawal, *Rogers on Elections*, 424 (5 & 6 Vict. c. 102, s. 1), *First Horsham case* (1 P. R. & D., 107), and the law in this respect is not altered. See the *New Windsor case* (Judgments of Election Judges, 208-210; 19 L. T. Rep. N. S. 613). In the *Taunton case*, *Waygood v. James* (L. Rep. 4 C. P. 361; 21 L. T. Rep. N. S. 202), the Judges assume throughout that the result of claiming the seat is to put in issue irrevocably the conduct of those who claim it. The decision in *Maunder v. Lowley* (*ubi sup.*) is a strong authority against the proposed amendment. Lord Coleridge there says, "Mr. Tennant has also pointed out that after the expiration of the twenty-one days it would be too late for anyone else to present a fresh petition; and that to allow a petitioner to amend so as substantially to make the amended petition a fresh one would be conferring upon him a privilege which no other person could possess. That seems to me to dispose of the case." That reasoning is directly in point here, for what change could be more vital than a change in the prayer of the petition? In the *Youghal case* (1 O'M. & H. at p. 296), O'Brien, J. refused to allow an amendment, and expressed a doubt as to whether he had power to do so. Even if there is power to amend, this is not a case in which an amendment ought to be allowed.

A. L. Smith in reply.—By 31 & 32 Vict. c. 125, s. 2, the court has the same powers as if the petition were an ordinary cause. This gives power to amend. In *Pickering v. Startin* (28 L. T. Rep. N. S. 111) amendments by which certain allegations were added to a municipal election petition were allowed to be made. That case was not cited in *Maunder v. Lowley* (*ubi sup.*). In *Yates v. Leach* (L. Rep. 9 C. P. 605; 43 L. J. 377, C. P.; 30 L. T. Rep. N. S. 790), Brett, J. expresses an opinion that the court has jurisdiction to strike out the name of a person who has been improperly made a respondent. The dictum of O'Brien, J. which has been referred to, is no authority against the power of amendment, for he only refused in the exercise of his discretion to allow an amendment under the circumstances of that case. It has not been suggested that there is no power to amend in any of the other cases, except *Maunder v. Lowley* (*ubi sup.*). In the third Stroud Election Petition an order similar to that now asked for was made by Pigott, B. at Chambers. Sect. 35, as to withdrawal of a petition, only refers to withdrawal of the whole petition. It does not provide that the petition or any part of it shall not be withdrawn except as therein prescribed. A paragraph claiming the seat is not in effect a separate petition. The prayer is in the alternative—see the form given in Rule 5 of Michaelmas Term 1868, and the special forms in Leigh and Le Marchant's Election Law, pp. 161-166, 2nd edition. Only one security is given, which shows that it is only one petition. He also referred to

The New Windsor case, 2 Peck. 187;
The Maldon case, 2 P. R. & D. 143;
Pearse v. Norwood, L. Rep. 4 C. P. 235; 19 L. T. Rep. N. S. 648.

GROVE, J.—We are all of opinion that the application must be refused, but as the case is one of great importance, we will give a judgment stating the reasons for our decision at a future time. The question of costs will be left to be dealt with by the Judge who tries the petition.

Feb. 11.—The judgment of the court (Grove, Archibald, and Lindley, JJ.) was delivered by

GROVE, J.—In this case, which was that of a petition against the return of Mr. Hurst for the borough of Horsham, an application was made to Quain J., to amend the petition by striking out a part of the prayer, viz., that which claimed the seat for Major Aldridge, the petitioner, and certain other allegations applying to a scrutiny, which would be dependent on this claim. The question was referred by the learned judge to this court, and an affidavit by the petitioner was read, stating, among other things, that the application was made *bonâ fide* and without collusion, but as our judgment does not turn on the terms of this affidavit, we need not go fully into this. On the part of the petitioner it was urged that sect. 2 of the Parliamentary Elections Act 1868 (31 & 32 Vict. c. 125) invests this court, subject to the provisions of the Act, with the same powers, jurisdiction, and authority with reference to an election petition and the proceedings thereon as it would have if such petition were an ordinary cause within its jurisdiction. It was also stated that an order such as that now asked had been made by Pigott, B. though the case appears to have been scarcely argued before that learned judge. The case of *Stevens v. Tillet* (L. Rep. 6 C. P. 147) was also cited, where this court, after the abandonment of the claim to the seat at a trial before an election judge and the subsequent election of the claimant, held that the petitioners against him might give evidence of corrupt practices by himself and his agents at the previous election, although they might have been given in evidence in support of recriminating charges at the previous trial where the now sitting member was petitioner. It was further contended that although the court might not have jurisdiction to add new matters to a petition, it might expunge on proper grounds shown. It was contended *contra* that, without going the length of saying that the court or a judge might not have jurisdiction to allow the addition or withdrawal of certain allegations in an election petition, it could not permit the withdrawal of a distinct prayer, such as that claiming the seat; that this would be analogous to, if not within, the sections of the Act and the rules relating to the withdrawal of an election petition, and that such withdrawal, if permissible at all, should be guarded by similar provisions, and not allowed by the court on mere application and affidavits, and that the respondent ought not to have his right to adduce recriminatory evidence taken from him by such an application as this. We were of opinion that the arguments for the respondent were well founded, and that the application should be refused, and as the matter pressed, the trial being near at hand, we announced our decision to that effect, and we now proceed to state the main grounds on which it proceeded. It will be observed that the second section of the Act above alluded to states that the powers there given

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shall be subject to the provisions of the Act, and we think it clear that the jurisdiction conferred by the Act cannot be in all respects the same as that of the court in ordinary causes. Numerous provisions of the Act have reference not merely to the individual interests or rights of petitioners or respondents, but to rights of electors, of constituencies, and of the public in purity of election, and in having the member seated who is duly returned by a majority of proper votes. It appears to us also that the scope of the Act is that petitions should not be mere pleadings, nor framed for the purpose of intimidating or in any way inducing the respondent to abandon his seat, still less, of course, should they be collusive, but that they should be real, well considered, and not lightly to be withdrawn either in whole or in part. (See ss. 5, 6, 8, sect. 11, sub-sects. 14, 15, 16, ss. 20, 25 to 42, and other parts of the Act.) By sect. 5 of the Act a petition may be presented by a person who voted or had a right to vote at the election, or by a person claiming to have a right to be returned or elected. By sub-sect. 13 of sect. 11 the judge is to determine, not merely whether the member whose return or election is complained of, but whether any or what other person was duly returned or elected, and sect. 53 speaks of a petition complaining of an undue return and claiming the seat for some person. These sections show that not merely may the candidate who is not returned claim the seat, or in other words, claim to have been duly elected, but that any other voter might claim the seat for a candidate who has not been returned, and claims have been so made, as in *Stevens v. Tillet* (*ubi sup.*) and other cases. This right of petitioning shows that the Act contemplated in regard to petitions not merely the rights of candidates not returned, but the rights of the constituency, in order to insure that the person really elected should be their member, and this without the cost and disturbance of a new election, as the judge's decision in favour of such claim is final: (*Taunton case*, L. Rep. 4 C. P. 361.) It appears to us that it would be an infringement of this right if a petition having been presented by one person (in this case a candidate claiming the seat), the claim to the seat could be withdrawn by the mere motion of the person presenting it after the twenty-one days, when no other petition could be presented, and thus the voters be prevented from claiming the seat for one who may be the duly elected representative, or on the other hand from showing by means of the recriminative charges, which put in issue the claim, that the claimant is not a person entitled to the seat by that election, or that he is disqualified for future elections, such withdrawal not being accompanied by the power to substitute another person as petitioner, by means of which the inquiry might be gone into at the trial. A right to have an election petition proceeded with, though one object of it is obtained, is reopened, by sect. 18 of the statute, which provides that an election petition shall be proceeded with notwithstanding the acceptance by the respondent of an office of profit under the Crown. It appears to us that the withdrawal of this portion of the prayer of the petition is *in pari materia* with, even if it is not within, the provision of the Act relative to the withdrawal of a whole petition. We see no reason why the prayer claiming the seat for some one might not form the subject of a separate petition

from that which is directed against the return of the sitting member, and if so, it would be within the provisions of sect. 35, and the rules XLV., *et seq.*, carrying out those provisions, which provide *inter alia* for due notices to be given to the constituency, and for the substitution by leave of the judge of another person in place of the petitioner. If this be so, and these sections and rules apply to a petition simply claiming the seat for some person, we see no reason why they should not apply to such claim when the prayer including it is joined with another or other prayers, and if, in the latter case, by reason of the words "in whole or in part," not occurring in the provision of the Act as to withdrawal of petitions, applications such as the present do not fall within such provision, we see no reason why at all events the election judges may not under sect. 25 make rules for properly guarding the interest of the particular constituency and of the public in respect of such application. We, however, incline to think, although it is not necessary to decide this point in the present case, that an election petition under the Act (sect. 35) is not the less an election petition because it is joined in one document with another petition, and if so, the provisions as to withdrawal apply to the present case. By sect. 22, two candidates may be made respondents to the same petition, and this case may for the sake of convenience be tried at the same time, but "for all the purposes of this Act such petition shall be deemed a separate petition against each respondent;" this section shows that two petitions may be joined in one document and tried at one time. By sect. 26, it is provided that "so far as the rules framed under sect. 25 do not extend, the principles, practice, and rules on which committees of the House of Commons have heretofore acted in dealing with election petitions, shall be observed as far as may be by the court and judge in the case of election petitions under this Act." It therefore becomes desirable to see what has been the mode in which election committees have dealt with cases analogous to the present. In the *Clare case* (W. & B. 143), recriminatory evidence was allowed to be given against a candidate for whom the seat was claimed, though the claim to the seat was abandoned. So also in the *Coventry case* (1 Peck. 99) and other cases cited in Mr. Rogers' Law and Practice of Election Committees, edit. 1863, p. 470. The *New Windsor case* (2 Peck. 193), cited in the present case by the learned counsel for the petitioner, does not appear to conflict with the other decisions, as the committee there allowed recriminatory evidence to be given against a petitioner who had abandoned his claim to the seat. The *Maldon case* (2 P. R. & D. 143) was also relied on for the petitioner. In that case there were three petitions; the second petitioner, who charged bribery and treating against the sitting members, and claimed the seat for himself, wholly withdrew his petition, and what the committee decided was to decline to proceed upon the application of a third petitioner, which alleged corrupt practices against the second petitioner, the committee having unseated the sitting members on the first petition. This decision does not appear to us substantially to conflict with the other decisions of election committees, as tribunals of this description must have some discretion as to where inquiries are to stop. The

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practice of committees of the House of Commons appears to us, therefore, to be strongly in favour of not excluding recriminatory evidence by the sitting member, when the seat is claimed by the petitioner and the petitioner afterwards desires to abandon the claim, and the exclusion of such evidence appears to be the only object sought by this application, as if it were not desired to exclude this, or if it were known that no recriminatory evidence would be adduced, the alleged object, as to saving costs, could be obtained by giving the respondent notice that no evidence would be tendered in support of the claim to the seat, and that that claim would not be persisted in at the trial. The learned counsel for the petitioner fairly admitted the fact that frequently, if not universally, election petitions were presented on the last of the twenty-one days, and that if so, information was not given by them of which members of the constituency could avail themselves by presenting in due time another petition, if they found the requisite allegations and prayer in the petition presented were unsatisfactory to them. This may present a difficulty in remedying a defect if a prayer such as this joined with another prayer in one document is not within the clauses and rules as to withdrawal; but we do not see that it affords an independent argument in favour of granting this application, and it is a difficulty which may probably be lessened or removed by rules under sect. 25. It is also to be observed that, although petitions may be presented at the last moment, it is commonly known in the county or borough that such petitions are likely to be presented, and if any suspicion exists that they are sham petitions, means are taken by those who are in earnest to lodge petitions, and the entire withdrawal of collusive petitions is guarded against by the provisions of the Act to which we have alluded. In one point of view it is an argument against our allowing this prayer to be withdrawn, that if there be no power under the withdrawal clauses to substitute a person for the petitioner as to this prayer the constituency will be without means of proving either that the petitioner is the duly elected member, or to answer his allegation that he is elected, or to show that he is unfit to serve in a future Parliament, he himself having raised their issue by claiming the seat. We by no means decide that this court has no power to make amendments in petitions, provided it sees that no injurious or unjust result, or that a beneficial result will follow. In *Pickering v. Startin* (28 L. T. Rep. N. S. 111), the Court of Common Pleas allowed in the case of a municipal election petition an amendment by adding two paragraphs relating to matters discovered after the filing of the petition. On the other hand, in *Maunder v. Lowley* (L. Rep. 9 C. P. 165) an application for an amendment by addition of allegations as to the acts committed in other wards besides those named in the original petition was refused by this court. We do not enter into the arguments as to the question of the position of the sureties being altered, as the counsel for the petitioner agreed to make their consent to this amendment a condition in his leave to amend. We cannot discard the question of possible collusion in favour of particular individuals. The provisions giving protection against the chance of this must be of general application, and its possibility jealously watched by judges and the court.

Here, if the petitioner suffers in the result, he has brought it on himself, but if, as he states in his affidavit, he has no cause for apprehension, he can hardly suffer any damage, as, if he gave notice to the other side of not pressing his claim, and if in consequence of particulars furnished by the respondent he had to go to expense in defending the conduct of himself or his agents, and he does this successfully, the election judge will probably decide in his favour as to the costs of such defence. If otherwise, he can hardly complain of having to pay them. That the matter may be entirely open for the discretion of the learned judge at the trial, we, in refusing this application, leave the costs of it to be adjudicated upon by the judge who tries the case.

Application refused.

Solicitors for the petitioner, *Robinson and Preston.*

Solicitors for the respondent, *Wyatt, Hoskins, and Hooper.*

Dec. 1 and 2, 1875; and Jan. 20, 1876.

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Arbitration under special Act incorporating the Lands Clauses Act 1845—Compensation—Actionable damage—Award—Evidence of umpire—Removal of shoals from bed of river—Lands Clauses Consolidation Act 1845—Airedale Drainage Act (24 & 25 Vict. c. 160).

By the Airedale Drainage Act (24 & 25 Vict. c. 160) the defendants were empowered to execute certain works, and by that Act it was provided that "full compensation shall from time to time after the passing of this Act . . . be made by the" defendants . . . "to the owners, occupiers, and lessees for the time being sustaining any damage by reason, or in any way consequential upon, the exercise of any of the powers of this Act of the lands and hereditaments of F.," . . . "and in case of dispute as to the amount of such compensation, the same shall be settled by arbitration in manner provided for the settling of questions of compensation in the Lands Clauses Consolidation Act 1845."

*The plaintiffs were occupiers of lands of F., and the defendants executed works under the above Act, by reason of which the plaintiffs alleged they had, as such occupiers, sustained injury to the land of F. occupied by them. An umpire was appointed under the provisions of the Lands Clauses Consolidation Act 1845, in accordance with the above Act, who, by his award, awarded to the plaintiffs 110*l.* and costs as the "damages sustained by the plaintiffs by reason of and consequential upon the exercise by the commissioners of the powers of the Airedale Drainage Act." At the trial the plaintiffs only put in the award, which the judge then ruled was *prima facie* evidence requiring an answer from the defendants. The defendants pleaded, first, a plea denying the validity of the award; secondly, a plea setting out the award and a special case explaining it, drawn by the arbitrator, which plea was held bad upon demurrer; thirdly, that the umpire had awarded damages beyond his jurisdiction; fourthly, that the plaintiffs had sustained no damage. The judge having ruled as above, the defendants put in, as the evidence of the umpire, by consent, the*

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special case drawn by him explaining his award. The judge then directed a verdict for the plaintiffs. In this special case the works done by the defendants were described, *inter alia*, as the removal from the river side "of shoals formed therein by gravel soil and other materials, which from time to time had been brought down by tributaries of the said river near the confluence therewith of the said tributaries," and the umpire further stated therein "there was no sufficient evidence before me to enable me to determine one way or the other, whether the said works, exclusive of the removal of the said shoals and weir, caused the" damage complained of.

Held, that the defendants were entitled to keep the verdict; that it sufficiently appeared that the damage was actionable damage.

Per Lord Coleridge, C.J., and Archibald, J., on the ground that the award was *prima facie* evidence against the defendants of their liability, and that the award and findings of the umpire given in evidence at the trial, showed that the damage in respect of which compensation was awarded was actionable damage, though they were of opinion that even if the damage were not actionable damage, the award would, by reason of the special clauses of the Airedale Drainage Act, be valid.

Per Amphlett, B., on the ground that the award, taken in connection with the pleadings setting out in the special case, was *prima facie* evidence against the defendants of their liability, and that it sufficiently appeared that the damage was actionable damage, though if it had not so appeared the award would, in his opinion, be invalid.

THE facts and the arguments made use of by counsel in arguing the rule are so fully discussed in the judgments that it is unnecessary to repeat them.

Manisty, Q.O., Bidder, Q.O., and Cave, Q.C. showed cause (1st and 2nd Dec. 1875).

Herschell, Q.C. and K. Digby supported the rule.

Our adv. vult.

The following judgments were delivered on the 20th Jan. 1876.

LORD COLERIDGE, C.J.—My brother Archibald concurs in this judgment which I am about to read. This was an action on an award made by Mr. Kemplay, who was appointed umpire under the Airedale Drainage Act, a private Act passed in 1861, and with which the Lands Clauses Acts 1845 and 1860 were incorporated, "save so far as any of the sections and provisions of those Acts were expressly excepted or varied" by the Act itself. The 45th section of the private Act enacted that the arbitration should be conducted "in the manner provided for the settling of questions by arbitration in the Lands Clauses Act 1845;" and the Court of Common Pleas held on demurrer in this very case that Mr. Kemplay was precluded from stating a special case as he wished to do, and indeed provisionally did, to obtain the opinion of the court on certain questions of law which arose in the course of the proceedings before him. Some of these questions are raised in a less convenient form, and must be determined in our judgment upon this rule. This action is brought upon Mr. Kemplay's award for the sum of 110*l.* and costs, which he found to be the amount of "damages sustained by the plaintiffs by reason of and consequential upon the exercise by the commissioners of the powers of the Airedale Drainage

Act." It was tried before me at Guildhall, when the plaintiffs contented themselves with putting in the award of Mr. Kemplay, and then closed their case. The defendants had pleaded first in effect denying the validity of the award under the Airedale Drainage Act. Next they had set out the award and special case, and pleaded a plea which has been held bad upon demurrer. Thirdly, they had pleaded that the umpire had awarded damages in respect of matters beyond his jurisdiction. Fourthly, they had pleaded that the plaintiffs had not sustained any such damage as entitled them to compensation under the provisions of the Airedale Drainage Act. The fifth and sixth pleas are not necessary to be considered for the purposes of this judgment. On this state of pleadings and proof the defendants insisted that there was nothing to go to the jury, and that a nonsuit should have been directed. Mr. Kemplay was called by them, and it was agreed that, without being formally sworn and examined, it should be taken that he had repeated in the witness-box the statements made in the special case appended to his award. No further evidence was given by the defendants, except that a witness was called to establish the fact that the defendants had no funds in hand to meet the demands made on them by the plaintiffs; but the latter evidence became immaterial as the point to which it was directed was abandoned in the argument upon the rule. On this state of the pleadings and the proof, I directed a verdict for the plaintiffs for 244*l.* 1*9s.* 8*d.*, the amount of the damages and the costs incurred in ascertaining them; and the defendants had leave to move to enter the verdict for them. The rule was obtained as a matter of convenience and by agreement to enter either a nonsuit or a verdict in the alternative, and we are now to determine whether that rule should be made absolute or discharged. It is necessary to determine first whether the evidence given by the plaintiffs, which was confined to the award, called upon the defendants for any answer; secondly, whether if it did, the statements in the special case, which are to be taken as the evidence of Mr. Kemplay, afford that answer. The solution of this latter question depends on, thirdly, whether the damage for which the plaintiffs are entitled to be compensated under the Airedale Drainage Act is such damage only as, without the Act, would have been actionable; and fourthly whether all the damage for which it appears the umpire awarded compensation to the plaintiffs was or was not such damage. It will tend to clearness, though it may at first sight appear illogical, if we consider the latter question before the former one. For if the damage giving a right to compensation under the Airedale Drainage Act be not mere actionable damage, but injury or harm, though not actionable; or if upon the whole case taken together there should be evidence that no damage but damage otherwise actionable was, in fact, taken into account by the umpire in ascertaining the amount of compensation, then there could be no question of nonsuit, and the verdict could not be entered for the defendants; and furthermore, the authority of the cases decided upon the Lands Clauses Acts, and on statutes containing equivalent provisions to the provisions of these Acts, would be materially weakened, because those cases would not then be in point. Now the Airedale Drainage Act was passed, as the preamble recites, for the public

object of improving the drainage, and thereby the health of a large district in the West Riding. It authorised the execution by the defendants of considerable works according to deposited plans and sections; and these works, which are enumerated in the 36th section of the Act, include "the removing from the river Aire of shoals and other obstructions;" and after setting out a variety of works to be executed, and conferring on the commissioners a variety of powers for the purpose of executing them, the 43rd section enacts, in the first portion of it, as follows: "In the execution of this Act the commissioners shall do as little damage as may be, and subject to the provisions of this Act shall make, to all parties entitled, compensation for all damage or injury so done." It has already been mentioned that the Lands Clauses Acts are incorporated with the Special Act. Then follow two clauses in favour of two sets of properties, the language of which clauses is the same, except as to the properties affected by them. The 44th is in favour of the owners, lessees, and occupiers of the lands commonly known as the Riddlesden Hall Estate and Lenton Farm. The 45th, under which the present plaintiffs claim, is as follows: "Full compensation shall, from time to time, after the passing of this Act, but not beyond twenty years from and after the completion of the cuts, embankments, and works by this Act authorised, be made by the commissioners out of the rates to be levied under this Act to the owners, lessees, and occupiers for the time being, sustaining any damage by reason or in any way consequential upon the exercise of any of the powers of this Act of the lands and hereditaments of William Ferrand, Esq., situate, &c.; and in case of dispute as to the amount of compensation, the same shall be settled by arbitration in the manner provided for the settling of questions of compensation by arbitration in the Lands Clauses Consolidation Act 1845." The plaintiffs are tenants of Mr. Ferrand, and claim under this section; and the question is, in respect of what have they a right to claim? In respect of actionable damage only, say the defendants. The Lands Clauses Acts are incorporated, and a long series of decisions, too numerous and uniform to be now disputed, has settled that the damage for which compensation can be recovered under the procedure enacted by the Act of 1845 is actionable damage only. The words of the 45th section of the Airedale Drainage Act are no wider than the words in the analogous sections in the Public Health Act and the Waterworks Clauses Act. They are substantially the same, and under these last-mentioned Acts the courts have uniformly confined the damage recoverable to actionable damages. *The New River Company v. Johnson* (2 E. & E. 435; 6 Jur. N. S. 374; 29 L. J. 93, M. C.; 8 W. Rep. 179), decided upon 10 & 11 Vict. c. 17, s. 12 (The Waterworks Clauses Act); *Hall v. The Mayor, &c., of Bristol* (15 L. T. Rep. N. S. 573; L. Rep. 2 C. P. 322; 36 L. J. 110, C. P.), decided on 11 & 12 Vict. c. 63, s. 144 (The Public Health Act 1848), are, no doubt, authorities for this proposition. The Legislature, in using the word "damage," use a word to which a legal meaning had already been affixed by judicial decisions, and must be taken to have used it in the sense ascertained by those decisions, i.e., "actionable damage." Nor are the defendants driven to admit that the 44th and 45th

sections do not give the persons in whose favour they are enacted any greater or better protection than they already had under the words of the 43rd. For under the 44th and 45th sections, the compensation for damage may be ascertained and awarded "from time to time," during a period of twenty years; whereas, under the 43rd, as to all other persons than those protected by the 44th and 45th sections, it can be ascertained and awarded only once for all. These considerations are, no doubt, of great weight, but there are considerations on the other side of equal weight, or greater. It is difficult, say the plaintiffs, to believe that the 44th and 45th sections would have been inserted in the Act in their present shape, merely to provide that compensation under them might be ascertained and awarded more than once. These sections appear to have intended to give the persons in whose favour they were passed, a remedy wider and larger than the Lands Clauses Act would give. They were the price paid for procuring the acquiescence of certain powerful persons in the passing of the Act, and it is to reduce the price almost to nothing to construe them as suggested by the defendants. For the permanent liability to injury is a permanent injury to the property, which might be taken into account on a single assessment of compensation. In the first words of the 43rd section, "the commissioners shall do as little damage as may be," it is plain that "damage" is used in the broad sense of harm or mischief. The interpretation of the public Acts already referred to is, indeed, now established; but it has been established not without resistance, and the acquiescence of the House of Lords in that interpretation has been by no means hearty or unqualified; and in such an Act as this there is good reason why compensation may have been given for damage not actionable; because the commissioners are clothed with large and varied powers to execute large and varied works, and may, and probably do, exercise these powers to do damage, in the sense of harm or mischief, which, although not actionable, it is plain no individual would be likely to do, and which very few individuals could do. If, therefore, the decision of this case turned upon this point, we should have been prepared to hold that these two sections did go, in their true meaning, beyond the sections of the Acts which have been referred to and decided on; and that compensation was intended to be given by them for damage other than actionable damage. The decision of the case, however, does not turn upon it; because we think that construing the award by the language of the special case, no damage except actionable damage has been included by the umpire in the subject-matter of his award of compensation. For this purpose we assume (what we have still to discuss) that the award is evidence, and that the statements of the umpire as to his findings are evidence also. The whole controversy as to this point between the plaintiffs and defendants, turned upon the true construction of his language, as to the removal of certain shoals, and upon the question, what kind of removal had taken place in point of fact, and how far that removal, assuming it to have been actionable in point of law, was found by the umpire to have caused any harm in point of fact. It is plain that if the umpire has admitted that he considered and awarded compensation for a matter not within the Act, his award

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is invalid. He has awarded a lump sum, and if part of the claims for which that lump sum has been given is bad, the whole award is bad also. *The Duke of Buccleugh v. The Metropolitan Board of Works* (L. Rep. 3 Ex. 306; L. Rep. 5 Ex. 221; Ex. Ch.); L. Rep. 5 H. of L. Cas. 418; 18 L. T. Rep. N. S. 906; 23 L. T. Rep. N. S. 255 (Ex. Ch.); 37 L. T. Rep. N. S. 1 (H. of L. Cas.), and the case of *The Dare Valley Railway Company* (L. Rep. 6 Eq. 429; 37 L. J. 719, Ch.) are conclusive as to this. It is important, therefore, to state with accuracy what it is which the umpire has done. He has described the acts of the defendants in respect to shoals; the removal from the river Ayre "of shoals formed therein by gravel soil and other materials, which from time to time had been brought down by tributaries of the said river, near the confluence therewith of the said tributaries." This is what the defendants did. Then he finds that the plaintiffs "sustained damage . . . by reason of, and consequential upon the execution by the commissioners (i.e., the defendants) of all the said works," including therein the removal of the shoals above-mentioned. He, however, complicates the question, it must be admitted, by immediately appending the following words: "There was no sufficient evidence before me to enable me to determine either one way or the other, whether the said works, exclusive of the removal of the said shoals and weir aforesaid, caused the farm, on the occurring of the said floodings, to be flooded to greater extents, or for longer periods of time, or to be more damaged than it otherwise would have been." The fair construction, however, of the umpire's language appears to us to be, that the removal of the shoals with other works, and as an appreciable ingredient in the whole result, did damage (we will here say it in the sense of harm or mischief) to the plaintiffs. We further think that the fair meaning of the umpire's description of the work as to the shoals is, that there was a dealing by the defendants with the bed of the stream, beyond that mere scouring which riparian proprietors would have a right to do, supposing, which we doubt, that what a riparian proprietor might do without liability to action could, as a matter of course, be done by the defendants without a liability. We understand the umpire also to describe the removal by the defendants of long standing accumulations, of which, although some portions may have been of recent accretion, the substance must be of great, though unascertained, age. Damage accruing from such acts is clearly, in our judgment, actionable damage. We acknowledge the authority of the cases quoted to us by the defendants' counsel, to the effect that cleansing and scouring of a river bed, so as to keep the stream in its accustomed course, and at its accustomed level, is not only permissible in, but obligatory upon, a riparian owner. This is the effect of the *dictum* of Lord Holt in *The King v. Wharton* (12 Mod. 510) of a passage in Rolfe's Abridgement, Nunsen, A., and of what is attributed to Lee, C.J., in *Brown v. Best* (1 Wil. 174), and we have no intention of questioning the law there laid down. But it is equally clear that a substantial interference with the bed of a stream so as to increase or diminish the flow of water to the detriment of other riparian owners is a thing actionable in itself, and that damage resulting therefrom is actionable damage. It was so held by Lord Thurlow in

Robinson v. Lord Byron (1 Brown's Ch. Cas. 588), quoted in Goddard on Easements 284, and by the House of Lords in *Bicket v. Morris* (L. Rep. Scotch App. 47; 14 L. T. Rep. N. S. 835), a case to which our attention was drawn with great minuteness by the plaintiffs' counsel. The words of the Airedale Drainage Act itself appear to contemplate such a substantial dealing with the bed of the river by the defendants, and we think that on the findings in the special case, their dealing must be taken to have been such a dealing in point of fact. We are, therefore, of opinion that even on the view of the language of the 45th section of the Airedale Drainage Act most favourable to the defendants, there has been no damage considered by the umpire in ascertaining the amount of compensation, except damage that is actionable. This, however, assumes that the award of the umpire is some evidence of the facts on which it is founded, and that the statements of the umpire, as to what entered into his consideration in ascertaining the amount of damage, are some evidence of the facts which he considered. Whether this is so or not is the only point which remains to be discussed. It is one point, because if the award of the amount of compensation for damage be *prima facie* evidence that the damage in respect of which the compensation was awarded was actionable, the findings of the umpire, which are in truth a mere explanation of his award, are *prima facie* evidence of the facts necessary to, or implied in the findings and of the award, is no evidence, neither are the findings. Now, the award is part of a proceeding under an Act of Parliament, in and by which the jurisdiction of the arbitrator is (for the purpose of this part of the discussion we must assume) confined to awarding compensation for actionable damage. In this respect it is strictly analogous to the proceedings taken before the under sheriff and a compensation jury, who can give compensation only for damage which is actionable. In such a case, if some claims made are in respect of damage, which is not the subject of compensation, it was said by Lord Cranworth in *The Caledonian Railway Company v. Ogilvy* (2 Macqueen, 229) that it is the duty of the sheriff or under-sheriff to point out to the jury which kind of damage is the subject of compensation and which is not. The award is good upon the face of it; the compensation is to be presumed to be according to the claim. (See Russell on Arbitrators, 433, 4th edit.) As to the umpire it is to be presumed, until the contrary appears, that he kept within his jurisdiction, and did not receive evidence of damage which was not the subject matter of compensation under the Act. As to the compensation the claim is made under the Act and for the compensation given by the Act, and it is to be presumed till the contrary appears that the compensation following the claim has only been given for damage within the Act under which it is claimed. In most of the decided cases the want of jurisdiction is apparent on the face of the awards set out in them. But in the case before us the claim is made, and the compensation is awarded for damages in general terms; and it must be presumed, until the contrary is shown, that the umpire did not make his award as to matters over which he had no jurisdiction. To hold the contrary, as we have been pressed to do, would lead to consequences of which the barest statement is very startling, and if the argument *ab inconvenienti* can

ever have a legitimate place in legal reasoning, it surely should have place here. In this case an eminent lawyer has ascertained the fact of damage necessary in order to arrive at the amount of compensation after the most careful and prolonged inquiry, on the examination of the most skilful men of science on each side, and at an expense of more than 2000*l*. It is not denied that this is not conclusive. However eminent the umpire or expensive the inquiry, it is admitted that the defendants, as they may plead, so may prove that the umpire has been mistaken as to the extent of his jurisdiction, and that his award is invalid. What is contended for on the part of the defendants is that the award and evidence of the umpire is not even *prima facie* evidence against them, and that the plaintiffs must, apart altogether from the award, prove in an action upon it what has been variously called a shilling's worth of actionable damage or a cause of action. But in such a case as this, that means, it is manifest, that they must prove their whole case over again, for almost the whole of the evidence was directed to making out, and almost the whole of the expense was incurred in establishing, the fact of injury, rather than the amount of compensation to be paid for it; and the expense and time consumed in proving a shilling's worth might be as much as that consumed in proving 20,000*l*. worth of actionable damage. Such a view of the law needs authority to support it. If authority could be found we should have deferred to it, whatever our own opinion might be, and have left our judgment to be set right, if wrong, upon appeal. But as far as we are aware there is no such authority; certainly none of the cases cited to us warrant any such conclusion. There is no doubt that it has been determined that the powers of the compensation jury (and therefore of the arbitrator or umpire) are limited to determining the fact of damage and its amount, leaving the question of right to be determined, if it is disputed, in an action on the judgment or award. This was held in the case of the *Queen v. London and North-Western Railway Company* (3 E. & B. 443); in which Sir John Coleridge elaborately reviews the earlier cases, both at law and in equity, and especially the conflicting decisions of Lord Cottenham in the *London and North-Western Railway Company v. Smith* (1 Mac. & G. 216; 19 L. J. 193, Ch.) and of Lord Truro in the *East and West India Docks v. Gatlke* (3 Mac. & G. 155; 20 L. J. 217, Ch.). But it is nowhere suggested, either in the judgment or in argument, that though the finding of the jury might be impeached in the action, it was no evidence, whether impeached or not. Indeed, the proceeding in that case to bring the inquiry up and quash it, would have been useless: if unquashed it was not even a step in proof in an action brought upon it. The case of *Brady v. Southampton Local Board* (4 E. & B. 1014; 24 L. J. 239, Q. B.) seems, though perhaps not directly in point, yet to lean strongly against the defendants. There had been an *ex parte* award against the Local Board. The Local Board admitted their liability if there had been damage, and the plaintiff's right to the land affected; but they denied that any actionable damage had been done, and unless it had been done, they contended that there was no dispute as to the amount of compensation, and that the award was without jurisdiction. The court held otherwise. They said that the only question at issue was the fact

of damage and the amount, and that the arbitrator had jurisdiction. But this must have meant that the award ascertained the fact of actionable damage, till it was impeached, and that it cast upon the Local Board a *prima facie* liability to pay the sum awarded. The cases of *Read v. Victoria Station, &c., Railway Co.* (1 H. & C. 826; 32 L. J. 167, Ex.); and *Barber v. Nottingham, &c., Railway Co.* (15 C. B., N. S., 726; 33 L. J. 193, C. P.; 9 L. T. Rep. N. S. 829), were both decided on demurrer, and established only that you may plead against the finding of a jury, or arbitrator, which is not here disputed. In the case of the *Duke of Buccleugh v. The Metropolitan Board of Works* questions of law arose. But so far as can be gathered from the report, the report and award of the arbitrator, in general terms and good upon the face of it, was taken as *prima facie* evidence that damage within the statute had been sustained. In *Beckett v. The Midland Railway Co.* (L. Rep. 3 C. P. 82; 17 L. T. Rep. N. S. 499; 37 L. J. 11, C. P.) other evidence besides the award seems to have been given. In that case, however, the award merely stated that a narrowing of a road had injuriously affected the plaintiffs' house, without going on to say whether the injury and depreciation was temporary or permanent, a permanent narrowing of a roadway being within the statute, whereas a temporary one is not. The last case which it is necessary to consider is *Chapman v. Monmouth Railway and Canal Company* (2 H. & N. 267; 27 L. J. 97, Ex.). This case is the only one in which, so far as I know, it has ever been suggested that an award of this sort was not evidence for a jury. In this case no doubt the point was taken. But there is no decision upon, or even allusion to, the point in the judgment of the court. At the trial of the case at Nisi Prius Mr. Justice Willes, as he expressly stated, intended deliberately to disregard and indeed overrule the decision of the Queen's Bench in the case of the *Queen v. London and North-Western Railway Company* (3 E. & B. 443), already referred to, and he held the finding of the jury conclusive upon the title as well as upon the fact and amount of damage, and refused to receive evidence to impeach it. The judgment of the Court of Exchequer is confined to this single point, and the rule was made absolute for a new trial on the short and single ground that the court held itself bound by the case which Willes, J., had proposed to overrule. This is the only case, so far as I am aware, in which the point now insisted on appears to have been taken. It cannot be said to have been at all favoured by the judgment. It appears to us, in the absence of authority to be untenable, and we are aware of no authority which gives it countenance. On the three important points, therefore, insisted on by the defendants we have come to a conclusion adverse to their contention—on the construction of the 45th section of the Airedale Drainage Act (a point perhaps not necessary to be decided), on the character of the works executed by the defendants, and on the quality of the damage resulting from them, and lastly on the effect of the award and findings of the umpire. For these reasons it follows that we are of opinion that this rule should be discharged.

AMPHLETT, B.—The first question which I think it will be convenient to consider in this case is whether the damage for which compensation can be claimed under the 45th clause of the Drainage

Act is confined to actionable damage. Now it could not be, and was not, in fact, denied on the part of the plaintiffs that by a long series of cases of which I need only mention the *Caledonian Railway Company v. Ogilvy* (2 Mac. 229), it is perfectly settled that the right to compensation under the 68th section of the Lands Clauses Act 1845 is limited to actionable damage. It is true that the language of the 68th section of the Lands Clauses Act, which speaks of lands "being injuriously affected," is slightly more favourable to the limited construction, but the courts have adopted the same construction in analogous cases where the language used was practically identical with that of the clause we are considering:—In *The New River Company v. Johnson* (2 E. & E. 435; 29 L. J. 93, M. C.) under the Waterworks Clauses Act (10 & 11 Vict. c. 17) where the words were "that in the exercise of the powers conferred by the Act the undertakers shall do as little damage as can be, and shall make full compensation to all parties interested for all damage sustained by them through the exercise of such powers;" and in *Hall v. The Mayor, &c. of Bristol* (L. Rep. 2 C. P. 322; 15 L. T. Rep. N. S. 572; 36 L. J. 110, C. P.) under the Public Health Act (11 & 12 Vict. c. 63) where the words were "that full compensation shall be made . . . to all persons sustaining any damage by reason of the exercise of any of the powers of this Act." I cannot but think, under these circumstances, that it would be very undesirable on light grounds to disturb this unanimity of decision upon a point constantly arising in practice, and which with the single example of Lord Westbury in *Ricket v. Metropolitan Railway Company* (16 L. T. Rep. N. S. 542, 547; L. Rep. 2 H. L. 176, 200), has been approved of on general grounds by almost all who have taken part in such decisions. But it was argued on the part of the plaintiffs that the Legislature must have used the word "damage" in a more extended sense in the 45th section, since otherwise that section would have given the owners and occupiers of the lands mentioned therein no further protection than they would be entitled to under the Lands Clauses Act. I think, however, that there are two answers to that argument. First, having regard to the decision in the *King v. The Directors of the Bristol Dock Company* (12 East, 429); and the language of Lords Cranworth and St. Leonards in the *Caledonian Railway Company v. Ogilvy* (sup.), I think it would be an arguable question (and that is sufficient for this purpose) whether persons who have rights in respect of a public road or a public river, the same in principle, but different in degree from other people, could claim compensation under the Lands Clauses Act for damage either to one or the other which was authorised by Act of Parliament; secondly, the compensation given by the 45th clause of the Drainage Act is quite different from that given by the Lands Clauses Act. In the latter case compensation is given once for all, whereas in the former case it is to be given from time to time, the reason, no doubt, for which was that as the only damage that could accrue to the lowerlands from the improved drainage of the upper would be at flood times it would be impossible to estimate the damage except when the floods happened. These reasons satisfactorily account for the introduction of the special clauses without supposing the Legislature intended to enlarge the subject matter of compensation. Indeed,

looking at the object of the Act, which was for the more effectual drainage of a large tract of country, which is expressly recited to be, as it manifestly was, for the public benefit, it is difficult to suppose that the Legislature intended that the commissioners in the execution of their duties should be hampered by claims for compensation in respect of acts which the riparian proprietors had a common law right to do with impunity, and if the Legislature had any such intention, it is strange that they should have used language which had already at that time acquired by judicial decision a more limited sense. In my judgment, therefore, the first point ought to be decided, if it should be necessary, in favour of defendants. Then arises a question how the amount of such actionable damage (if any) is to be ascertained. By the terms of the Act in case of dispute such amount is to be settled by arbitration as provided in the Lands Clauses Act, and it is now settled, after a great conflict of opinion among the judges, that the jurisdiction of the arbitrator, or in this case the umpire, is confined to settling the amount, and does not enable them to determine what is or is not actionable damage as distinguished from damage in fact. *The Queen v. The London and North Western Railway Company* (sup.), *Chapman v. The Monmouthshire Railway Company* (2 H. & N. 267; 27 L. J. 97, Ex.), *Bradley v. The Southampton Local Board of Health* (sup.), and numerous other cases are to be found in the reports, where the same point is either decided or recognised. It follows from these decisions that after the award it is competent to the defendants in an action to recover the amount awarded to deny that there was any actionable damage, and if they succeed in that issue the award will fall to the ground. So far I think there is at the present day no room for controversy, but then in the present case, since the plaintiffs produced no evidence but the award itself, the question arises whether the award, though *ex concessis* not conclusive, is not *prima facie* evidence of actionable damage. On the part of the defendants in this case it may be said that it would be very extraordinary to hold that the finding of the umpire in a matter in respect of which, according to the decision, he had no jurisdiction at all should, nevertheless, have the effect of changing the *onus probandi* from the plaintiffs to the defendants, which might in some cases, and probably in this, be of vital importance, and the remarks of Coleridge, J., at the end of his elaborate judgment in *The Queen v. The London and North Western Railway Company* (sup.), as to the inconvenience of even a preliminary and inconclusive inquiry when there is to be a second and conclusive trial, are well worth attending to. Those remarks, however, were made in a case where the damage was capable of being assessed on the assumption that the road alleged to be stopped was a public road. Without going into the question whether that assumption was correct in point of fact or not, it does not apply in a case like this, when it was absolutely necessary for the umpire to ascertain from what acts of the defendants the damage arose, and certainly it would be a most lamentable waste of time and money to prove that matter over again in the action. Upon the whole I am of opinion that these conflicting views may be best reconciled by holding, as I am disposed to do,

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that the award ought to be taken as *prima facie* evidence of the particular acts which give rise to the damage, but not any evidence at all on the question whether such damage was actionable or not, that being according to the decisions altogether beyond the jurisdiction of the umpire to determine. The only question then which remains is whether the finding of the umpire in respect of those acts enable the court to decide that the damage arising from them is all actionable; for if they do I think there was a case on the mere evidence of the award when put in which called upon the defendants for an answer. Now if the case had depended upon the first part of the award, before we came to the special case, I should have thought the court could not have so decided, because it merely finds that the damages assessed arose from the exercise of the powers of the Act, some of which extend to acts which might have been done by the landowners without making themselves liable to an action, and there would be nothing in the award itself to show that the damages attributable to the last mentioned acts were excluded. I think, however, that the latter part of the award ought not to be excluded altogether from consideration, and that we must read the award by the light of the facts subsequently stated in the special case. Now, it is there stated, sect. 6, that there were four distinct classes of works taken into consideration by the umpire: First, diversions of tributaries; second, new cuts; third, removal of shoals; fourth, removal of weir, and all these, excepting perhaps the removal of the shoals, of which I shall say a word presently, were clearly acts in respect of which damage would be actionable. Probably from not having seen the evidence, or knowing the way in which the case was shaped before the umpire, I find it very difficult to ascertain the exact meaning of the subsequent findings, but I think it must be taken to be this: The damage I have assessed has been occasioned by the four classes of works I have mentioned. I have ascertained that the removal of the weir made no substantial difference, and I am unable to ascertain whether the works, exclusive of the shoals or weir, would or would not have produced damage. This amounts, in my opinion, to a finding that the damage was caused by the conjoint result of three acts, and that the proportion due to each it was impossible to ascertain, and if that is so, the damage would be actionable, although that arising from one of these acts, if it could have been assessed separately, would not have been so. Entertaining this view of the construction of the award it is unnecessary to determine whether damage from the removal of the shoals alone would have been actionable. I will only say, therefore, that I think that question one of considerable difficulty, and on which very little authority can be found in the books, and I should be very reluctant to decide it without having before me all material circumstances both as to the formation and as to the removal of the shoals. For the above reasons, I think that it sufficiently appears from the award itself, that the damage assessed was actionable damage, and that consequently the rule ought to be discharged.

Rule discharged.

NOTE.—This decision has since been reversed: (*ante* p. 251; 35 L. T. Rep. N. S. 46. Ct. of App.)

Solicitors for the plaintiffs, *Field and Boscoe*, agents for *Taylor, Jeffery, and Co.*, of Bradford.

Solicitors for the defendants, *Phelps and Sidgwick*, agents for *Brown*, of Skipton.

EXCHEQUER DIVISION.

Reported by H. LEIGH and A. PAWSON, Esqrs., Barristers-at-Law.

Wednesday, May 24, 1876.

(Before BRAMWELL, CLEASBY, and HUDDLESTON, BB.)

BAKER (BART.) v. THE VESTRY OF ST. MARYLEBONE.

Damage to private property by public works—Raising level of streets—Obstruction of ancient lights—Property injuriously affected—Claim to compensation for—St. Marylebone (Local) Acts (35 Geo. 3, c. 73, s. 53; 57 Geo. 3, c. 29, s. 52)—Lands Clauses Consolidation Act 1845 (3 Vict. c. 18, ss. 6 to 15, and 16 to 68)—Metropolis Local Management Act 1855 (18 & 19 Vict. c. 120, ss. 98-150, 151, 152)—Incorporation of Lands Clauses Act in Metropolitan Act—Exclusion of compulsory clauses—Construction.

The defendants, as the vestry of St. Marylebone, were empowered by local Acts (35 Geo. 3, c. 73, and 57 Geo. 3, c. 29), to pave and repair, and to raise or lower the ground of the streets within their district, "without making compensation to owners of property thereby injured."

The Metropolis Local Management Act 1855 (18 & 19 Vict. c. 120), by sect. 98 empowers every vestry to pave and repair, and to raise or lower the ground or soil of the streets in their district as they think fit; and by sect. 150 they have power to purchase "any land or any right or easement in or over land," necessary for the formation or protection of any works authorised to be executed under the Act. By sects. 151 and 152 the Lands Clauses Act of 1845 (3 Vict. c. 18), except the compulsory purchase clauses, 16 to 68, which are expressly excluded, is incorporated; and by sect. 247 all Acts which are inconsistent with the Metropolitan Act are repealed.

Under the provisions of the said Acts, or one or more of them, the defendants raised and altered the road and pavement of a street in their district in a manner justified by the said Act, but thereby obstructed the ancient lights of and entrances to certain houses of the plaintiff, and "injuriously affected" the said houses.

Notice was given to the defendants under sect. 68 of the Lands Clauses Act to summon a jury to settle the amount of compensation, but the defendants refused to pay the compensation claimed, or to enter into any agreement, or to summon a jury.

Held by the court, Bramwell, Cleasby, and Huddleston, BB. (although doubting whether the Legislature intended that a public body should be enabled for the public benefit to do an injury to an individual without giving him compensation) that the works were done under the local Acts of Geo. 3, which were not repealed or superseded by the Metropolitan Local Management Act 1855; that, there having been no agreement to purchase, sects. 150, 151, and 152 of the Metropolitan Act did not apply; and that sect. 68 of the Lands Clauses Act being expressly excluded from the Metropolitan Act, the plaintiff had no claim under that section, and, therefore, the case was governed and con-

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cluded by *Ferrar v. The Commissioners of Sewers for London in the Exchequer Chamber* (21 L. T. Rep. N. S. 295), and the plaintiff was not entitled to compensation.

Per Bramwell, B.—Sect. 150 of the *Metropolis Local Management Act 1855*, means that the vestry may acquire an easement in or over land, and not that they may purchase an already existing easement belonging to somebody else.

Quare (per *Bramwell, B.*), whether sect. 68 of the *Lands Clauses Act of 1845* is limited to compulsory purchase.

THIS is an action brought for the recovery of 250*l.* for damages occasioned to certain houses and tenements of the plaintiff by the defendants under the circumstances hereinafter stated, and by consent and by judge's order, dated 2nd July 1875, according to the Common Law Procedure Act 1852, there has been stated for the opinion of the court, without any pleadings, the following:

SPECIAL CASE.

1. The plaintiff is tenant for life of certain houses, known as Christ Church-buildings, situated in Little James-street, Lisson-grove, Marylebone, and which are now occupied by the Marylebone Association for Improving the Dwellings of the Industrial Classes, under a lease of which there are seventeen years still to run. The said houses have in them ancient lights overlooking Little James-street, Lisson-grove.

2. The defendants are the Vestry of St. Marylebone, in the county of Middlesex.

3. By the 53rd section of 35 Geo. 3, c. 73, being an Act among other purposes for paving, repairing, cleansing, and lighting the parish of St. Marylebone, it was enacted that it shall and may be lawful to and for the vestrymen of the said parish to pave and keep in repair, or to cause to be paved and kept in repair, from time to time, all or any of the streets within the limit of the Act, and likewise to cause the ground thereof to be raised or lowered in such places, manner, and form, as they shall judge best.

4. By the 52nd section of 57 Geo. 3, c. 29 (local), being an Act for better paving, and improving, and regulating the streets of the metropolis, and for other purposes, it was enacted that it shall and may be lawful to and for the commissioners or trustees or other persons having the control of the pavements of the streets, in any parochial or other district within the jurisdiction of the said Act, from time to time to pave and keep in repair, or cause to be paved and kept in repair, all or any part or parts of the carriage ways or footways of all or any of the streets or public places in their respective parochial or other districts within the jurisdiction of the Act, and that they or their respective surveyor or surveyors of the pavements, or any inspectors or other officers by them appointed for the time being, shall and may from time to time cause the ground of any streets or public places within their respective parochial or other districts, to be raised or lowered in such manner as they or he should think necessary.

5. The Vestry of Saint Marylebone are the persons having control of the pavement of Little James-street, Lisson-grove, in the parish of Saint Marylebone, within the meaning of the said Act.

6. By the 98th section of 18 & 19 Vict. c. 120, being an Act for the better local management of the metropolis, it is enacted that it shall be lawful

for every vestry and district board from time to time to cause all or any of the streets within their parish or district, or any part thereof respectively to be paved or repaired when and as often and in such form and manner and with such materials as such vestry or board think fit, and to cause the ground or soil thereof to be raised or lowered, and the course of the channels running in into or through the same to be turned or altered in such a manner as they think proper.

7. The defendants under the provisions of the said Acts, or one or more of them, have raised and altered the road and pavement of the said Little James-street, which is a street within the limits and jurisdiction of the said Act. Such raising and alteration of the said road and pavement was done in a manner justified by the said Act.

8. In consequence of the said works in the last paragraph mentioned, the ground floor of Christ Church-buildings is converted into an underground floor more than 8ft. below the said street, and the light and air of the said ground floor of the said buildings are seriously affected. The plaintiff alleges that the ground floor is rendered unfit for human habitation, but this the defendants deny. An area wall has been built within 3ft. of the windows of the ground floor of the said buildings, and the access to the said buildings has been blocked up and a new door and other alterations have become necessary by reason of the above-mentioned works of the vestry. A plan of such works is annexed hereto and forms part of this case.

9. In consequence of the said works the said buildings together with the said ancient lights in the said ground floor have been injuriously affected, and it has been agreed that if the defendants are held liable they shall pay for such injury the sum of 250*l.*

10. By sect. 151 of the *Metropolis Local Management Act 1855* (18 & 19 Vict. c. 120), it is enacted as follows: "For the purpose of enabling the said metropolitan board and every district board and vestry to obtain any land or right or easement in or over any land which they respectively may require for the purposes of this Act, The Lands Clauses Consolidation Act 1845, except the provision of the Act with respect to the recovery of forfeitures, penalties, and costs, shall, subject to the provisions herein contained, be incorporated with this Act, and the provisions of the said Act so incorporated with this Act, which would be applicable in the case of a purchase of any land, shall be applicable in the case of the purchase of a right or easement in or over any land;" and by sect. 152 of the said *Metropolis Local Management Act 1855* (18 & 19 Vict. c. 120), it is enacted "That the provisions of the said Lands Clauses Consolidation Act with respect to the purchase and taking of lands otherwise than by agreement, shall not be incorporated with this Act, save for enabling the Metropolitan Board of Works to take land or any right or easement in or over land for the purpose of making any sewers or works for preventing the sewage or any part of the sewage within the metropolis from passing into the Thames, in or near the metropolis, or otherwise, for the purpose of the sewerage or drainage of the metropolis; provided also, that no land or right or easement, in or over land, for the purposes aforesaid shall be taken compulsorily by the said board without the

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previous consent in writing of one of Her Majesty's principal Secretaries of State."

No such consent has been obtained.

11. For the purposes of this case, but not otherwise, it is to be taken that the plaintiff gave notice to the defendants, under the 68th section of the Lands Clauses Act, to summon a jury to settle the amount of compensation payable by the defendants to the plaintiff by reason of his premises having been injuriously affected as aforesaid. And that the defendants refused to pay the compensation so claimed, or to enter into a written agreement for the purpose, or to summon a jury within twenty-one days after the receipt of such notice.

12. For the purposes of this case, but not otherwise, it is to be taken that all notices required by the Lands Clauses Act have been given.

13. The said Acts of Parliament are to be taken as part of this special case.

14. The court is to have power to draw all inferences of fact.

The question for the opinion of the court is whether, under the above-mentioned circumstances, the plaintiff is entitled to recover from the defendants the above-mentioned sum of 250*l.*, or any part thereof.

If the court shall be of opinion in the affirmative, then judgment shall be entered up for the plaintiff for 250*l.*, or such other sum as the court shall name, with costs of suit.

If the court shall be of opinion in the negative, then judgment, with costs of defence, shall be entered up for the defendants.

The plaintiff's points for argument.—First, that the Lands Clauses Consolidation Act is incorporated in the special Act. Sect. 68 of the Lands Clauses Act confers the right to compensation to the claimant. Secondly, that the damage sustained by the claimant is the subject of compensation. Thirdly, that inasmuch as the right of action has been taken away by statute, the claimant is entitled to compensation. Fourthly, that there is nothing in the special Act to destroy the claimant's right to compensation by reason of the works carried out under the Metropolis Local Management Act.

Points of argument for the defendants.—First, that by the Acts of Parliament mentioned in the special case the defendants are expressly authorised to alter the level of the streets within their district, and to do the matters complained of in the special case. Secondly, that the said Acts of Parliament do not impose on the defendants the obligation of making compensation to the owners of property injuriously affected by the doing of the matters complained of. Thirdly, that it is expressly provided by the 152nd section of the Metropolis Local Management Act 1855 (18 & 19 Vict. c. 20), that the Lands Clauses Consolidation Act shall not be incorporated with the said Act except for sewerage or drainage purposes. Fourthly, that the matters complained of were not done by the defendants for such excepted purposes. Fifthly, that the clause about obtaining the previous consent of one of Her Majesty's Secretaries of State only applies to land or rights or easements in or over land taken for such purposes, and is not applicable to the present case.

A. L. Smith (with him was Joyce) for the plaintiff.—The decision of the Court of Exchequer Chamber reversing the decision of this court in the case of *Ferrar v. The Commissioners of Sewers*

for London (21 L. T. Rep. N. S. 295; L. Rep. 4 Ex.; 38 L. J. 202, Ex.) is, I must admit, conclusive upon the present question against the plaintiff, unless the two cases can be distinguished, which it is submitted they can be. In *Ferrar's* case it was decided that when the Lands Clauses Act of 1845 (8 & 9 Vict. c. 18) was incorporated in the special Act under which the defendants there acted, but with the express exception of its compulsory clauses, the plaintiff, whose house was blocked up by the road being raised above its previous level, was not entitled to any compensation, and had no remedy either by action of trespass or for recovery of money damages. [BRAMWELL, B.—Do you mean that you are entitled to judgment if you would have been entitled to compensation under the Lands Clauses Act?] Certainly, if the defendants have done wrong. [BRAMWELL, B.—If they have a right to stop up your lights on making compensation under the Act, that would not be doing wrong.] Not if they paid us. [Sir H. James, Q.C.—It may save time to state the issue the defendants seek to raise, viz., that under their local Acts they were justified in doing what they have done, and that no compensation has been given. In the first place, sect. 68 of the Lands Clauses Act is not incorporated in any Act under which the defendants did their works; and if it were, still what they have done is not an "injuriously affecting." I admit that if we have committed any tort, or if the court think we are bound by sect. 68 to give compensation, or, in other words, if we come within that section, then the plaintiff is entitled to the sum which he claims.] It may be taken then as admitted by the defendants, that if the plaintiff could maintain trespass or a claim for compensation under the Lands Clauses Act, he is entitled to judgment. Now in *Ferrar's* case (*ubi sup.*) a private Act enabled the commissioners to raise the street, and that private Act incorporated the Lands Clauses Act, and made its provisions applicable to the special Act, "except so far as the same provisions were inconsistent therewith or were therein declared not to extend thereto;" and the Exchequer Chamber held that, inasmuch as sect. 68, and what Lord Cairns called that "faggot of clauses" comprised under the heading, "with respect to the purchasing and taking of land otherwise than by agreement," were excluded, therefore there was no right to compensation to one whose land had been "injuriously affected." Were the Metropolitan Act here the same as the special Act in that case I could not distinguish the two cases. But the present case is governed by, and must be decided by, the true construction of the Metropolitan Act (18 & 19 Vict. c. 120), sects. 98 and 247 of which repealed, or at all events superseded, the two Acts of Geo. 3 stated in the case. These works, therefore, were executed under the Metropolitan Act. By sect. 96 of that Act the vestries are made surveyors of highways, and by sect. 98 power is given to them to repair and raise or lower the level of the roads, and it is that section probably on which the defendants rely as entitling them to destroy the plaintiff's ancient lights and pay him nothing for so doing. Then comes sect. 150, by which the vestry is authorised to purchase easements. [BRAMWELL, B.—Does not that section mean that they may acquire an easement, and not that they may purchase an already existing easement belonging to somebody else?] The plaintiffs here

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had an easement of ancient lights over this street or road ("an easement in or over land," in the words of sect. 151) and that easement the defendants required for the purpose of their works. Under sect. 150 (a) they had power to purchase such an easement, and it must be assumed that they agreed to do so under that power, or they would have been trespassers. Then, by sects. 151 and 152, the whole of the Lands Clauses Act, except only the compulsory purchase clauses, is incorporated, and therefore the plaintiff has the benefit of clauses 6 to 15 of that Act relating to the purchase of land by agreement, for, by sect. 151, the purchase or taking of an easement is expressly stated to be the same thing as the purchase or taking of land. In *Ferrar's* case there was no Metropolitan Act, nor any sections such as sects. 150 and 151 here, but it turned on their special Act entirely. The Legislature never contemplated or intended that vestries should have the power to deprive persons of these valuable properties and rights without compensation. On the contrary, they have, by sects. 150 and 151, and the incorporation of the purchase by agreement clauses of the Lands Clauses Act, expressly provided for their acquiring the property and making due compensation.

Sir H. James, Q.C. (with him were *Crompton* and *Swan*) for the defendants *contra*, was not heard.

BRAMWELL, B.—I am of opinion that our judgment in this case must be for the defendants. Mr. Smith admits, and very properly, and indeed it is so, that the case is concluded by the case which he has cited of *Ferrar v. The Commissioners of Sewers for London* (*ubi sup.*) unless he is able to distinguish it in the way in which he proposed and endeavoured to distinguish it. Now, as I understand his argument, the way in which he proposed to distinguish that case is this, that sect. 98 of the Metropolis Management Act repeals or supersedes the former local Acts of Parliament, and that the later Act is now the governing law. I should myself say that if there had been found in it such words as these: "They may raise or alter the road, or level the road, making compensation," then, no doubt, that would be a repeal of the former Act of Parliament, because it would be a different enactment, that is to say, if the local Act meant that you might do a man a damage without compensating him for it, and the Metropolis Management Act said that you must compensate him if you did it, that would be a repeal of the former local Act, because the first would be an absolute right, the other would be a right with an accompaniment. But sect. 98 contains no such express words. But then Mr. Smith says: "If you look at sects. 150, 151, and 152, which must be coupled with sect. 98, you will there find such a qualification as I have stated." I cannot find that; and I cannot find it for many reasons. One is, that I think the 150th section has a different meaning from that for which Mr. Smith contends. It says: "It shall be lawful for

the Metropolitan Board of Works or any district board," and so forth, "to purchase or take on lease, &c., any land or any right or easement in or over any land." And it is argued that that extends not merely to the acquisition of an easement by them, but to the purchase by them of an easement which somebody else possesses. I think I appreciate Mr. Smith's argument, but I do not agree with him. I think it means that they may either take land or acquire an easement over land, and not that they may purchase an easement. But, supposing it were so, another difficulty arises, namely, that in this case they have not purchased it. There has been no agreement of any sort or kind, and the easement of the plaintiff is not absolutely given; it is only lessened; he has it to some extent, though not so fully as he enjoyed it before. It seems to me, therefore, that sect. 150 does not apply to the facts of this case. But then, if it did, there is another difficulty, and that is, how is the compensation to be got? Not by the 68th section of the Lands Clauses Act, because Mr. Smith admits that it has been held that that section is not included in this particular Act, inasmuch as that section applies to compulsory purchase, and not to purchase by agreement. Then Mr. Smith says: "Be that as it may, I rely upon this, that there was an agreement here." But, so far from that, there is no agreement, or shadow of an agreement, nor, indeed, any statement of any agreement, and the only way in which Mr. Smith can suggest that there was an agreement, is by saying that they should have taken the plaintiff's easement by agreement, that they have taken it (which is not true, by-the-by), and therefore that they must have agreed to take it. It is an ingenious argument, but it fails the moment that it is examined. It seems to me, therefore, that we must hold the defendants to have the same right now under the Metropolis Local Management Act as they had under the former Acts to raise or lower roads, and that, if they formerly had power to damage a man's property without making him any compensation, they have it still. But, for my own part, and speaking with great respect for anybody who has so decided, I cannot help thinking that it is, as a certain conclusion was called yesterday in the Court of Appeal, "a revolting one." It seems to me to be really outrageous that 5l. worth of property cannot be taken without a man's consent, but that 5000l. worth of damage may be done to his land by its being "injuriously affected" by the works done under the authority of the Act of Parliament. I have, with all respect for the authorities who so decided, the greatest misgivings upon the subject. It seems that the defendants might almost as well say "We were raising the road, which we had a perfect right to do, and we saw you, the plaintiff, walking by, and although some of the stones fell upon you and broke your limbs or fractured your skull, yet we had authority to inflict that injury upon you under this Act of Parliament without making you any compensation." A perfectly rational meaning may, I think be given to this Act of Parliament, though it is going out of one's way to do so, and that is to say, "As far as roads are concerned, you (the defendants) may alter them or raise them or lower them, but of course, as with anything else, you must not do any damage to anybody in so doing." However, that is concluded and past hope in this

(a) Sect. 150 of the Metropolis Local Management Act (18 & 19 Vict. c. 120) enacts that "it shall be lawful for the Metropolitan Board of Works and every District Board and Vestry, to purchase, or to take on lease for such term as they may think fit, any land or any right or easement in or over land which they may deem necessary or expedient for the formation or protection of any works which they are authorised to execute under this Act."

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court, and also, as I understand, in a Court of Appeal. Mr. Smith has not even made the point, but I cannot help suggesting that there must be some doubt upon it. Another matter upon which I should like to reserve my judgment is whether sect. 68 of the Lands Clauses Act is limited to compulsory purchase. That I say nothing about at present; only if it should go to the ultimate court of appeal there would be time and opportunity to look further into the point and give it greater consideration. Meanwhile, our judgment must be for the defendants.

CLEASBY, B.—I am of the same opinion, and upon the statement of facts and the admitted law in this case, I cannot help coming to the conclusion, disagreeable as it is—I will not use any other expression—that the plaintiff is without redress. I should certainly have thought that the earlier Acts and the late Act did not contemplate such an act as has been done in this case, namely, an act which takes away the property of an individual without affording him any compensation. I can easily understand, as my brother Bramwell says, that so far as regards any interference with a public highway the defendants are not to commit a nuisance, or to place themselves in a wrong position in altering the level of the highway by raising or lowering it, although they have a right to alter it. I should have thought if the matter could have been brought before us free from the difficulties which the statement of the facts and the admission of the law creates, that this was a matter not to be answered by those Acts of Parliament at all. The case states that “the raising and alteration of the said road and pavement was done in a manner justified by the said Act;” that is to say, it is one of those things which the defendants are justified in doing to any extent if only it comes within the Act of Parliament. As regards the other question, the statutory authority under which the works in question were executed being admitted, it really is plain that the result of the legislation which has taken place upon that subject is, that in respect of injuries inflicted upon the owner of property by reason of a right of easement being taken away, as in the present case, there is no claim given by way of action and none by way of compensation. If there had been some agreement made between the parties here before the doing of the alterations or repairs which damaged his property, the plaintiff would have been entitled to have had the matter arranged and settled in the manner provided for by the earlier clauses of the Lands Clauses Act which have reference to the acquisition by public bodies of property by agreement. But, as the board or vestry here have chosen to do the act compulsorily under the powers vested in them by statute, the effect of the decision in *Ferrar's case* (*ubi sup.*), is that the plaintiff, the injured landowner, has no mode of getting compensation for the injury which he has sustained.

HUDDESTON, B.—I am of the same opinion, and I regret very much that some means have not been pointed out to us by which the plaintiff might have been held to be entitled to compensation. I cannot suppose that it was contemplated by the Legislature that any board or other public body would be enabled, for the benefit of the public, to do what seems to have been a very serious injury to the plaintiff, without giving him compensation. Now, if this act was done, as it

is alleged to have been done, under the Metropolitan Local Management Act, and if sect. 68 of the Lands Clauses Act could have been held to have been incorporated in that Act, then justice would have been done; because, the road being raised and the plaintiff's property “injuriously affected,” he could have claimed and would have obtained compensation under sect. 68; and really that does seem to be the reasonable construction. It has been said that it might be very well in the time of George III. to give power to a local authority to raise a road without affording compensation, but it certainly is not within the ordinary intention of Acts of Parliament of the present day that a public body should do an injury to a man without affording him some means of obtaining compensation for such injury. However, Mr. Smith admitted, on the part of the plaintiff, that he is concluded by the authority of the case in the Exchequer Chamber which has been referred to, and that he cannot successfully contend, after that decision, that sect. 68 does not come within the compulsory clauses which are excluded from the Metropolitan Local Management Act. This case, therefore, is entirely within that decision, except so far as it can be distinguished by introducing the power, under sect. 150 of the Metropolitan Act, to purchase by agreement. Under that the defendants might have had a power, had they chosen to exercise it, of purchasing this right of which they have deprived the plaintiff, and if they had done so then the Metropolitan Act points out in sects. 151 and 152, the means by which it might have been done, that is to say, the sections of the Lands Clauses Act, which relate to purchase by agreement would apply, and the compulsory clauses would be excluded, and so the purchase by agreement would be effected, and compensation for any damage thereby done to the plaintiff be provided for. But in fact there has been no agreement here at all. The defendants here have chosen to take it, and to say, “We will not make any agreement.” Therefore those clauses do not apply, and that throws us back upon the state of things which is governed by the case of *Ferrar v. The Commissioners of Sewers for London* (*ubi sup.*). The result is, that, in obedience to the decision of the court of error in that case, we must hold that the defendants are entitled to our judgment. I can only say that I deeply regret that I am obliged to come to such a conclusion, and I fully agree with the strong expression, which seems to be of very recent introduction, that this decision is somewhat of “a revolting” character.

Judgment for the defendants.

Solicitors for the plaintiff, *Gregory, Rowcliffes and Rawle.*

Solicitors for the defendants, *Clarkson, Son, and Greenwell.*

Jan. 28 and 29, 1876.

(Before KELLY, C.B. and AMPHLETT and HUDDLESTON, BB.)

THE IMPERIAL FIRE INSURANCE COMPANY (apps.) v. WILSON (resp.).

Income tax—Fire insurance company—Assessment of to the law—Return of profits—Unearned premiums—Claim for deduction in respect of—Mode of return and assessment.

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In making a return of their profits for assessment to income tax under Schedule D of the Income Tax Act (5 & 6 Vict. c. 35), a fire insurance company is not permitted by the Act to credit themselves with, or to claim a deduction for, a portion, calculated by them at 33 per cent., or one-third of the amount of premiums received during the given year, as the unearned or unexhausted portion of such premiums, although in respect of such portion the company remain liable to losses which may occur in the ensuing year. The fair and proper mode of ascertaining the amount of net profits for the purposes of the Act (it being impossible to ascertain it with such strictly mathematical accuracy as to do perfect and absolute justice) is to take on the one side the whole receipts and on the other the whole expenditure and disbursements for the given year, the balance remaining being, for the time at least, net profits on which the tax should be assessed. This being done year by year, there is an absolute balancing of accounts; and if any wrong be done by losses afterwards occurring in respect of premiums on which, as profits, income tax has been assessed and paid, that will be taken into consideration in the ensuing year.

This is a case stated for the opinion of the court, under Part 3 of the Act 37 & 38 Vict. c. 16, as to income tax, schedule D, as follows:

The directors of the Imperial Fire Insurance Company, of No. 1, Old Broad-street, in the City of London, gave notice of appeal to the special commissioners, through their solicitors, by letter dated the 3rd Dec. 1874, against an assessment of 67,927l., made on them by the Commissioners for General Purposes, for the year ending 5th April 1875. The special commissioners issued their precept requiring statements of accounts for the three years preceding the yearly assessment, and in reply thereto a statement was sent in of which a copy (marked A) is annexed.

The appeal was heard at the office of the Special Commissioners of Income Tax, Somerset House, on the 12th Feb. 1875, when Mr. Cozens Smith (general manager), Mr. Johnson (clerk in the accountants' office), and Mr. Oliver, solicitor, attended on behalf of the Imperial Fire Insurance Company. Mr. W. Wilson, the surveyor of taxes for the district (the respondent), also attended on behalf of the Crown. Mr. Oliver, the company's solicitor, was informed that he could take no part in the proceedings, but that there was no objection to his remaining in the room.

The company originally returned a loss, or rather put in a statement instead of a return, dated the 19th Dec. 1874, showing a deficit of 45,559l.; but afterwards they consented to pay on 42,340l. The books of the company were produced by Mr. Johnson, and showed that the accounts are made up to the 3rd Dec. in each year, and that no notice is taken therein of unearned premiums. In other respects the figures in the statement corresponded with the books, and showed an average of profit of about 67,000l. The commissioners would not allow the introduction of the unearned premiums, as they did not appear in the books, and as this was the first year in which they were taken into account by the company in making their return for income tax, the commissioners confirmed the assessment on 67,927l.

Mr. Smith, the company's manager, being dissatisfied with the determination of the special

commissioners declared his dissatisfaction, and duly required the commissioners to state and sign a case for the opinion of the Court of Exchequer, under the provisions of the Act of 37 Vict. c. 16, which the commissioners accordingly did.

The following is a copy of the account "A" referred to in the case:

STATEMENT OF PROFIT AND LOSS FOR THE YEARS 1871, 1872, AND 1873.

Income, 1871.	£	s.	d.	£	s.	d.
Premiums	609,184	4	10			
Ditto unearned in 1870	150,808	0	0			
				760,992	4	10
Interest on investments, &c.				39,884	13	9
Balance				656	14	2
				£801,583	14	9

Expenditure, 1871.	£	s.	d.	£	s.	d.
Losses				845,768	0	10
Expenses				194,785	13	11
Dividends to proprietors				60,000	0	0
Unearned premiums (33 per cent.)				210,080	0	0
				£801,583	14	9

Income, 1872.	£	s.	d.	£	s.	d.
Premiums	718,864	14	2			
Ditto unearned in 1871	201,030	0	0			
				919,878	14	2
Interest on investments, &c.				44,597	3	2
Balance				41,783	15	1
				1,006,257	12	5

Expenditure, 1872.	£	s.	d.	£	s.	d.
Losses				472,342	4	9
Expenses				236,696	7	8
Dividends to proprietors				60,000	0	0
Unearned premiums (33 per cent.)				237,219	0	0
				£1,006,257	12	5

Income, 1873.	£	s.	d.	£	s.	d.
Premiums	683,538	10	5			
Ditto unearned in 1872	237,219	0	0			
				919,745	10	5
Interest on investments, &c.				45,793	17	8
				£965,539	8	1

Expenditure, 1873.	£	s.	d.	£	s.	d.
Losses				875,335	2	6
Expenses				24,097	7	1
Dividends to proprietors				60,000	0	0
Unearned premiums (33 per cent.)				225,233	0	0
Balance				88,873	18	6
				£965,539	8	1

The company is assessed for the year 1874 on the average profits of the above three years at	55,973	1	4
Interest on investments 1873 on which tax has not been paid	11,954	18	4
	£67,927	19	8

The company contended it should be—
Average profits £30,385 17 6
Interest on investments 11,954 18 4

42,340 15 10

Imperial Fire Insurance Company,
1, Old Broad-street, London.(Signed) E. COZENS SMITH,
General Manager.

A. L. Smith (with whom was John, Q.C.), for the appellant company.—The company are entitled to credit themselves in their return to the income tax, or to claim a deduction for a certain portion, calculated by them at 33 per cent. of the total amount of premiums received

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by them in any given year, as the unearned portion of such premiums. Suppose, for instance, a fire company insure 100 people in a given year, there would be 100 premiums received; but inasmuch as the policies are dated and issued, and the premiums on them paid at different times and in different months during the year, the whole of those premiums would not be earned in that year. If all the premiums were paid on the 1st Jan. in any one year, then all the policies would have expired, and all the premiums have been earned on the 31st Dec. of that year; but assuming one premium to be paid in March, another in June, and another in September, and so on, then the whole of these premiums would not be earned till the subsequent months of March, June, and September respectively; and inasmuch as the company's books are made up in December every year, there would then remain a considerable portion of unearned premiums in respect of which the company would be liable to risks and losses during the subsequent year. This proportion is calculated on a fair average at 33 per cent. of the whole year's premiums. [KELLY, C.B.—How do you arrive at the proportion of 33 per cent.? The case does not state anything about that.] The case does not, but we have an affidavit of the manager, showing beyond doubt that that is the true average of the unearned premiums in any one year in insurance offices, and though I cannot refer to it, I may state the result as a matter of fact. True, the office has received all these premiums in the year, but they have not, in the words of the section, earned them, because throughout the whole of the next year they are liable to be called on to pay them back in case of losses occurring on the policies in respect of which they were issued; one-third, therefore, of the premiums received in the year is still unexhausted, and liable to losses which may occur in the succeeding year. A fair result cannot be arrived at by the mode adopted by the commissioners of taking the whole receipts of the year, and setting off the losses and expenses of that year, and assessing the company on the balance. The fair and just mode would be to take, as the appellants proposed to do, the whole receipts of one year, and then to deduct 33 per cent. therefrom, and carry it to credit next year, and so go on for three years. The unearned premiums should be brought into the account on both sides, and as the company debit themselves with the unearned premiums of, say, 1872, they ought not to be debited with the unearned premiums of 1873. Taking a fair average of a third in this last year, 1873, the assessable amount, instead of 67,000*l.*, is only 42,000*l.* (He referred to, and relied upon, the rules appended to sect. 100 of the Act 5 & 6 Vict. c. 35, schedule D, case 1, rules 1, 3, 4.) The company have not made a gain of 600,000*l.* on the 31st Dec. 1874, inasmuch as throughout 1875 they are under liabilities with respect to one-third of the amount. [HUDDLESTON, B.—Suppose an agister of cattle takes them at 5*l.* a head per month, payable for the year in advance, if one is brought at the end of Dec., and he is paid 60*l.* in respect of it, he carries that into his account, because it is what he receives; but inasmuch as he has to give the animal twelve months' food next year, he debits himself with 55*l.* and credits himself with 5*l.* only; that is this case.]

Gorst, Q.C. (with whom were the *Attorney-*

General (Sir J. Holker, Q.C.), the *Solicitor-General* (Sir H. Giffard, Q.C.), and *Pinder*), for the Crown, *contra*.—No doubt my friend's suggestion is an ingenious one for improving the method of keeping insurance companies' accounts, but it has been made merely for the purpose of reducing the amount of duty payable in this particular case; and the answer to it is that the company do not keep their books in that way themselves. For the purpose of ascertaining the dividend divisible amongst their shareholders, they take no account of these so-called "unearned premiums or profits," and therefore, if they leave them out of consideration in calculating the amount of profits divisible amongst their shareholders, it is not unreasonable to require them to be left out of consideration in ascertaining the amount of income tax payable by the company. As to the phrase "unearned premiums," the premium is earned the moment it is paid. It becomes an asset of the company, and cannot be received back from them. [AMPHLETT, B.—Has a servant who is paid a year's wages in advance earned his wages before he has served a year?] It is submitted that that is not a parallel case. This is not a case of service, nor is it like the agistment of cattle put by Huddleston, B.; but a case in which, in consideration of the company contracting to pay a very large sum upon a contingent event, a very small sum is paid in advance; and the loss, if it occur, is not paid out of the premiums, but out of the capital of the company. The Crown contend that there should be no deduction, except that which they have already allowed for actual losses and expenses of management. All left after these deductions is the net gain of the year. The tax is not and cannot be calculated upon an exact and scientific ascertainment of the profit of each year, but, according to the statute, upon a rough average of three years, the Crown having a right to a return of the gross actual receipts in those three years, and the company being entitled to treat as losses every expense actually incurred upon an average of three years. The mode now suggested is not a more strict and scientific mode of ascertaining the profit than that prescribed by the Act and pursued by the commissioners. The strictly scientific and accurate method would be to take the amount of every single contract during the year, putting on one side the premiums received in respect of those contracts, and on the other side the payments made in respect of losses which are the subject matter of them. So also the expenses of the management should be strictly confined to the given year. As a matter of fact, until every single contract entered into in any one year has come to an end, it is impossible to say whether the year's transactions result in a profit or a loss. The company now seek to apply that strict method to one item of the account only, viz., the premiums, but they have no right to include losses incurred in respect of contracts made in some other year. If premiums are to be dealt with in a particular way on one side of the account, losses should be dealt with in the same way on the other side. [HUDDLESTON, B.—If they debited themselves with the gross receipts and credited themselves with the expenses, and then with a fair proportion of the premiums applicable to the risks in the ensuing year, would not that be a fair way of getting at it?] I admit that that is a fairer principle and way of doing it, but

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here they have fixed on a lump sum which they choose to take at one-third. Their books, by which they are bound, show 67,927*l.* to be the right sum. He referred to 5 & 6 Vict. c. 35, sect. 100, schd. D, rule 1, par. 3; case 1, rule 1, sect. 133.

A. L. Smith in reply.

Cur. adv. vult.

Jan. 29.—KELLY, C.B.—It is with some reluctance that I feel that we ought to give judgment in this case in favour of the Crown. I say with reluctance, because it is impossible not to see that perfect justice cannot be done by giving our judgment for the Crown; and, on the other hand, it is not to be forgotten that the scheme or mode of making out and settling the accounts suggested by the insurance company seems substantially, though it is not really, unobjectionable. Perhaps it is the most reasonable mode that could be determined on in most cases; but it really is not according to law. There is nothing in the Income Tax Acts which enables the parties in such a case, the Crown on the one side and the insurance company on the other, to determine with certainty what is the amount or value of the risk which continues after the end of the year, while a number of policies upon which a year's premiums have been paid are unexhausted, and where there may or may not be, upon one, or two, or more, or all of them, losses to a large amount, or to a small amount, or no losses at all. Therefore, the company, in the mode suggested by them, are obliged to resort to a speculative mode of ascertaining the probable amount of the risk which continues; but I see no warrant in the Income Tax Acts, nor, indeed, in the principle of the law, which will enable this to be done. Under these circumstances, therefore, it seems to me that, unless we revert to the 133rd and 134th sections of the Act which have been referred to, but which do not apply in the present instance, the case stands thus: The only mode in which one can really say what is net profit is by taking on the one side the whole receipts, and on the other side the actual expenditure or disbursements for the given year, and all that remains is, at least for the time, profit; and, therefore, taking the sum of 682,000*l.* and odd as having been paid to and received by the company in the year 1873, and, taking, on the other hand, losses during that year to the amount of 275,000*l.* and odd, expenses to the amount of 221,000*l.* and odd, and some further disbursements which it is admitted should be allowed, and which reduces the sum on the profit side to 50,000*l.*, their profit for the year 1873 is 50,000*l.*; and if everything were to stop at once, and if nothing further were done by the company, 50,000*l.* would be the amount of their profits. It is open to this observation, however, and that is why this mode does not do, and I do not know any mode which can do, perfect justice; and it is this, that the company remain under the liability of paying the amount of any losses in respect of these policies upon which they have received the 600,000*l.* premiums, which may occur in the course of the ensuing year; and if they do occur, it is quite clear that the amount of the profits upon which the income tax has been assessed and paid will be thereby diminished. But there is a provision for that in the Act. If they leave off business the 134th section applies, and then a calculation is made in which perfect justice upon the figures is done. If, upon the other hand, they continue their business, then at

the end of the year 1874 they again take the amount of premiums which they have received on the one side and they take the receipts and any other sums of money which may be properly set off against the amounts received, and they take the amount of the losses against which the 600,000*l.* and odd has been received in the year before, so that year by year, as they go on, there is an absolute balancing of accounts, and it is only when the last year comes—if a last year does come—when the company are about to cease carrying on their business, that, although they will have paid the income tax upon the same sum of 600,000*l.* and odd of premiums, they may leave off business within a month, but are liable to make good any loss which may happen upon the policies in respect of which this 600,000*l.* and odd has been paid. But that, as I have before said, can only happen in the last year of the business being carried on; and if that should happen, then, by the 134th section, there is a provision for the fact being ascertained and the matter being made clear in some way or the other, and a deduction if necessary being made. Looking, therefore, at the very nature of the case, and to the absolute impossibility of doing perfect justice, because, even if we were to take it upon an estimate of an actuary, which might be fair enough, if we take into account the number of policies and the amount of premiums paid upon them in numerous small sums, amounting in the aggregate to some hundreds of thousands of pounds, it would cost more money to get the calculations made by an actuary or anybody else than perhaps double the amount of the income tax which has to be paid. Under the circumstances, then, and seeing that at the moment it is profit, and that, if any wrong be done by losses afterwards occurring, that will all be taken into consideration in the next year's account, it seems to me that the only way in which something as near to exact justice as possible can be arrived at in a case of this nature is by taking the accounts as they have been made out and adjusted and the income tax upon them assessed. Our judgment, therefore, will be for the Crown.

AMPHLETT, B.—I am of the same opinion. I was certainly struck in the first instance with what seemed to me to be an apparent injustice in this mode of assessing the duty, but on further consideration I saw that the injustice, if any, was really confined to the first year when the company commenced business. In the first year there would, no doubt, be this injustice, which has been pointed out by my Lord—they would be charged upon all the premiums received, though as to some or most of them there would be a liability of loss, and in strictness that loss ought to have been taken into account in the first year when the business commenced. Not very much injury, however, arises, because in the very next year—one year too late, no doubt, so far as strict justice is concerned—these losses are all brought into the account and are allowed as a deduction to the company. It is not a recurring loss. After that system has been once begun, there is really no injustice at all for the subsequent years, unless it should happen that the business was an increasing business; and then, with regard to the increase of business done in any subsequent year, there would be a slight modicum of loss, the same as there was in the first year; but on the other hand, if in any subsequent year the business diminished, then

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this way of keeping the accounts would be in favour of the company; and I observe that in these three years there was in the last year a not inconsiderable reduction in the premiums received. In that case it is actually rather an advantage to the company than otherwise. Taking, therefore, three years together, and taking the average, supposing the business to remain stationary, there is no recurring loss at all. The only thing is this, which my Lord has pointed out, if the business be stationary the account would be perfectly accurate for this year upon the average of the three years in this way of taking it; and assuming for the moment that the business did remain stationary, the only possible further injury which could be done would be after the last year, when the company would have paid income tax upon the whole amount of the premiums, and then there would be some loss which would remain unaccounted for in consequence of their having ceased to carry on business. I have no doubt that, under the section of the Act of Parliament which has been referred to, if this company should happen to come to an end of their undertaking, an allowance would be obtained from the commissioners in respect of that loss, which had not been taken into account during the year in which the premiums upon the policies were paid, and which would be a loss which had never been brought into the accounts in favour of the company. I cannot, therefore, help thinking that really the inconvenience is, at any rate now, after the insurance office has been started for some years, extremely small; and when we consider the inconvenience of having recourse to estimates and averages for the purpose of ascertaining how much contingent loss ought to be taken into account during the year in which the premiums are paid, I think that the insurance company themselves would find that they would gain nothing by now making any change of plan. If they find it to be for their interest to adopt a new system, I by no means intend to say that if they choose at a future time to alter their mode of taking the account, and to set aside, for instance, some fund to answer contingent losses in the next year; if they choose to do that, and make it intelligible, I by no means say that they may not oblige the commissioners to accept the accounts in that amended form. But they have not done so. They have kept the accounts, I have no doubt, in the most convenient way, taking the premiums as receipts in the year, and taking the actual losses incurred in that year as a payment, and striking the balance, and calling the balance profit. It is not exactly mathematically accurate, but that is the way in which, as between themselves and their own shareholders, they have found it most convenient to keep their books; and, therefore, I think that as long as they keep their books in this way, the commissioners have a right to apply the same rule in estimating the amount upon which they ought to be assessed. Under these circumstances, I think that we ought to give our judgment for the Crown.

HUDDESTON, B.—I should have thought that the most convenient way for the insurance company to have kept their accounts would have been to have debited themselves first of all with the amount of premiums applicable to the risks of the year; that is to say, they might very readily have ascertained when the premiums were paid, in what-

ever month it was, how much of them was applicable to the current year, and how much would be applicable to the risks to be incurred in the succeeding year, assuming them to be annual payments; and they might very readily have carried out a figure which would really represent the amount applicable to the rates of that year—that is to say, they might either, in the first instance, have taken the gross sum of the premiums received, deducting therefrom such proportion as would be applicable to the succeeding year, and have debited themselves with the balance; or they might have done it in the way in which it is suggested by the company that they should now do it here, they might have debited themselves with the gross sum, and then have credited themselves with the actual sum which would be applicable to the next year; and in that case I think that they probably would have got at the right amount of the gross profits. I do not see that in the case of fire insurances such a course would be very difficult, or, perhaps, as difficult as in the case of life insurances. This, however, the company has not done. What they have done is this: under these three years they have debited themselves first with the gross sum of the year, they have then added to that sum the sum with which they say they have credited themselves in the previous year, and then, adding to that the sum receivable from interest, they carry to the other side of the account first their losses, next their expenses, and then their dividends, which are all proper items of deduction, and then they take an arbitrary sum, which they say (but we have no evidence whatever of the fact) would represent the unearned premiums, and they take that at something like 33 per cent. We have to decide whether the difference between the two sides of the account, as stated by the company, is “the full amount of the balance of the profits or gains of such trade upon a fair and just average of three years.” They do it with reference to the three years. It is quite clear to me, looking at this arbitrary sum which they put in the credit side of the account, that they have not arrived at “the full amount of the balance of the profits or gains of such trade upon a fair and just average of three years.” They have not (as is found by the case) kept their accounts in that way as between themselves and their shareholders, and I find it also stated that “this was the first year in which they” (that is the “unearned premiums”) “were taken into account by the company in making their return.” Now, an obvious inconvenience arises. Supposing that at the expiration of the next three years the company should feel themselves justified in establishing a different mode of accounts; it might be that they would not carry to the debit of the first year of the next three years that sum which they had carried to their credit in the year previous to the first of the three years, and then justice would not be done. I cannot help thinking that, as the company have not in their accounts adopted this method of computation, as this is the first year in which they have made this attempt at changing the mode of keeping or stating the accounts, they must be bound by their accounts; and really, as pointed out by my Lord and my brother Amphlett, in the result, *communibus annis*, no injustice will be done. If they find that in one year there are great losses they may, under the 133rd section,

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get the matter put right by the commissioners. If they stop business they may, under the 134th section, obtain the proper return of what they have overpaid. On the whole, I think, looking at the case as stated before us, that our judgment must be for the Crown.

KELLY, C.B.—I may add that it is not unworthy of consideration that the company have in their hands during the whole of the year, say 1873, from the time of the receipt of each premium, the premiums upon the whole of these policies, and so they have in the year 1874, until the losses with respect to the policies begin to be sustained. They possess this advantage, which is a great one to them. We do not think that this is a case for costs. Each party must pay its own costs.

Judgment for the Crown.

Solicitors for the Company (appellants), *Oliver and Sons.*

Solicitor for the Crown (respondents), *The Solicitor of Inland Revenue.*

Jan. 31 and Feb. 1 and 2, 1876.

THE CESENA SULPHUR COMPANY (LIMITED) v. NICHOLSON; AND THE CALCUTTA JUTE MILLS COMPANY (LIMITED) v. NICHOLSON.

Revenue—Income tax—Company incorporated and registered in England—Business and profits carried on and earned abroad—5 & 6 Vict. c. 35, s. 40, and 16 & 17 Vict. c. 34, s. 2, sch. D.—“Person residing within the United Kingdom”—“Trade carried on in the United Kingdom or elsewhere”—Residence of a joint-stock company.

The Cesena Sulphur Company, incorporated in 1871 under the Companies Acts of 1862 and 1867, with a capital of 35,000l., in 10l. shares, and registered in Italy for all purposes in 1872, was formed for the purpose of developing and working the mines of sulphur at Cesena, in Italy, and the manufacture and sale of sulphur there, with power to take occupation of lands wherever sulphur was likely to be found. As regards its affairs in the United Kingdom, the company is managed by a board of directors, who hold their meetings at the registered office of the company in London. An Italian delegation, consisting of two or three members of the board, reside in Italy, and carry on all the practical management of the company's properties and affairs, one of them being the managing director of the company, and residing at Cesena, where all the operations connected with the manufacture and sale of sulphur are exclusively carried on and the profits are earned. The Italian members of the board are in constant correspondence with their co-directors resident in France and England, who meet at the registered London office; and the working of the mines, the mode of the disposal thereof, and the general business of the company, are wholly under the order, direction, and management of the directors, subject to the control of general meetings, as provided by the articles. The original account books and all the moneys are kept at Cesena, but copies of such books are sent to London, where the register of shareholders prescribed by English law is kept. The company's principal banking accounts are kept at Turin and Paris, the London banking account being kept for payment of office and ad-

ministrative expenses and the dividends required for the English shareholders, which are the only part of the company's profits which are sent to England. The shares of the company are divided between English and foreign holders in the proportion of 8924 held in England to 26,076 held abroad.

The Calcutta Jute Mills Company, incorporated in 1872, under the Companies Acts 1862 and 1867, with a capital of 120,000l., in 20l. shares, was formed for the purpose of taking over the business, goodwill, and plant of certain jute mills near Calcutta, then belonging to and carried on by a firm of merchants resident there. The affairs of the company in the United Kingdom are managed by a board of not less than five directors, by whom one of the shareholders residing in Calcutta was appointed to be the managing agent and resident director of the company in India, and by whom and under whose entire control the buying of the raw material and its manufacture and sale, as well as all the operations connected with the company's business in all its branches, are wholly and exclusively carried on in India, where alone the profits of the company are earned; the company neither buying, manufacturing, nor selling in the United Kingdom. There is both an Indian and an English share register, and rather more than half the capital and shares are owned by residents in India. The company has no office or place of business in England, but, for purposes of registration, its address is at a merchant's office in London, where, by leave of the occupier, the meetings of the company are held. The books of accounts, documents, and moneys are kept, received, and dealt with by the manager in India, and the company has no property in the United Kingdom. Nothing whatever comes into the hands of the English directors, except periodical remittances from Calcutta to defray necessary expenses, and such portion of the profits realised in India as are divisible as dividends amongst the shareholders in the United Kingdom; and all that takes place in England after receiving such proportion of the profits is the calling by the directors of a meeting of shareholders, and a declaration by the directors of the amount to be distributed by way of dividend amongst the English shareholders for the current year.

The companies having been assessed to income tax in respect of the entire gains or profits of their business carried on by them in Italy and India respectively, appealed therefrom, and contended that they were only liable to be assessed on the portion of their profits remitted to England for distribution in the way of dividends amongst the shareholders resident in the United Kingdom.

Held by the Court (Kelly, C.B., and Huddleston, B.), giving judgment in favour of the Crown in each case, that it was clear from the constitution of both companies, as shown by their articles of association, that the entire and absolute control of their affairs and business was vested in and exercised by a board of directors in London, which place was therefore, in each case, the seat of business of the company, at which it must be deemed to “reside,” and that in effect the companies therefore were to be, and were rightly, assessed as a “person residing within the United Kingdom,” upon the whole of the annual profits or gains of their businesses carried on in Italy and India respectively.

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Per Curiam.—A corporation is not a partnership, nor are the shareholders in a joint-stock company partners; and a company cannot be divided into two portions, the English and the foreign, and income tax be assessed only upon the profits accruing or belonging to the shareholders residing in England.

THE Commissioners of Income Tax for the city of London assessed the above first-named company, the Cesena Sulphur Company, in the sum of 5834*l.*, under schedule D, in respect of their entire profits in their business of sulphur miners, &c., at Cesena, in Italy. They also assessed the other company, the Calcutta Jute Mills Company, under the same schedule, in respect of their profits in the sum of 25,000*l.*, being their entire or aggregate gains for the year 1874, as spinners and manufacturers of jute in India. The company in each case appealed, and contended that the assessment should be restricted to the portion of the profits distributed amongst the shareholders resident in the United Kingdom, and thereupon the Commissioners of Inland Revenue, in conformity with the provisions of the 37 Vict. c. 16, s. 7, stated two cases for the opinion of the court.

The question raised and the point involved in these two cases being very similar, the court decided to hear the arguments in each of them in succession before delivering their judgment in either.

The following are the material portions of the cases that were so stated:

THE CESENA SULPHUR COMPANY (LIMITED).

1, 2. The Cesena Sulphur Company (Limited), hereinafter called the company, was formed to carry on the trade or business of sulphur miners, manufacturers, or merchants, at Cesena, in the province of Firi, in Italy. It was incorporated under the Companies Acts 1862 and 1867 on the 27th Oct. 1871, with a capital of 350,000*l.*, divided into 35,000 shares of 10*l.* each, and was subsequently registered in Italy, for all purposes, in the following year, viz., on the 1st Nov. 1872.

3. By the articles of association (forming part of the case) the company, so far as its affairs in the United Kingdom are concerned, is managed by a board of eight directors, holding their meetings at the registered office of the company in England. There is an Italian delegation, consisting of two or three members of the board, resident in Italy, by whom all the practical management of the company's properties and affairs is carried on. One of the Italian directors is managing director of the company, and resides at Cesena.

4. All the operations connected with the manufacture and sale of sulphur are wholly and exclusively carried on at Cesena, where the profits of the company (if any) are earned, but the Italian members of the board are in constant correspondence with their co-directors resident in France and England, who meet at the English registered office, No. 84, King William-street, in the City of London.

5. Transcripts and copies of the company's books of accounts are sent to London, where the register of the shareholders, prescribed by the English law, is kept, but all the original books of accounts of the company, and all its moneys, are kept in Italy, the dividends required for the English shareholders being the only part of its profits which are sent to this country. The principal banking accounts of the company are kept

at Turin and at Paris; the London banking accounts being kept for the payment of offices and administrative expenses and of dividends here.

6. The shares of the company are divided between the English and foreign shareholders in the proportion of 8924 held in England to 26,076 held abroad.

7. The assessment or tax is leviable under Schedule D of the Acts of 5 & 6 Vict. c. 35, and 16 & 17 Vict. 34; under the former of those Acts (see sect. 1, Schedule D) certain duties are granted to Her Majesty upon the annual profits or gains arising or accruing to any person residing in Great Britain from any kind of property whatever, whether situate in Great Britain or elsewhere . . . and upon the annual profits or gains arising or accruing to any person residing in Great Britain from any profession, trade, employment, or occupation, whether the same shall be respectively carried on in Great Britain or elsewhere.

8. By sect. 40 of the first mentioned Act it is enacted that all bodies politic, corporate, or collegiate, companies, fraternities, &c., whether corporate or not corporate, shall be chargeable with such and the like duties, as any person would, under and by virtue of the said Act, be chargeable with.

9. By 16 & 17 Vict. c. 34, the like duties as are referred to in paragraph 7, are granted to Her Majesty upon profits arising from property, profession, trade, and offices (*inter alia*) sect. 2.

SCHEDULE D.

For and in respect of the annual profits or gains arising or accruing to any person residing within the United Kingdom from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere.

10. By 5 & 6 Vict. c. 80, s. 2, persons entrusted with the payment of foreign dividends or annuities are required to deliver, for the use of the Commissioners of Taxes, true and perfect accounts of the amount of the annuities and shares payable by them respectively, and the said commissioners are empowered to make an assessment thereon under Schedule C.

And by sect. 10 of the 16 & 17 Vict. c. 34, the provision so made by the last recited Act is extended to the assessing and charging of the duties granted by the Act, "as well on such dividends and shares of annuities aforesaid, as on all interest, dividends, and other annual payments payable out of or in respect of the funds or shares of any foreign company, society, adventure, or concern, and which said interest, dividends, or other annual payments, have been or shall be entrusted to any person in the United Kingdom for payment to any persons, corporations, companies, or societies in the United Kingdom;" and all persons entrusted with the payment of any such interest, dividends, or other annual payments as aforesaid in the United Kingdom, or acting therein as agents, or in any other character, are required to perform all such acts and things in order to the assessing of the duties on such interest, dividends, and other annual payments as are required to be done by persons entrusted with the payment of annuities or any dividends under the 5 & 6 Vict. c. 80, above referred to. And the assessment of the duties on all such interest, dividends, and other annual payments as

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aforesaid, shall be made by the Commissioners for Special Purposes under Schedule D.

11. By sect. 5 of the 16 & 17 Vict. c. 34, the duties thereby imposed are directed to be assessed under the regulations of the statute 5 & 6 Vict. c. 35.

12. The duties granted by 16 & 17 Vict. c. 34, have been continued at various rates by a series of subsequent Acts, and the Act imposing the duty for the year 1874 is the 37 Vict. c. 16.

13. The commissioners, having regard to the articles of association accompanying the case, and to the certificate of incorporation signed by the Registrar of Joint-stock Companies, and also to the fact that the registered office of the company is in England, where the directors meet, and direct, and control the main operations of the company, were of opinion that the company is an English company, formed under the Joint-stock Companies Acts, for carrying on an undertaking abroad, and is, by virtue of sects. 40 & 192 of the 5 & 6 Vict. c. 35, in the same position as a "person" residing within the United Kingdom, and liable under the provisions of the 5 & 6 Vict. c. 35, sect. 1, and 16 & 17 Vict. c. 34, s. 2, to make a return of the whole of the profits of any trade, whether the same shall be carried on in the United Kingdom or elsewhere.

The commissioners were further of opinion that the decision of the Court of Exchequer in the case of *The Imperial Ottoman Bank v. The Attorney-General, Alexander, and others* (31 L. T. Rep. N. S. 694; L. Rep. 10, Ex. 20; 44 L. J. 3, Ex.) was not adverse to but confirmatory of the contention of the Crown in the present case; the Court of Exchequer having there decided that the residence of a corporation must be regarded as the place of its incorporation, which, in the case of the Cesena Sulphur Company, is within the United Kingdom. That the 5 & 6 Vict. c. 80, s. 2, and sect. 10 of the 16 & 17 Vict. c. 40, referred to by the company in the present case, do not bear upon the question at issue, and apply only to agents or other persons entrusted with the payment of dividends or other annual payments payable out of or in respect of stocks, funds, or shares of any foreign company, society, or concern.

14. The assessment was accordingly confirmed upon the whole of the profits of the company.

15. The question for the opinion of the court is whether the company is bound to make a return in respect of all annual profits wholly made by its business in Italy, including the portion paid to the Italian shareholders, and is chargeable to income tax thereon; or whether, as is contended on the part of the company, the London directors are bound only to make a return and to pay income tax in respect of so much of the profits made abroad as actually pass through their hands for distribution among the shareholders residing in the United Kingdom.

Points for argument on behalf of the appellants.—First, that the company is not a person residing within the United Kingdom, within the meaning of schedule D to the Acts 5 & 6 Vict. c. 35, and 16 & 17 Vict. c. 34, respectively. Secondly, that residence in the United Kingdom cannot be predicated of a company within the meaning of the said Acts. Thirdly, that there is no one within the United Kingdom who receives any profits in respect of the said company's business, other than the amount of dividends required for the share-

holders in this country. Fourthly, that the profits, other than the aforesaid amount of dividends, accrue outside the United Kingdom, and are received by persons not resident within the United Kingdom. Fifthly, that no part of the profits of the said company is liable to income tax except the amount of dividends distributed among shareholders in the United Kingdom.

Points for the Crown.—That the Cesena Sulphur Company, being an English company, registered in England under the Companies Acts 1862 and 1867, and having also the registered office of the company in England, is in the same position as a person residing in the United Kingdom, and is liable to income tax under schedule D of the Acts 5 & 6 Vict. c. 35, and 16 & 17 Vict. c. 34, in respect of the annual profits and gains of the company, whether made in England or elsewhere. Secondly, that on the facts of this case the company resides in the United Kingdom, and not in India. Thirdly, that the provisions of sect. 10 of the 16 & 17 Vict. c. 34, relied on by the appellants, apply to the case of dividends payable by or for a company or concern to shareholders residing in the United Kingdom, and have no application to the present case. Fourthly, that the return made by the secretary of the company is bad in law.

THE CALCUTTA JUTE MILLS COMPANY (LIMITED). CASE.

1. The Calcutta Jute Mills Company (Limited) (hereinafter called "the company") was formed for the purpose of taking over the business, goodwill, and plant of certain jute mills at Ishera, near Calcutta, in India, belonging to and then carried on by a firm of merchants, Messrs. Borradaile, Schiller, and Co., resident there.

2. The company was incorporated under the Companies Acts 1862 and 1867, on the 16th April 1872, with a capital consisting of 120,000*l.*, in 6000 shares of 20*l.* each.

3. By the articles of association (a copy of which forms part of the case) the company, so far as its affairs in the United Kingdom are concerned, is managed by a board consisting of not less than five directors. The directors have (*inter alia*) power to appoint one or more persons resident in Calcutta as "the Calcutta directors." As a matter of fact, there is at the present time one Calcutta director, Mr. George Muirhead Sturthers, who is a large shareholder in the company, and the acting partner of the firm of Messrs. Borradaile, Schiller, and Co., of Calcutta, the former proprietors of the mills.

4. On or about the 1st May 1872, the company commenced business as spinners and manufacturers of jute at Ishera, in Calcutta, aforesaid, and not elsewhere.

5. The buying of the raw material and the manufacture and sale of the same, as well as all the operations connected with the business of the company in all its branches, are wholly and exclusively carried on in India, where alone the gains and profits of the concern (if any) are earned.

6. At the time of the purchase of the said mills the company adopted an agreement whereby Messrs. Borradaile, Schiller, and Co., of Calcutta aforesaid, were constituted the managing agents in India, and they have had the entire control of its business and works at Ishera. At the same

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time they guarantee the solvency of those with whom they deal, and receive a *del credere* commission from the company in return.

7. There is an Indian as well as an English share register, and the larger amount of capital, as well as the greatest number of shares, are owned by persons residing in India.

8. On the 31st Dec. last the share register stood as follows: 3843 shares, representing a capital of 76,860*l.*, were held in India, and entered on the Indian share register; while only 2157 shares, representing a capital of 43,140*l.*, were held by persons residing in this country, and entered in the English share register.

9. The company has no office or other place of business in the United Kingdom, although, for the purpose of registration, its address here is No. 4, St. Helen's-place, in the City of London. This is, in fact, the office of Mr. Ferdinand Schiller, one of the directors of the company, and when meetings of the English members of the company are held there, it is entirely by his leave and favour.

10. All the company's books of accounts, papers, and other documents, as well as its moneys, are kept, received, and dealt with by the management in India.

11. As a matter of fact, the company has no property whatever in this country. Nothing comes into the hands of the English directors excepting what is remitted from Calcutta from time to time, to defray their necessary expenses. In addition to this, such proportion of the profits realised in India as is divisible amongst the shareholders in the United Kingdom by way of dividend, passes through their hands.

12. After receiving such proportion of the profits as is mentioned in par. 11, all that takes place in England is that the directors call a meeting of the shareholders, and declare the amount that is to be distributed by way of dividend amongst them for the current year.

13. For the year 1874 the sums received by the directors in this country as the proportion of the profits wholly made and acquired by the business of the company in India, and payable to the shareholders in the United Kingdom, amounted to 8497*l.*

14. In the said year the secretary of the company duly made a return of that amount to the commissioners for putting into execution the Income Tax Acts for the City of London, as the true and proper amount upon which the company was ready and willing to be assessed to income tax. To the said return there is appended a statement of the manner in which the same was made or estimated, as follows: "This return is made by me as secretary of the Calcutta Jute Mills Company (Limited). It includes the whole amount of the dividends or profits paid or payable to the shareholders residing in the United Kingdom for one whole year, on a fair computation or average, from the commencement of the business of the company on the 1st May 1872, but not the dividends or profits paid or payable to shareholders resident in the East Indies, and whose names are entered on the company's Indian share register. The trade of the company is that of jute spinners and manufacturers. The only place of manufacture as well as the place of sale is at Ishera, Calcutta. The company neither buys, manufactures, nor sells in the United Kingdom. The raw

material is all purchased in India, manufactured there, and sold there, where also the entire profits are made."

Paragraphs 15 to 20 inclusive (setting forth the several sections of the Income Tax Acts applicable to the present question) are similar to paragraphs 7 to 12 inclusive in the previous case; and paragraphs 21, 22, 23, stating the opinion and decision of the commissioners, and the appeal of the company therefrom, and the question for the opinion of the court, are similar to paragraphs 13, 14, 15, in the previous case.

Points for argument on behalf of the appellants:—First, that under the circumstances stated, the Calcutta Jute Mills Company is not a company resident within the United Kingdom, within the meaning and for the purposes of the Income Tax Acts; secondly, that the trade of the said company is not exercised or carried on within the United Kingdom within the meaning and for the purposes aforesaid; thirdly, that under the said Acts the appellants are liable to pay income tax only upon so much of the profits as are received by them for distribution amongst the shareholders in this country.

The points for the Crown are similar to those in the previous case of the Sulphur Company.

The articles of association in each case, so far as they are material on the present occasion, are so fully stated and gone into in the judgments of the court, that it is unnecessary to set them forth here.

THE CESENA SULPHUR COMPANY (LIMITED).

Jan. 31 and Feb. 1.—Sir H. James, Q.C., and R.S. Wright (with them was R. T. Reid), argued on behalf of the appellants, and cited and referred to the following authorities:

The Carron Iron Company v. Maclaren, 5 H. of L. Cas. 141 (per Lord Cranworth, L.C.);

The Keynsham Blue Lias, &c., Company (Limited) v. Baker, 9 L. T. Rep. N. S. 418; 33 L. J. 41, Ex.; 9 Jur. N. S. 1346;

Taylor v. The Crowland Gas and Coke Company, 24 L. J. 233, Ex.;

The Kilkenny and Great Southern and Western Railway Company v. Fielden, 6 Ex. 81; 29 L. J. 141, Ex.;

The Attorney-General v. Alexander and others, 31 L. T. Rep. N. S. 694; L. Rep. 10 Ex. 20; 44 L. J. 3, Ex.;

5 & 6 Vict. c. 35, s. 40; 16 & 17 Vict. c. 34, s. 2 (sched. D), s. 10.

The *Attorney-General* (Sir J. Holker, Q.C.), with whom were the *Solicitor-General* (Sir H. S. Giffard, Q.C.) and *Pinder*, on the part of the Crown, *contra*, commented on the cases cited on the part of the appellants, and cited and referred to the following additional authorities:

Adams v. The Great Western Railway Company, 3 L. T. Rep. N. S. 631; 6 H. & N. 404; 30 L. J. 124, Ex.;

Shiels v. The Great Northern Railway Company, 4 L. T. Rep. N. S. 479; 30 L. J. 331, Q. B.; 7 Jur. N. S. 731;

Brown v. The London and North-Western Railway Company, 8 L. T. Rep. N. S. 695; 4 B. & S. 396; 32 L. J. 318, Q. B.;

Sully v. The Attorney-General, in error, 2 L. T. Rep. N. S. 439; 5 H. & N. 711; 29 L. J. 464, Ex.;

The Aberystwith Promenade Pier Company v. Cooper, 13 L. T. Rep. N. S. 276; 35 L. J. 44, Q. B.;

and the following American cases:

The Bank of Augusta v. Earle, Curtis' Rep. 223; 13 Peters' Rep. 569;

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The Blackstone Manufacturing Company v. The Inhabitants of Blackstone, 13 Gray's Repr (Massachusetts) 488;

The United States v. Arnesley, 11 Wheat. 412; 13 Peters' Rep. 135;

Beaton v. The Farmers' Bank of Delaware, 12 Peters, 135;

The Ohio and Mississippi Railroad Company v. Wheeler, 1 Black's Rep. 286;

The Baltimore and Ohio Railroad Company v. Glenn, 28 Maryland Repr. 287;

Lindley on Partnership;

Lorton's Conflict of Laws, sect. 38;

Savigny (Guthrie's Translation, 1869), p. 63;

5 & 6 Vict. c. 35, s. 192;

The Companies Act 1862, ss. 10, 18, 38;

The Companies Act 1867.

R. S. Wright (for the appellants) replied.

The court then proceeded to hear the arguments in the case of

THE CALCUTTA JUTE MILLS COMPANY (LIMITED).

Feb. 1 and 2.—H. Matthews, Q.C. (with him were Sir H. Jackson, Q.C. and Bolland), argued on behalf of the appellant company, and, in addition to citing and commenting on all the cases and authorities that were cited and relied on upon both sides in the *Ceeena Sulphur Company's case*, cited also the following:

Newby v. Van Oppen and others (Colt's Patent Fire Arms Manufacturing Company), 26 L. T. Rep. N.S. 164; L. Rep. 7 Q. B. 293; 41 L. J. 148, Q. B.

The Oldham Building Company (Limited) v. Heald, 10 L. T. Rep. N. S. 534; S. C., in error, 33 L. J. 236, Ex.; 3 H. & C. 132;

The United States v. Mackensis (American), 3 Brockenbrough, 393;

Lindley on Partnership, p. 6;

5 & 6 Vict. c. 35, ss. 39, 40, 46, 59, 100, Rule 3.

Pinder (with whom were The Attorney-General (Sir J. Holker, Q.C.) and The Solicitor-General Sir H. S. Giffard, Q.C.) for the Crown (*contra*), was not called upon to argue.

In each case the contention on the part of the Crown was that the company was an English company under the Joint-stock Companies Acts for carrying on an undertaking in England, and was by virtue of the Income Tax Acts in the same position as a "person" residing in the United Kingdom, and was liable under the provisions of the Acts to make a return of and be assessed upon the whole of their profits, whether arising from business carried on in the United Kingdom or elsewhere; the companies, on the other hand, insisting that they were not "persons" residing within the United Kingdom under the Income Tax Acts, and were only liable to be assessed upon the amount of the dividends sent to England and there received by and distributed amongst the shareholders resident in the United Kingdom.

It is unnecessary to state the arguments on either side more at length here, as they are fully noticed and commented on by the learned Barons in their judgments.

KELLY, C.B.—In both these cases I think that the Crown is entitled to the judgment of the court. I will first deal with the case of the Calcutta Jute Mills Company, which has been most admirably argued on both sides, and especially—if I may say so without being invidious—by Mr. Matthews, who in his zeal has certainly said and done all that was possible to overcome the difficulties by which he was environed. We have carefully considered both the cases, and the great principles of the law upon which they ought to be decided. Both are cases raising, I believe for the first time, a ques-

tion of great importance both in its nature and the extent of its operations, and involving important principles of great weight as affecting the law of this country, and, I may almost say, the international law of the world. I should be glad if we felt it possible, consistently with our duty and the view which we take of the law, to decide the question otherwise than we are about to do; for it is in vain to deny that the result of our decision is to declare that the Legislature taxes foreigners who are neither natives nor inhabitants of this country, and, with the exception of India, are not within the jurisdiction of its laws. Now, the question in the case of the Calcutta Jute Mills Company is whether they can be held liable to income tax upon the entirety of their profits. It is a company incorporated in England under the Joint-stock Companies Acts, having a local position in this country, and occupying, or rather being permitted to occupy, an office within the City of London, where it transacts its business and exercises the very large and extensive powers with which it is invested by the Act of Parliament. On the other hand, it is equally true that the whole property in which the entire capital of the company is invested is not in this country, but in India, and that the mills are worked and the whole profits of the company earned in that country alone. It likewise appears (and it is here that the question arises) that out of the whole of its profits, amounting for the year in question to 25,000*l.*, about two-thirds of the dividends are payable, not to inhabitants of England, nor to persons having any connection with England, except that they happen to dwell under the same Crown and the same rule, but to persons residing out of England, and chiefly, if not entirely, in India. Again, the actual trading business of the company is transacted in India and not in England. But then, on the other hand, upon looking to the constitution of the company and its articles of association, under and by virtue of which it exists, we find that it is entirely under the control and in the actual possession of the governing body in England. It is stated in the case that "the company, so far as its affairs in the United Kingdom are concerned, is managed by a board, consisting of not less than five directors. The directors have power (*inter alia*) to appoint one or more persons resident in Calcutta as the Calcutta directors. As a matter of fact, there is at the present time one "Calcutta director," Mr. George Muirhead Struthers, who is a large shareholder in the company, and the acting partner of the firm of Messrs. Borradaile, Schiller, and Co., of Calcutta, the former proprietors of the mills. We begin, then, with this, that the company is incorporated in and under the law of England, and, therefore, its origin and first existence is in England, and England alone; that the governing body, the directors, are in England, and that they have power to appoint—not that there exists by virtue of the company's constitution a director having power himself to act and conduct the company's affairs in India—but that the governing body in England have power to appoint one or more persons resident in Calcutta as the Calcutta directors, and that they accordingly appointed a resident director at Calcutta, who controls the whole conduct of the business there. But he is merely the appointee or agent of the governing body of

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directors in England. Then we see that "the buying of the raw material, and the manufacture and sale of the same, as well as all the operations connected with the business of the company, in all its branches, are wholly and exclusively carried on in India, where alone the gains and profits of the concern (if any) are earned;" and further on in the case, without going at more length into what relates to the property itself, we find (and these are the passages chiefly relied on by the appellants) that the company has no office or other place of business in the United Kingdom, although for the purpose of registration its address here is No. 4, St. Helen's-place, in the City of London. This is, in fact, the office of Mr. Ferdinand Schiller, one of the directors of the company, and when meetings of the English members of the company are held there it is entirely by his leave and favour. Now it really signifies little, and makes no difference whether the office, in which the very important business of holding meetings at which everything, that is, may, or can be done by the company, is determined, is an office hired at a rent, or is a place lent for that purpose by one of the directors of the company for the use of the company and at their disposition, and for that purpose alone. There is their location, their "residence," to apply the term of the Act of Parliament; and there it is that the directors accordingly meet, and there the company, the great body of shareholders, hold their general and extraordinary meetings. It is, therefore, for all the purposes of this case, the office of the corporation. The case then states that, "as a matter of fact, the company has no property whatever in this country. Nothing comes into the hands of the English directors excepting what is remitted from Calcutta from time to time to defray their necessary expenses. In addition to this, such proportion of the profits realised in India as is divisible amongst the shareholders in the United Kingdom, by way of dividend, passes through their hands." Now, it may be convenient here to refer to what must be the basis of our decision, namely, the words of the Act of Parliament. By the 5th section of the 15 & 16 Vict. cap. 34, it is enacted that "The said duties hereby granted shall be assessed, raised, levied, and collected under the regulations and provisions of the Act of 5 & 6 Vict. c. 35, and of the several Acts therein mentioned or referred to, and also of any Act or Acts subsequently passed explaining, altering, amending, or continuing the said first mentioned Act;" and by schedule D there is the provision that the companies or persons are to be assessed "for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere, and for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere," and to be charged for every 20s. of the annual amount of such profits and gains. Now, the first thing important to be noticed here is that the tax is imposed upon "any person residing in the United Kingdom." By other Acts of Parliament for the word "person" may be substituted a "corporation" or "joint-stock company;" so that we may read this word "person" here as if the words

were for and in respect of the annual profits or gains arising or accruing to any "joint-stock company." Then follows the words "residing in the United Kingdom," and so forth. A great deal has been said as to how an individual entitled in his own right to property of this description would be assessed; but I think it leads only to complication and confusion to enter into all the cases which might well be applied to the tax as imposed upon a single individual, and to attempt to apply them to the tax as imposed upon a joint-stock company. I therefore pass away from that, and will consider the matter as if the words "joint-stock company" had been here used in place of the word "person." In order to come within the Act, it must be a joint-stock company "residing in the United Kingdom," and upon that a question of law arises, independently of the particular terms and provisions of this company's articles of association. Where does a joint-stock company "reside," and what is the meaning of the term "residing" as applicable to such a company? The answer to that question, without expressing any opinion at the present moment as to whether there may or not be two places at which a joint-stock company or corporation can reside, is that it resides where its place of incorporation is, and where its general body exercises the powers conferred upon it by the Act of Parliament and its articles of association, and where it meets, and is in bodily and personal presence for the purposes of the concern. Where, then, is that place in the present case? I deny that the whole case presents a single act which is done in Calcutta otherwise than in England or elsewhere than in this very office, which can truly be called the act of the company. That acts of the highest importance as affecting the well-being of the company, the operation of its business, and the realising and disposing of its funds, are done in India, is perfectly true, but they are all done by mere agents, whether they be directors or not, appointed under the sole authority of the general body of, and represented by, the corporation in this country, and so making their acts the acts of the corporation; therefore, within these words, if a company can be said to "reside" anywhere, as we must suppose that it can, in order to give effect to the Act of Parliament touching joint-stock companies, this company undoubtedly resides at the office or place where the directors meet—meetings of the whole company are held—and where they transact their business and exercise the powers conferred upon them by the law and their articles of association. I need not go into the cases about "residing." The question has arisen, as it did in the case of *The Attorney-General v. Wheeler*, whether the acts of a single member of a firm consisting of several partners, carrying on business in New York, and which single member happened to reside in Nottingham and represented the firm there, and purchased goods which were afterwards sent to America and purchased and paid for by the firm, their commencing the operations and performing a part of them in the name of the firm in this country, made the firm liable; and it was held that this one individual did not represent the firm, and that the firm were not liable to be assessed to the income tax in his person by reason of his carrying on a portion of the business, namely, that of buying goods and consigning or transmitting them to

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America; because, in the first place, no one complete transaction of business was ever effected by him; and also because the principal seat of business and the place at which alone the great bulk of the business of the firm was carried on was in New York. There are a variety of other cases arising under the County Court Acts, where the question has arisen as to where the corporations constituting the great railway companies of this kingdom reside. Where, for instance, do the Great Western and the London and North-Western Railway companies reside? Everybody who knows anything of these affairs would say, directly the question was asked, why, at Paddington and at Euston. And it has been held that the railway companies do reside there, because there is the principal seat of their business, and there their directors meet and exercise their powers; there their books are kept, and there or thence all their lines of railway emanate, and either begin or end. I need refer to no other authority. There is none, nor the shadow of any quoted, which goes to show that the place in which the directors or governing body meet and the shareholders hold their general and special or extraordinary meetings and the power of transacting the business is exercised, is not the principal seat of business, and the place in which, in the language of the Act of Parliament, the company may be said to "reside." I am, therefore, clearly of opinion in this case, upon these principles, and for these reasons, that this joint-stock company resides at No. 4, St. Helen's-place, in the City of London. Now, it is said that the whole business is transacted in India, and that "nothing comes into the hands of the English directors excepting what is remitted from Calcutta from time to time to defray their necessary expenses; in addition to which, such proportion of the profits realised in India as is divisible amongst the shareholders in the United Kingdom by way of dividend, passes through their hands." All that is true; but every act which is done, the working of the mills, the realising of the profits, the transmission of the proportion of them to England, and the distribution of them in the form of dividends to the different shareholders, all that, if not done by the company directly in India is done by them indirectly, because it is done by the person whom they appoint and may recall at their pleasure, and who has no power to do a single act or any authority to interfere in any degree in the affairs of the company except the authority conferred upon him by the governing body at home. Then comes the other statement, "after receiving such proportion of the profits as is mentioned in paragraph 11, all that then takes place in England is that the directors call a meeting of the shareholders, and declare the amount that is to be distributed by way of dividend amongst them for the then current year." And then the case gives a statement of the amount of the profits payable to the shareholders in the United Kingdom. Now it is quite true that all that they actually do in England with respect to the dividend is that, having received a certain proportion, about one-third, of the profits, they apportion it among the shareholders who are in England, and distribute and pay over to each of those shareholders the dividend to which he is entitled. But the payment of the dividends to the shareholders who are in India or elsewhere, though not actually

done by the hands of the governing body, is done under their authority; and, undoubtedly, at any time upon learning that 25,000*l.* was in the hands of their representative in India, and therefore to be distributed in dividends, they might direct that sum to be at once remitted to England; and if it was withheld by any person or banker into whose hands it had been paid, they might maintain an action against that banker for money had and received, and recover it against him. It is their money, and they are the persons who, in contemplation of law, are the possessors of it as of right; and it is only because it would be a very expensive and useless, and it might be, through the failure of agents and banks, sometimes a very hazardous proceeding to desire the acting director in India to remit the whole amount to the governing body in London for them to remit two-thirds of it back again to India for payment to the shareholders there, that that course is not adopted; they clearly have and might exercise that power if they chose so to do. I do not propose to refer particularly to any other of the statements in the case, because they will all be found to fall within the same principle and to be open to the same observation. Though the property is in India, and the whole capital invested there, and though the produce of the property is in India, and the whole of the money which the company are ever entitled to receive, whether as profits or in any other shape or way, or for any other purpose, is earned in India, yet it all belongs to the company, who might at any moment virtually take possession of it, and might bring ejectment against anybody in India who against their will and without their consent had taken possession of one of these mills, and to such an action there would be no defence. Everything, therefore, is the property of the company, and it is the company thus located in England that alone can deal or authorise the dealing with the property in any way whatever. That this is so appears clear also from the terms of the articles of association. The memorandum of association, after stating the name of the company, and that its registered office will be situate in England, goes on to state: "The objects for which the company is established are, first, the purchasing of the jute mills, land, business works, machinery, plant, and stock-in-trade of the present proprietors of the Ishera Jute Mills, Bengal, with all the rights, privileges, and appurtenances thereto belonging, the carrying on there of the trade or business of buying, selling, and manufacturing jute in all its branches, and the extending of the said business and works or either of them." Now, who is that purchaser? Not the director who has been over there, nor the shareholders who are resident in India, but the company themselves in this country. Then what is to be done? Why, the carrying on in all branches of the trades or businesses of dealers in jute and other similar materials including their purchase, preparation, pressing, and so forth, and all this to be done, not by people in India, though it must be done of course by the hands chiefly of labourers in that country, but by the company or by persons authorised by them to do the acts in question in India. So with regard to "the purchasing or otherwise acquiring of any total or partial or contingent interest in, or the taking out in Great Britain, British India, or elsewhere, and the working of letters patent or inven-

tions which may be conducive to the advancement of the businesses aforesaid." No one but the company can do that. Indeed it, will be found that every single act which is to be done, from the beginning to the end, from the coming into existence down to the ultimate dissolution of the company, is to be done by the company, and by them alone, namely, by the governing body or by meetings of the shareholders, all in England and nowhere else. Then we come to this object, "the establishing of agencies for the purposes of the company either in the United Kingdom, British India, or elsewhere." Now there is the key to the whole of the proceedings on behalf of the company upon which the appellants rely. The learned counsel contended that all that is done in India is done by a director there, who may do as he pleases, and by certain persons under him who alone carry on the business of the company. How is that? It is under the last-mentioned article that the company authorised Mr. Struthers to go to India and to do this very act of establishing an agency in his person for carrying on the entire business of the company. But, as I have before said, his act is theirs, and it is they alone who do the acts which constitute the entire carrying on of the company's business. There is, then, a power to amalgamate the company, and so forth; and, finally, "the doing all such other things as are incidental or conducive to the attainment of the above objects." All this, as before said, is done by the company alone. The next article I will refer to is the third: "The directors may, with the sanction of a resolution of the company previously given in general meeting, increase its capital by the issue of new shares," and then there is provision made for that. Now, that is one of the most important powers which can be conferred upon a company. If their capital be a million, they may increase it to two millions. Could they do that, or take any step towards such an act, in India? Clearly not, even by their authorised agent there. It could only be done by the directors here with the authority of a general meeting. Then comes the last of the series of provisions to which it is necessary to call attention, viz., as to the creation of shares; the company being constituted and having come into existence under the Joint Stock Companies' Acts, and the articles of association being the constitution of the company, the questions come, How is it to be set going, what is to be done, and who is to do it? Here, again, we find that the company and they alone, are to do it. By article 5 "The directors may allot and issue shares in the capital of the company to such persons, upon such terms, and at such times, as they may think fit; and any shares which may be allotted in payment or part payment for property transferred, goods or machinery supplied, or for services rendered to the company, may be issued and, if so issued, shall be deemed to be fully paid-up shares." Here, again, is what we may call really the creation of the entire company. The creation of shares which may pass into the hands of Indians, Frenchmen, Italians, and Englishmen also, is entirely and exclusively the act and under the sole authority of the company. Before a single share is issued or allotted to anyone they belong to the company, who may by such machinery or system as they think convenient allot them to as many people, whether English-

men or the natives of any other country, as they think fit. I need go no further into the articles of association. Suffice it to say that there are provisions for general meetings and powers given as to the forfeiture of shares and for a great variety of other purposes, all of which powers are vested solely in the company. The only remaining question, therefore, is this. It is the case that every power which has to be exercised touching the property of the company or the carrying on of their business must be exercised by the directors, the general body of the company, with or without the authority of a general meeting; the governing body, and these shareholders' meetings all being in England, where the "residing" is locally situated. Reliance was, no doubt, justly placed upon the fact that the whole carrying on of the business took place in India, but the carrying on of the business, the manufacture of the jute and the realisation of the funds, and the immediate and ultimate disposition of the funds, is wholly and exclusively under the authority of the general body in this country. And the language of the Act of Parliament is conclusive that the assessment shall be upon the company, "for and in respect of the annual profits or gains arising or accruing," and so forth, "from any kind of property whatever, whether it be in the United Kingdom or elsewhere, and for and in respect of the annual profits or gains arising or accruing from any profession, trade, employment, or occupation, whether the same shall respectively be carried on in the United Kingdom or elsewhere." Is not this an assessment upon the company in relation to their property, although the property happens to be situated, in the language of the Act of Parliament, not in this country but in India, and in respect of profits which are earned and acquired, not in this country but in India? It appears to me, therefore, that the case is clearly and directly within the terms and meaning of the Act of Parliament, and that on this ground the Crown is, without any doubt, entitled to judgment. Before I conclude my observations on this case, I might say that in the first place the great principle of the law of England in relation to taxation is, that the tax shall only be imposed upon persons or things actually within this country. Here, undoubtedly, the question must be determined. Is this company, who are the persons, and is this property, which, under the Act of Parliament, is included in the same category as property actually in this country, are they or not, under the express terms of the statute, to be treated in the same way, with respect to the application of the principle of law, as if the property had been situated in an English county? It appears to me that the true principle of the law is that they are. Now, although it may seem to be an infringement of one of the principles upon which taxation is levied in any country that two-thirds of the earnings of this company made or arising from a business carried on out of England, and belonging to persons not resident in the United Kingdom, should be subject to taxation, yet the answer to that (and it is not for me to say whether or not it is a sufficient one) is that if a foreigner residing abroad, and having no property or interest in and no connection with this country, thinks fit to invest his money here, and so to obtain the broad shield and protection of English law for his property, he must

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take the benefit with the burdens belonging to it. It may seem to be hard upon a foreigner, who may be never in his life set his foot upon English ground, and never intends to do so, to tax him upon his whole income, but nevertheless the law is so, and he must submit to it. On these grounds, therefore, I think that this assessment was well made. I might deal with the latter argument so ably urged by Mr. Matthews, which held that there may be cases in which persons in this country may be taxed in relation to property abroad, and that therefore there is something like a reciprocity of injustice, if injustice it be. I will not, however, dwell upon those cases, or upon that argument, because it is founded upon clauses in the Act which have no relation to the matter now before the court, which is as to the property and the gains or income of a joint-stock company. If the words "joint-stock company" had been introduced into those clauses which Mr. Matthews lastly referred to, his argument would have been entitled to much consideration; but I find nothing in the Act of Parliament, or in any one of the numerous authorities which have been cited, which interferes with the plain and direct operation of the clause to which I have called attention, and under which I hold that this company is liable to be assessed in respect of the whole amount of its annual profits. I will now proceed to deal with the other case of the Cesena Sulphur Company. It is not necessary to repeat the observations which I have already made as to the general principles of the law and their operation upon the cases now before the court. Like the Calcutta Jute Company, this company also was brought into existence under the Joint-stock Companies Acts. It appears that certain persons being possessed of some sulphur mines and plant and other property of considerable value at Cesena, in Italy, which they were desirous of parting with, sold the whole of it to a body of persons, seven in number, who were the first subscribers, and through whom the company was constituted and came into existence under the Joint Stock Companies Acts. They became the purchasers of the whole of this property and, like the company in the previous case, they were stationed (I will not use the word "resided") in England, where they had an office, their whole property being within the kingdom of Italy. Again, upon looking at their articles of association, we find that the company was "formed for the purpose of developing and working the mines of sulphur at Cesena, and carrying on the business mentioned or included in the memorandum of association." Then comes a description of the business, as follows: "The business of the company shall include all the business mentioned in the memorandum of association, and all incidental matters; and the working of the mines will be commenced as soon as the board shall think fit, after the 1st Jan. 1872, and whether a part only or the whole of the capital of the company is subscribed." The very origin and commencement, and the first step taken in the creation of this business, which is clearly the act of the company, is "the working of the mines as soon as the board shall think fit." Then, "the working of the company's mines, the mode of the disposal thereof, and the general business of the company shall be wholly under the order, direction, and management of the directors." Everything that is done, whether in England, in France,

or in Italy, at Cesena itself, is to be done wholly under the order and management of the directors, subject only to the control of general meetings, as thereafter provided for. The general meetings are in England; the location or residence, as I may now call it, is in England, and the directors exercise their powers and authorities at their office in this country; and, except under their order, control, and management, not a single act of any kind whatever, in relation to the business or proceedings of the company, is or can be done. Again, "the company may undertake any operation or business mentioned or included in the memorandum of association, either singly or in connection with any other firm, corporation, or company in England or Italy, upon such terms as the directors may think fit. The directors shall have full power to register the company in Italy as a 'Société Anonyme,' and to do all necessary acts for that purpose." Now, although it is a registered company in Italy, that does not in the least degree injure its power, character, or nature in this country. And, as in the present case, "the directors may from time to time appoint and send any number, not exceeding three, of their board, to superintend or examine into the working and state of the company's mines and business at Cesena, and to remain there or in that locality for any period of time not exceeding one calendar month, and shall defray, out of the funds of the company, the travelling and hotel expenses of the director or directors who shall undertake such superintendence or examination;" and such director or directors shall make a written report of their proceedings and the state of the mines, their produce and prospects, with remarks and suggestions relative to the company's business as they shall consider proper. Then comes a provision that "no person except the directors shall have any authority to make, accept, or indorse any promissory note or bill of exchange on behalf of the company or otherwise to pledge the credit of the company. No person, except the directors and persons thereunto expressly mentioned by the board, and acting within the limits of the authority conferred on them by the board, shall have any authority to enter into any contract or engagement so as to impose thereby any liability on the company." And then comes a very important article (the 12th), which seems to me alone sufficient to dispose of this case in substance. It is as follows:—"All moneys payable to the company shall be received by the directors, or the bankers, or by some person authorised by the board, and shall be paid to the account of the company with the bankers." When, therefore, the money constituting the annual profits or gains of the company, and in respect of which the present assessment was made, comes to be received, whose was that money, and to whom did it come? It came to the company, it was received by the directors, or the general body of the company, and came into their hands as constituting the profits of the company, and they, and they alone, have the power to dispose of it; and they alone are liable to the assessment. I have disposed of the question of residence, and therefore only refer to the 14th article because it is very short. It may not be immaterial, and it is as follows:—"The office shall be at such place in London as the Board shall from time to time appoint."

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Then the first officers are mentioned, and there are also many clauses relating to the capital and its disposition; but in every case it is to be the capital of the company, and not a fraction of it can be touched or dealt with except under the company's authority. It is identical in that respect with the previous case. It is, indeed, open to the same complaint, and perhaps in a stronger form, because in the Calcutta case the shareholders in India are subjects of the Queen, and India itself is subject to the exercise of the legislative powers of this country. But that cannot be said of these Italian shareholders, whose case, therefore, if it be a hard one at all, is harder than that of the Indian shareholders. But it is open, as that case was, to the same observation, that if Italian investors think fit for any reason to come to this country, or by their agents who represent them, to become shareholders in a joint-stock company here, and receive a considerable income under the protection of English laws, I do not know why they should not be subject to the obligation of paying a tax upon the incomes so received by them. Howsoever that may be, as a matter of opinion, it is clear that these gains are the guins of the company. A company cannot, as Mr. Matthews suggested might be done, be divided into two or three portions as a partnership consisting of two or three individuals can; and it cannot be said that "so much of this money belongs to the Italian, so much to the French, and so much to the English shareholders; let them therefore only be assessed in respect of the portion belonging to the English shareholders." That cannot be done, and there is no instance of such a thing being attempted. The result consequently is that the whole of these gains, being the property of the company, and coming into the hands of the company, have to be divided in certain proportions amongst all the shareholders, both English and foreign; but until they are so divided they are the property of the company, and only pass into the hands of the shareholders when the dividends have been declared by and under the company's authority and according to the articles of their constitution. Under these circumstances I think that, in both these cases, our judgment must be for the Crown.

HUDDESTON, B.—I am of the same opinion. The whole question turns, as has been agreed on all sides, upon the interpretation of the word "residence," as applicable to a company. The income tax is only imposed upon a "person who is resident in the United Kingdom," in respect of property which he has there, or which he receives from foreign sources. A corporation, for the purpose of paying income tax, is a "person," and then we have to see what interpretation we should give to the word "residence," as applied to a corporation. Now the definition of the word "residence" is founded upon the habits and relations of a natural man, and is, therefore, inapplicable to the artificial and legal "person" which we call a "corporation." But for the purpose of giving effect to the words of the Legislature, an artificial "residence" must be assigned to this artificial "person," and one formed on the analogy of natural "persons." No great difficulty is found in defining what is the "residence" of an individual. It is where he sleeps and lives. What is the residence of a natural person we understand perfectly well.

Then what is the "residence" of this artificial "person?" All the learned counsel I think agreed here, the residence of an artificial person, such as a trading corporation, must be taken to be where his real trade and business is carried on. I adopt the powerful suggestion of Mr. Matthews, that the Income Tax Act of 15 & 16 Vict., when it speaks of a "residence" does not mean an artificial residence; and Mr. Matthews argued, therefore, that when dealing with a corporation the Act did not mean the place where they carry on the form or shadow of business, but the place where they really carry it on; and that seems to be a definition almost conceded by all the learned counsel. It is one perfectly understood by foreign jurists. There is a German word which is applicable to it, which means "the middle point" of the business carried on. The French term, adopted from Savigny, is "le centre de l'entreprise," the central point of the business, that is to say, the real place where it is carried on. Now all the cases which have been cited support that view. In *The Keynsham Blue Lias Company v. Baker* although the court held that Keynsham was the place of business, they did so because the real substantial business was carried on there, although the company had no office in London. In the case of *Taylor v. The Crowland Gas Company* the judgment of the court was put upon the question of the place where the corporation carried on its business. In *Adams v. The Great Western Railway Company*, for a similar reason it was held that the place where the company carried on its business was Paddington, and in *Brown v. London and North-Western Railway Company* that it was in London, and not in Chester. The same rule is applied in *Shiels v. The Great Northern Railway Company*. Then there is a very strong authority, namely, the case of *The Aberystwith Promenade Pier Company v. Cooper*, in which the place of the company's business was held to be in London, although the pier was built in Wales, and the tolls were there taken. Mr. Matthews, I think, satisfactorily distinguished the case of *The Kilkenny and Great Southern and Western Railway Company v. Fielden* (*ubi sup.*), which was cited by Sir H. James. The decision in the case of *Sully v. The Attorney-General* was to the same effect. And in the last case in this court, *The Attorney-General v. Alexander and others* the judgment of two at least of the learned judges (the Lord Chief Baron and Baron Amphlett) pointed out that Constantinople, where the company was incorporated (there being no charter of incorporation in England in that case) was the seat of business, that is to say, the place where it was carried on. The learned Attorney-General put a proposition which, with deference, I for one cannot assent to. He suggested that the registration of a company was conclusive of its "residence," and if a company were registered in England that it must be held to reside there. I think Sir Henry James gave a good answer to that when he said that "registration," like the birth of an individual, is a fact to be taken into consideration upon the question of "residence," because, if we find that a man was born in a place, and eats and drinks and lives in that place, it is a strong circumstance to show that it is his place of "residence;" but it is only a circumstance. The birth is not conclusive of "residence." Taking the analogy between a

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natural and an artificial person, in the case of a corporation we would say that its place of registration is its place of birth, but it is not because it is the place of its birth that its "residence" must be there. It is a fact to be taken into consideration with all the other facts, and if it be found to be registered in a particular country, and acting and having its office and receiving dividends in that country, those are all acts, coupled with the registration, leading to the conclusion that that country is the seat of its business. Mr. Matthews, on a former occasion, I believe, in this court, quoted many American authorities as applicable to the individual States; and yesterday he mentioned a case in Brockenbrough's Reports, *The Bank of the United States v. Maclean*, as to the difference between a corporation created merely by the act of a State and one created by an act of Congress. He pointed out also that it is not at all consistent with the English view of the subject, that a corporation cannot be a corporation except in a particular State, and he founded that on the authority of the case of *Newby v. Van Oppen and Others (The Colt's Patent Firearms Company)*. The principle of law, therefore, is not, I think, in dispute, and we may take it for granted that the place of business is the sort of artificial residence which one would give to this artificial person to make him a "person resident" in this country, within the meaning of the Income Tax Act. And now comes the great difficulty which I have felt all along, and that is, in applying the facts of each individual case to the principle. I quite agree that the onus of proving the "residence" lies upon the Crown, as put by Cleasby B., in his judgment in *The Attorney General v. Alexander*, and that if the Crown fails to satisfy the court that the place of residence is within the jurisdiction, or within the area of taxation, it cannot be said that the company should be taxed. Admitting that, I have to ask myself where, in both these cases, was really the centre of the operations, the substantial and real place of business, "le centre de l'entreprise," or the middle point? I am afraid that I must answer that question, looking at the facts in both these cases, by saying that it was in England. It is not necessary to go at any length into the facts, because they have in both cases been so minutely and elaborately examined and commented on by my Lord, but Sir H. James's argument with reference to the Cesena Company, was put in so captivating a form that until my attention had been carefully called by the Attorney-General to the articles of association, I confess I was, if I may use the expression, caught by it. I am not going through the various clauses of the case, but in substance, as was said by Sir H. James, they amount to this: the trading of the company is in Italy, their unrealized and their fixed property is in that country, and everything that is sold is sold there; no goods are ever sent to England, the majority of the shareholders are in either Italy or France and the small minority of them only in England, the original books are kept in Italy, the managing director is in Italy, where he resides; and therefore, said the learned counsel, we have almost everything—books, profits, manufactures, &c., in Italy. At first I thought it appeared that the centre of business was in Italy, but when I looked at the articles of association, and found that the

object of the memorandum was no doubt to purchase sulphur from a company or firm established at Cesena, but that they contemplated "taking concessions of any lands wherever sulphur is likely to be obtained," and that it is not confined to Italy, and that the general powers of the company are for "the selling, leasing, letting and disposing of any of the lands, mines, and property acquired by the company," it seemed clear, by the memorandum, at all events, that the operations of the company were not to be confined to Italy. Now, the very first article of association is that "the company is formed for the purpose of developing and working the mines of sulphur at Cesena aforesaid, and carrying on the business mentioned or included in the memorandum of association;" that is, carrying on the business of a sulphur company wherever sulphur may be found. Then, on looking to see where the power is which is exercised by the directors, by the office in London, we find that the "board" is "a meeting of the directors duly called and constituted," and that "the working of the company's mines, the mode of disposal, working, and the general business of the company shall be wholly under the order, direction and management of the directors, subject only to such control of general meetings as is hereafter provided for." Then the directors have power (which they have exercised) to register the company in Italy, and to make promissory notes, and so on. "The office shall be at such place in London as the board shall from time to time appoint." A London bank is to be their "first and present bankers." True it is that they had a banker at Turin and one at Paris. They may invest their money in a reserve fund. General meetings are to be held, and those meetings which are described as ordinary or extraordinary, are to be held in London. There is the power given of adjourning from place to place no doubt. It is true that it is not said anywhere that the board meetings must be held in London; but it is obvious from the facts in the case, and from all the requirements of the articles of association, that the books must be kept at the office, and the office, according to the articles of association, must be in London, and thus, inferentially, we arrive at the conclusion, from the facts, and from the case, that the directors are to meet in London. Without going through the other different clauses of the articles, it appears that almost every act of the Cesena company connected with the administrative part of its business is to be done in London. No doubt the manufacturing part may be and was done in Italy; and so, supposing they found sulphur in some other part of the world, and carried on their business there, the manufacturing part of it would be carried on in that other place; but the administrative part of the business would be carried on at the place from which all the orders came, all the directions flowed, and where the appointments of the various officers were made and revoked, where agents were nominated and recalled, where the money was received and dividends were declared and were payable. We find all these acts performed in London, and I cannot help thinking that the main place of the company's business is in England, and that at Cesena is merely an agency as it were of the principal house, that agency being confined to the manufacture and sale of sulphur, but under the direction

of the principal house. With regard to the other case of the Calcutta jute mills, which also has been so fully and elaborately gone into by my Lord, I am bound to say that at one time I thought this case also a strong one in favour of the appellants. The learned counsel put it very strongly, and summed up his arguments as to the result of the case in very clear and terse language. He said in fact this: The only transactions in England are the receipts of the amount transmitted for the payment of the English expenses and dividends, and the declaration of their amount and its division amongst the English shareholders. Again, I look at the articles of association and the case. The office was no doubt lent to the company, or allowed to be used by them for the purpose; from that office would issue all the orders to the managing director in Calcutta, and no doubt until he received orders to the contrary he would have full power and discretion to do what he liked there; but at any moment they might from their head office have revoked his authority or altered any arrangement which he had made connected with the working of the company. The meetings were held in London. The operation of the company in London was, not to divide the money sent among the shareholders, but it was to "declare the dividend." And I apprehend that within the meaning of that clause the directors in London, who had full power, might disapprove of the system upon which the division had been made, and require a different dividend for the future, thus showing that they exercise the authority and are the principal body, while the Calcutta director is only their agent for the purpose of the manufacture and sale of the jute, as the Cesena Company is the agent of the London company for the purpose of the manufacture of the sulphur. Mr. Matthews argued with great ingenuity that, assuming the place of business to be in England, still the only division of the profits here is to be a division of the profits earned by the English shareholders; and he argued that if this were a partnership, then, on the authority of *Sully's case*, the English portion of the partnership only would be liable to pay on the profits received by them, whereas the Indian portion would not have to pay on their profits. If this artificial being, a corporation, could be made a partnership, and every shareholder a partner, that argument would be in accordance with, as he said, natural justice, and would be very striking. But I fear the simple answer is this, that a corporation is not a partnership, and the shareholders are not partners. For these reasons I cannot avoid coming to the conclusion that the place of business of both these companies is in London, and that, therefore, they are within the provisions of the Income Tax Act.

KELLY, C.B.—This is, I think, the first time this question has been raised, and, looking to the peculiar circumstances of the case, I do not think that we ought to give costs to the Crown. Each party, therefore, will pay its own costs.

Judgment for the Crown in each case, without costs.

Solicitors for the Calcutta Jute Mills Company,
Solicitors for the Cesena Sulphur Company, *Nash, Field, and Matthews.*

Solicitors for the Crown, *The Solicitor of Inland Revenue.*

DIVISIONAL COURT FOR APPEALS FROM INFERIOR COURTS.

Reported by M. W. McKELLAR, J. M. LELY, and R. H. AMFELTZ, Esqrs., Barristers-at-Law.

May 19 and 20, 1876.

(Before CLEASBY, B., and GROVE, J.)

COLLIER v. NORTH.

Statute 3 Geo. 4, c. 58, s. 42—Meaning of the word "town."

By 3 Geo. 4, c. 58, s. 42, any person who sells fish within the town of Rochdale, except in the market place (unless such sale take place from a shop or dwelling house), is liable to a penalty not exceeding 5l.

The respondent sold four herrings in an open street, not in the market place. The street was a main thoroughfare with houses on both sides, in a populous part of the ancient municipal borough of Rochdale, and there was a continuous line of buildings from the market place to the street where the sale took place. When the Act was passed the street in question was not made, and the site of it was in fact green fields. There was no definition in the Act of the meaning of the expression "town of Rochdale." The justices refused to convict, being of opinion that the words "town of Rochdale" were limited to the town as it then existed, but stated a case for the opinion of the court.

Held, that the justices were wrong in refusing to convict, inasmuch as the section was intended to apply to all parts of what might be fairly termed the town of Rochdale, whether in existence at the time of the passing of the Act or not.

This was a case stated under the statute 20 & 21 Vict., c. 43.

At a petty session of the justices holden on the 22nd March 1876, at the Town Hall in Rochdale, Charles Collier, hereinafter called "the appellant," appeared before us in support of a summons issued on an information preferred by him against Bridget North, hereinafter called "the respondent," charging: "That she, on the 4th March 1876, at Molesworth-street, in the said borough, not then and there being in the old or new market place in the said borough, but within the town of Rochdale aforesaid, unlawfully did sell certain fish, to wit four herrings, contrary to the statute in such case made and provided."

And the said information was heard and determined by us at the said petty sessions, and upon such hearing we dismissed the said information.

And whereas the appellant, being dissatisfied with our determination upon the hearing of the said information, as being erroneous in point of law, hath duly applied to us in writing to state and sign a case setting forth the facts and grounds of such our determination as aforesaid for the opinion of this court, and hath duly entered into a recognizance as required by the said statute in that behalf, now we do hereby accordingly state and sign the following case:—

Upon the hearing of the information the following facts were either proved before us or admitted by both parties:

1. The appellant is the inspector and superintendent of the Rochdale New Market Place, established by the Act 3 Geo. 4, c. 58, intituled

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"An Act for providing an additional market place in and for the town of Rochdale, in the County Palatine of Lancaster."

2. In sect. 42 of the said Act 3 Geo. 4, c. 58, it is enacted "that it shall not be lawful for any person or persons to kill, slaughter, or dress, or cause to be killed, slaughtered, or dressed, any beast, swine, calf, sheep, or any other cattle, in any shop, standing, or other place in the said new market, except in such buildings or places as may be erected or set apart for that purpose, nor shall any person or persons, from and after the space of eighteen calendar months from the passing of this Act, put, place, or set up, or cause to be put, placed, or set up, in any shop, stall, show, or standing, or any basket, or stool, table, or board, for the purpose of showing or selling or exposing to sale, any corn, grain butchers' meat, fish, poultry, butter, eggs, cheese, vegetables, fruit, or other marketable commodities, matters, or things, on any of the public footpaths or highways in the said town of Rochdale, other than within the limits of the said Old Market Place and the said New Market Place, nor shall any person or persons hereafter, on any market day or days or on any other day, sell or expose to sale within the said New Market Place, any meat, butter, poultry, eggs, garden stuff, potatoes, roots, or vegetables, or any fish, at any time within the said town, except as hereinafter mentioned; and if any person or persons shall offend in any of the cases aforesaid, such person or persons so offending shall forfeit and pay for every such offence, on conviction before one or more justices of the peace for the county, any sum not exceeding 5*l.*, to be recovered and applied as hereinafter directed. Provided, nevertheless, that nothing herein contained shall extend or be construed to extend, to prevent or hinder any person from selling or exposing to sale any marketable commodities, matters, or things whatsoever, in his or her own private dwelling house, or in his or her own shop, in any part of the said town of Rochdale."

3. The respondent did on the 4th March 1876, expose for sale, and actually sell, to one Elizabeth Holt, in a certain street in Rochdale, called Molesworth-street, in the present municipal and parliamentary borough of Rochdale, four herrings at the price of 2*d.*

4. Such sale was made in the open street, from a basket carried by the respondent from door to door, and was not sold in the private dwelling house or shop of the respondent.

5. Molesworth-street aforesaid is not in the said Old Market Place or the said New Market Place of Rochdale.

6. There is no definition in the said Act 3 Geo. 4, c. 58, of the limits of "the town of Rochdale," nor has any subsequent Act local to Rochdale defined what shall be the meaning of the expression "of the town of Rochdale," as used in the said Act 3 Geo. 4, c. 58, for the purpose of the said Act.

7. At the time of the passing of the Act (3 Geo. 4, c. 58), the said street, called Molesworth-street, was not then made, and the site of it was in fact green fields. The said street is now a main thoroughfare, with houses on both sides thereof, in a populous part of the present municipal borough of Rochdale, and there is a continuous line of building from the Rochdale Market Place to Molesworth-street aforesaid, and such line of

building extends beyond the said street to points much further distant from the said Rochdale Market Place.

It is contended, on the part of the appellant, that the expression, "the town of Rochdale," used in the Act 3 Geo. 4, c. 58, must be taken to mean the aggregation of buildings erected at the time of the passing of the said Act 3 Geo. 4, c. 58, and of those erected since that time.

It is contended in reply, on the part of the respondent, that the expression, "the town of Rochdale," as used in the Act 3 Geo. 4, c. 58, has reference only to the aggregation of continuous buildings forming the town of Rochdale at the time of the passing of the said Act.

We were of opinion that the meaning of the said expression, "the town of Rochdale," as used in the said Act 3 Geo. 4, c. 58, was the aggregation of buildings erected and in existence at the passing of the said Act 3 Geo. 4, c. 58, and that Molesworth-street aforesaid, being then fields un-built upon, was not within the town of Rochdale, as intended to be defined by that Act. We, accordingly, dismissed the information against the respondent.

The question of law arising on the above statement for the opinion of the said court, therefore, is, what is the present meaning of the expression, "the town of Rochdale," as used in the Act 3 Geo. 4, c. 58. The court is to make such order in relation to the matters aforesaid as to the court may seem fit.

Manisty, Q.C. and *E. A. Owen*, for the appellant.—The justices were clearly wrong in refusing to convict. The place where this sale took place was within the town of Rochdale within the meaning of 3 Geo. 4, c. 58, s. 42. The spot where this sale took place is within the present limits of the town, and the Act was intended to apply to all parts of the said town then and thereafter to be laid out in streets. This case is concluded by authority. In *Elliot v. The South Devon Railway* (2 Ex. 725; 17 L. J. 262, Ex.), the question was raised as to the meaning of the word "town" in the Railway Clauses Consolidation Act (8 & 9 Vict. c. 20, s. 11), and it was held that it meant a collection of inhabited houses so near to each other that they may reasonably be said to be continuous, and that the term will include a space of open ground surrounded by continuous houses. The case of *Reg. v. Cottle* (16 Q. B. 412; 10 B. & S. 548; 20 L. J. 162, M. C.) is a strong authority in favour of the appellant's contention. That was an indictment against certain trustees appointed under a local and personal Act, which was to be in operation for thirty-one years. The trustees were not to continue or erect any turnpike or tollgate across roads in the towns of Taunton or Wellington, or in any other town through or into which the roads might pass or be made, and the indictment charged the trustees with erecting and continuing a turnpike-gate within the town of Taunton. It was admitted that the gate was not, when first erected, within the town of Taunton, as the town then stood. Two questions therefore arose, first, as to the meaning of the word "town;" secondly, whether the operation of the Act was intended to apply merely to the town as existing at the time of passing the Act, or to whatever should become the town from time to time during the thirty-one years for which the Act was to be in force. At the trial, the

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learned judge told the jury that the word "town" in the Act was to be used in a popular sense as a congregation of houses, and they were to consider whether the spot where the gate stood was surrounded by houses so reasonably near that the inhabitants might fairly be said to dwell together. As regards the second point, leave was reserved to move to enter a verdict for the defendants. A rule nisi was afterwards obtained to enter a verdict for the defendants on the point reserved, or for a new trial on the ground of misdirection. Lord Campbell, C.J., in delivering the judgment of the court, expressed his approbation of the direction to the jury respecting what ought to be considered the limits of a town, and that the enactment was not confined to the town as constituted at the time when the Act passed. The case of *The Commissioners for Paving, &c., the Town of Milton v. The Faversham District Highway Board* (10 B. & S. 548), is to the same effect, and Cockburn, C.J., approve of the decision in *Reg. v. Cottle* (*ubi sup.*).

No counsel appeared to argue on behalf of the respondent.

CLEASBY, B.—The question reserved to us is as to the meaning of the expression "the town of Rochdale" in the Act 3 Geo. 4, c. 58. I confess it appeared to me at first that the Act had reference to an existing state of things, and in some sense that is correct. But the town of Rochdale manifestly does not remain the same, but is of a varying nature from generation to generation. At the time of the passing of the Act the town was a growing one, and the Legislature intended that the Act should have reference to a thing not always remaining the same. The Act itself commences by saying, "Whereas the town or parish of Rochdale hath of late years greatly increased in population and building," &c., showing that the town was an increasing one so far as regards its population. It appears to me, on consideration, therefore, that it would be unreasonable to hold that the words "town of Rochdale" only referred to the town as it existed when the Act was passed. If there had been two separate towns which by continual extension had become joined together, different considerations would have arisen. But when it is manifest that a growth was contemplated, the word "town" should be applied to the old town, together with its natural growth. Therefore I come to the conclusion that this sale took place within "the town of Rochdale," and that the justices ought to have convicted the respondent; the case must, therefore, be remitted to the Justices.

GROVE, J.—I am of the same opinion. When we look at the object of the Act, and the state of things intended to be remedied, it is clear that the word "town" did not mean town as limited at any particular time, but was intended to include what was commonly called the town of Rochdale. The preamble is as follows: "Whereas the town or parish of Rochdale, in the County Palatine of Lancaster, hath of late years greatly increased in population and buildings, and the present market place, &c., has become so inadequate, that the passages along the public streets within the said town are greatly obstructed, and rendered dangerous to the inhabitants of the said town, and also to travellers by reason of the number of stalls and standings placed therein; and whereas it would be a great convenience to

the inhabitants of the said town, and the persons frequenting the said town on market and other days, and would tend to remove nuisances and obstructions if a new or additional market place was provided and established," &c., which clearly shows that the very object of the Act is, as the town of Rochdale was increasing, to confine parties to selling in the market place, and that as the then existing market was inadequate, to provide a new market place for the town. It is worth while observing, however, that sect. 33 provides for the widening of the streets, and for certain buildings being taken down if necessary. Therefore we find direct provisions in the Act having reference to the increasing town of Rochdale, beyond what it was in 1822, when this Act came into operation. If we were to hold that the operation of the Act was confined to the then existing town, then any portions of a street which had been widened would not be within the Act, while the remaining portion which originally formed the street would be within the Act. So that in such a case a sale of fish would be permitted in one portion of a street and not in another portion of the same street. This certainly would be a great absurdity, but, as it seems to me, it would be the necessary consequence of holding that the "town of Rochdale" in the Act intended to include only the then existing town. For if you so limited the word "town," if some of the streets were elongated, on the part so elongated a sale could be legally effected, while on the other part a sale would render the seller liable to a penalty. Therefore the definition of the "said town of Rochdale" ought not to be so limited; and the word "said" merely has reference to the town to which the Act applies, and the expression was intended to include what might fairly be called the town. A row of cottages might be a mere suburb of the town, and not within the town; but that would depend on circumstances. The only other argument that could be raised for the respondent is, that the town may become so extended as to make the market place quite insufficient to meet the requirements of some of its inhabitants. The answer is, that if such a state of things should arise, another application must be made to Parliament for still further accommodation. For the reasons I have given, I think the justices were wrong in refusing to convict the respondent.

Case remitted to Justices.

Solicitors for the appellant, *Norris, Allen, and Carter.*

Thursday, May 11, 1876.

COOPER (app.) v. OSBORNE (resp.).

Licensed premises—Private friends—Gaming—35 & 36 Vict. c. 94, ss. 17 and 25—37 & 38 Vict. c. 49, s. 30.

The appellant, a private friend of a licensed person, bonâ fide entertained by him after the hours of closing at his own expense within the Licensing Act 1874, s. 30, was playing cards for money on the licensed premises, and was convicted under the Licensing Act 1872, s. 25, of being on the said premises during the period they were required to be closed.

Held, upon a case stated that the appellant was not on the premises in contravention of the provisions of the Licensing Acts with respect to the closing of

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licensed premises, and that the conviction must be quashed.

THIS was a case stated by two justices of the peace acting for the Newark Division of the county of Nottingham under the statute 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of the court on a question of law which arose before them as hereinafter stated.

At a petty sessions holden at Newark-on-Trent, in the said county of Nottingham, on the 5th Jan. inst., Charles Cooper, of Spalford, in the county of Nottingham, farmer (called the appellant), was charged before the said justices on the information of John Osborne, of Newark-on-Trent, police superintendent (called the respondent), for that he, on the 29th Dec. 1875, at the parish of South Clifton, in the said county of Nottingham, was on certain licensed premises (to wit), the Red Lion Inn, there situate, during the period during which the said premises were required under the provisions of the Licensing Act 1872 to be closed contrary to the statute in such case made and provided.

Henry Derbyshire, a police constable, stationed at Clifton, proved that on the 29th Dec. last he was passing the Red Lion Inn at South Clifton about eleven o'clock at night, when he heard voices within and distinguished that persons were playing cards for money. He subsequently obtained admission to the premises, and then found several persons present, including the appellant in the present case. The landlord stated that they were his private friends, and he considered that he had a right to entertain them as such.

The said justices' attention was drawn to the case of *Patten v. Rhymmer* (29 L. J., 189 M. C.). The appellant's advocate admitted the persons in the inn were playing at cards for money, but contended that the Legislature, when inserting clause 30 in the Licensing Amendment Act of 1874, whereby a licensed person was authorised to entertain and supply liquors after the hours of closing to his private friends at his own expense, intended that the licensed person should have the same rights as any private person to entertain his friends in any manner he pleases, and that, therefore, neither the landlord nor his friends were liable to any penalties under the Licensing Acts.

The said justices were of opinion that notwithstanding the persons on the licensed premises were, as they had no reason to doubt, and found as a fact that they were, private friends to whom the landlord might after hours give at his own expense intoxicating liquors under sect. 30 of the Licensing Act 1874; yet he was not thereby justified in allowing them to play for money; the said justices, therefore considered they were there in contravention of the Licensing Act, as to the closing of licensed premises (sect. 25 of the Licensing Act 1872), and they therefore convicted the appellant.

The appellant being dissatisfied with their decision, as being erroneous in point of law, requested a case to be stated for the opinion of the court.

Should the court be of opinion that the appellant, being a private friend of the licensed person, was upon the premises in contravention of the Licensing Acts, then the conviction is to stand; otherwise it is to be quashed.

The court having remitted this case to the said justices, who stated and signed the same to be restated by pointing out how the defendant had

contravened the Licensing Acts, they hereby stated as follows:—

"The reasons for our decision were: By sect. 3 of the Licensing Act 1874, it is provided that all premises in which intoxicating liquors are sold by retail, shall be closed at the hours in such sect. named, unless extended by the licensing justices, which had not been done. The appellant was found upon the licensed premises after closing time. He gave no evidence that he was an inmate, servant, or lodger, or *bonâ fide* traveller, and only contended that his presence on the premises was not in contravention of the Licensing Acts, but that he was a private friend of the landlord. As he was not there for the purpose only of being entertained by the landlord as a private friend with intoxicating liquors, as allowed by sect. 30 of the Act of 1874, but (though still a private friend of the landlord) it appearing to us that he was there for an unlawful purpose (to wit), gaming for money, we considered he was aiding and abetting the landlord (as the licensed person named in sect. 17 of the Act of 1872), in suffering unlawful games to be carried on on the premises; and therefore that he was on such premises in contravention of the Licensing Acts, and in consequence liable to the penalty in which we convicted him."

The case came on to be argued first at the same time with *Hare*, appellant, v. *Osborne*, respondent, on the 17th Feb. 1876, reported 34 L. T. Rep. N. S. 294; that was a case stated at the request of the landlord, who was convicted for suffering gaming on the occasion when the appellant was charged in this case. The court affirmed that conviction, but remitted the case of the charge against the appellant as stated by the justices.

Rolland now argued for the appellant on the amended case.—The charge against the appellant, as it appears by the information, is not one of aiding and abetting the landlord in suffering gaming, as suggested by the justices in the reasons for their conviction, but for being on licensed premises after closing time, which is provided for by sect. 25 of the Licensing Act 1872 (35 & 36 Vict. c. 94); by that section, "If, during any period during which any premises are required under the provisions of this Act to be closed any person is found on such premises, he shall, unless he satisfies the court that he was an inmate, servant, or a lodger on such premises, or a *bonâ fide* traveller, or that otherwise his presence on such premises was not in contravention of the provisions of this Act with respect to the closing of licensed premises, be liable to a penalty not exceeding 40s." Although under that Act, taken by itself, the appellant might have been liable to conviction, he is by implication now clearly exempt, in consequence of sect. 30 of the Licensing Act 1874 (37 & 38 Vict. c. 49), by which "No person keeping a house licensed under this or the principal Act shall be liable to any penalty for supplying intoxicating liquors after the hours of closing, to private friends *bonâ fide* entertained by him at his own expense. Sect. 17 of the Act of 1872 imposes a penalty upon the licensed persons only, and not upon his guests, if the former suffers gaming or any unlawful game to be carried on on his premises; there is, therefore, no such offence as that suggested by the justices, even if the appellant were charged with it.

The respondent did not appear.

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CLEASBY, B.—I believe we are all agreed. My opinion is that the conviction cannot stand, because the appellant was not guilty of the offence charged against him. The 25th section of the Licensing Act 1872, which imposes a penalty upon any person found upon licensed premises during the period the premises are required to be closed, must now be read with the 30th section of the Licensing Act 1874, which exempts licensed persons who supply intoxicating liquors after the hours of closing to private friends *bond fide* entertained by him at his own expense. That section of the later Act must also exempt such private friends so entertained, for their presence on such premises is no longer, to use the limiting words of sect. 25 of the first Act, in contravention of the provisions of the licensing Acts, with respect to the closing of the licensed premises. There is no provision for the conviction of a guest in a licensed house, whether during the hours of closing or not, for gaming or any unlawful game; but the magistrates have somehow introduced section 17 of the Act of 1872, which imposes a penalty on a licensed person for such an offence, into the subsequent sect. 25, so as to make the guest liable for his presence at the time of the landlord's contravention of the Act, although exempted by the second Act. The reasons given by the justices are in this case certainly erroneous, and it cannot be said that the appellant's presence on the premises was under the circumstances in contravention of the provisions of the Acts. The appeal, therefore, must be allowed.

DENMAN, J.—I am of the same opinion. The magistrates find as a fact that the appellant was, within the words of sect. 30 of the Act of 1874, a private friend of the landlord, and being entertained by him at his own expense. The landlord, therefore, was justified in allowing the appellant to be on the premises after the time of closing, and the appellant has not thereby contravened the Act. There was nothing illegal in what the appellant did, at all events until the playing at cards for money commenced. Although the landlord may be convicted for suffering such a proceeding, it seems that there is no penalty upon the persons playing cards either during the open or close hours. More might, perhaps, be said in support of a conviction if the appellant had been charged with aiding and abetting the landlord in a breach of the 17th section, but there seems to be no summary remedy for such an offence. At all events, there is nothing here to support the charge under the 25th section, which is made against the appellant, and the conviction must be quashed.

FIELD, J.—I am of the same opinion.

Judgment for appellant.

Solicitor for appellant, R. W. Marsland.

June 2 and 15, 1876.

(Before BRAMWELL, B. and GROVE, J.)

WILLIS v. MACLACHLAN.

Registration court—Qualification of voter—Power of revising barrister to remove from court—Interruption of business—Stat. 28 & 29 Vict. c. 36, s. 16.

By 28 & 29 Vict. c. 36, s. 16, a revising barrister may order the removal of any person who interrupts the business of the court, or refuses to obey lawful orders in respect of the same.

At a court held in 1874, by the defendant, who was a revising barrister, the vote of W., plaintiff's brother, was objected to, on the ground that he claimed as a freeholder, but was only a copyholder. In 1875 W. claimed to be put on the list as a copyholder. The plaintiff then produced certain deeds to show that W. was a freeholder, and, in answer to the defendant, admitted that he was present in court in 1874, when W.'s right to have his name on the list as a freeholder was objected to, and had the deeds in his pocket, though he did not produce them. Thereupon the defendant, after censuring him, ordered him to leave the court, and gave instructions to the police to remove him if necessary. The plaintiff then left the court, and afterwards commenced an action in the County Court for false imprisonment. The defence was that the plaintiff was interrupting the business of the court. The judge nonsuited the plaintiff on the ground that the act complained of was done in the exercise of a judicial discretion.

Held (reversing the decision of the County Court Judge), that the nonsuit was wrong, inasmuch as the plaintiff was guilty of no interruption of the business of the court, as alleged by the defendant in his plea.

This was an action for false imprisonment, tried in the County Court of Sunderland.

The following were the material facts, as proved by the plaintiff: In Oct. 1875 the defendant, who was the revising barrister for the district at North Shields, held his court at that place for the purpose of revising the list of voters. Among others Robert Willis, brother to the plaintiff, claimed to have his name put on the list as a copyholder. The plaintiff then produced certain deeds which proved that Robert Willis was a freeholder. It appeared that at a court held in the previous year Robert Willis's name had been inserted in the list as a freeholder; but it was then objected that his claim could not be allowed, inasmuch as he was a copyholder and not a freeholder. Plaintiff admitted, in answer to questions put to him by the defendant, that he was present at the court held in 1874, when his brother's claim to a vote as a freeholder was disposed of, and that the deeds were at that time in his pocket, though he had not produced them. The defendant then severely censured the plaintiff for his conduct, ordered him at once to leave the court, and gave instructions to the police to remove him if necessary. The plaintiff then left the court, and brought his action for false imprisonment.

The notice of defence was that the defendant was a revising barrister holding his court, and that the plaintiff was interrupting the business of the court.

The learned County Court judge held that the act complained of was done by Mr. MacLachlan in the exercise of a judicial discretion, and that he was not liable; accordingly he nonsuited the plaintiff. A rule *nisi* was afterwards granted to set aside the nonsuit, against which

Butt, Q.O. and John Edys, showed cause.—The defendant has done nothing to render himself liable to an action for false imprisonment. By 28 & 29 Vict. c. 36, s. 16, it is enacted that "it shall be lawful for any revising barrister, whether revising the lists of a county, city, or borough, to order any person to be removed from his court who shall interrupt the business of the court, or refuse to

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obey his lawful orders in respect of the same." The conduct of the plaintiff was an abuse of the process of the court. Moreover, it is clear that the judge of any court doing an act within his jurisdiction, and having exercised his discretion, and ascertained facts, however wrong he may be, is not liable because that discretion is erroneously exercised. In *Garnett v. Ferrand* (6 B. & C. 626), Lord Tenterden, C.J., in delivering the judgment of the court, said: "Even inferior justices, and those not of record, cannot be called in question for an error in judgment, so long as they act within the bounds of their jurisdiction. [BRAMWELL, B.—Your argument comes to this—that a revising-barrister, having power to turn a man out of court for one reason, if he turns him out for another he is nevertheless not responsible. GROVE, J.—The *ratio decidendi* here was clearly not an interruption.] If the defendant had authority his decision cannot be challenged. [GROVE, J.—Not even if there was an admitted *malafides*?] No; the cases go to that extent. In *Scott v. Stansfield* (L. Rep. 3 Ex. 220; 18 L. T. Rep. N.S. 572; 37 L. J. 155, Ex.) the defendant was a County Court judge, and the action was for slander in his capacity as such judge, and it was held that the action was not maintainable, though the words were spoken falsely and maliciously, and without any reasonable, probable, or justifiable cause, and without any foundation whatever, and not *bona fide* in the discharge of the defendant's duty as judge. All the cases on the subject are collected in *Kemp v. Neville* (10 C. B. N. S. 523; 4 L. T. Rep. N. S. 640; 31 L. J. 158, C.P.). Erle, C.J., says (p. 551): "Throughout these cases, and many others, the vital importance of securing independence for every judicial mind is earnestly recognised. . . . As the defendant had jurisdiction in respect of the matter, and the person, and the place, it does not appear to us to be essential to rely on his being a judge of a court of record." They likewise cited

Brittain v. Kinnaird, 1 B. & B. 432;

R. v. Bolton, 1 Q. B. Rep. 66; 10 L. J. 49, M.C. and

Broom's Legal Maxims, 5th edit. p. 87.

The *Solicitor-General* (Sir H. Giffard) and *Gainsford Bruce*, for the plaintiff, in support of the rule.—A great deal of the argument on the other side has turned on the question of jurisdiction, and might be applicable here if what was done had anything to do with the decision of votes. If the contention put forward on behalf of the plaintiff be correct, no action could be maintained against justices under Jervis's Act, because they believed they had authority to do something, although it turns out they had no authority. A man cannot find a fact without at least some evidence to give jurisdiction. The jurisdiction here depends on interruption to the process of the court. [BRAMWELL, B.—Can you say whether, if the defendant has a right, you will inquire how it is exercised, that being the sole question here?] In order to have such a right the defendant must have before him something which he believes to be an interruption of the business of his court, and if there is any evidence to support such a belief he may perhaps then not be responsible. Jurisdiction to strike out the names of voters is one thing, to give into custody is another, though no doubt the one is sometimes incidental to the other. In *Houlden v. Smith* (14 Q. B. 841; 19 L. J. 170, Q. B.) it was expressly decided that a judge of record is answerable in an

action for an act done by his command when he has no jurisdiction and is not misinformed as to the facts on which jurisdiction depends. In *Garnett v. Ferrand* (*ubi sup.*) the action was against a tenant for turning a person out of a room where he was about to take an inquisition, and the point taken was that the court of a coroner is a secret court. They also referred to

Smith v. Bouchier, 2 Str. 993; and

Pease v. Chaytor, 1 B. & S. 658; 31 L. J. 1, M. C.;

Butt replied.

Cour. adv. vult.

The following written judgments were delivered on June 15:—

BRAMWELL, B.—I have no doubt that the learned defendant thought he had power to deal with the plaintiff as he did, and that in so doing he was making a proper use of that power. But whether he had or had not power to do what he did, in the sense of not being liable to be made responsible for it, there can be no doubt that he had no right to, and, in my judgment, was very wrong to do as he did, for the plaintiff was absolutely free from all blame on the occasion in question. I say nothing—I am incapable of forming any opinion—as to whether the plaintiff had on a former occasion done anything that deserved censure. But on the occasion in question he certainly had not. He had answered certain questions of the defendant—by what authority, I know not—and he answered them truthfully, and was turned out of court, not for his then conduct, but for that of a year back. No doubt there are cases in which it is desirable that judges and persons in the position of the defendant should express disapprobation of improper conduct, that it may not be supposed that silence gives consent; and I doubt not, as I have said, that the defendant thought he ought to do so on this occasion; but he could have no right to punish the plaintiff for former conduct by turning him out of court; and in this sense it cannot be denied that the defendant's act was wrong and unlawful. But it was urged before the able judge of the County Court, and repeated before us, that the defendant having power to turn the plaintiff out of court for some cause, must be deemed to have done so for such cause on the present occasion, that otherwise it would be impossible for the judges to do their duty with safety, as they would be subject to actions, the decision of which would rest with a jury, as to whether they acted under an authority they possessed, or on some other ground, and whether they were acting *bona fide*. The result of this argument would be, that because a revising barrister could properly turn a person out of court for one reason—viz., when he was disturbing the business—he could do so with impunity for any or no reason when he was not, on the pretence that he was. This is somewhat startling, but the arguments in support of it are strong, and what was said by Lord Tenterden in *Garnett v. Ferrand* (*ubi sup.*) undoubtedly favours the contention. But I think the question does not arise. The defendant did not profess to turn the plaintiff out of court on the ground that he was disturbing the business. I do not say that any judgment should have been pronounced or minute of proceedings kept that the plaintiff was turned out of court for such a reason. What I do say is that that was not, and was not professed or stated to be, the reason for his expulsion. He was expelled as a punishment, or because he was unfit to be in

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court. It may be that a Revising Barrister has authority to expel others than those who are disturbing the business of the court. If the defendant here had pleaded that he deemed it right for the due conduct of the business of the court that the plaintiff should be expelled, the question of his right to do so would have arisen. But he has not so pleaded. He has pleaded that he expelled him because he was disturbing the court. That was not so, and the plea is not true. I do not mean that it is dishonestly untrue—no doubt it is supposed to be the true way of stating the defence; but it is, in fact, untrue. I think, therefore, there must be a new trial. It may be said that this will give rise to the same questions, which it is not desirable a judge should be subject to. But it does not. A judge has only to say that he adjudged it was desirable the party should be removed, if that is a defence. Besides, this argument must not be pressed too far. For, suppose the court was held at an inn, and about the time it was over the Revising Barrister ordered a guest to be turned out of a room. It cannot be doubted that an action would lie if the court was over, but in such action a question for a jury would arise, viz., whether the court was over. Anyhow, there can be no law which compels us to affirm what we know to be untrue, and say that the defendant expelled the plaintiff because he was disturbing the court. I repeat, I think there must be a new trial, no damages having been assessed. I say nothing about an amendment, setting up such a defence as I have supposed possible, except that I should regret to see it pleaded, as I feel sure that, in truth, the learned defendant did not turn the plaintiff out of court for any such reason, but to punish him. The defendant has very handsomely admitted that the act of turning the plaintiff out of court was his, and I should be glad if he would further admit that it was wrongful.

GROVE, J.—I agree, and will only add that, as for the purpose of this motion we are to take the newspaper report to be correct, it is clear the plaintiff was turned out of court, not for any disturbance, misconduct, or contempt, or for any reason which rendered his expulsion necessary for due decorum in the proceedings of the court, but for alleged past misconduct with reference to a voter, not with reference to the court; and the expulsion was in the nature of a sentence awarding punishment, and not in the nature of a summary committal essential to the maintenance of order in judicial proceedings. It was the exercise of a jurisdiction which the defendant did not possess, and not an erroneous action or an excessive exercise of a jurisdiction which he did possess. Although nothing wrong was intended by the defendant, yet it seems to me that if his act were sanctioned by law, which I am of opinion it is not, the law would sanction an arbitrary usurpation of jurisdiction where there is none, and a defence of such usurpation which would not be true in fact, viz., that which states as the ground of the expulsion the exercise of a jurisdiction which the defendant rightly had and an act within it, as a justification for an act in the exercise of a jurisdiction which he clearly had not.

Judgment for the appellant. Nonsuit set aside, and new trial ordered.

Solicitor for appellant, G. J. Brownlow.

Solicitor for respondent, Bowey.

QUEEN'S BENCH DIVISION.

Reported by M. W. McKELLAR, J. M. LELY, and R. H. AMPLETT, Esqrs., Barristers-at-Law.

May 3 and 6, 1876.

REG. v. FOX.

Turnpike trustees—Sale of toll-house—Improvement of road—Discretion—The Annual Turnpike Acts Continuance Act 1866 (29 & 30 Vict., c. 105), s. 2.

Defendant was indicted for obstructing a highway, having purchased and kept standing a toll-house, not required for the purposes of the road, from the trustees of the turnpike, under 29 & 30 Vict. c. 105, s. 2.

This toll-house was situated in the middle of a wide part of the road at the junction with another road. The addition of the site would have been a slight improvement to the road for the purpose of persons driving a particular way, but it would have been of no material benefit or advantage for the chief part of the traffic; and the price paid for the house was 120l.

Held, upon a special verdict, that assuming the court to have jurisdiction to review the propriety of the sale, the trustees must have a practical discretion under the said section; and that, the price of the house being far beyond the value of the improvement, the trustees were justified in selling the house instead of adding the site to the road.

THIS was an indictment preferred against the defendants for the obstruction of a highway. The defendants pleaded that they were not guilty.

The indictment came on to be tried before Blackburn, J., at the Summer Assizes of 1872, held at Leeds, in and for the West Riding of the County of York, when a verdict was taken for the Crown, subject to the opinion of the court on the following case: This indictment was preferred by the Local Board of Health for the Borough of Wakefield, as and being surveyors of highways within the said borough for an alleged obstruction to the highway, which runs from Leeds to Wakefield, and which was formerly the Wakefield and Leeds turnpike road.

The obstruction consisted in the maintenance by the defendants of a house which had formerly been used as a toll-house under the circumstances hereinafter mentioned.

Mr. Fox, one of the defendants, is a gentleman of property in the neighbourhood, and the other defendant is his tenant, occupying the said house. Before, and in the year, 1758, there was an ancient Queen's highway for all purposes, leading from Leeds through Newton to Wakefield. The course of this highway between Newton and Wakefield was shown upon a plan which accompanied and formed part of this case. There was also before and in the same year another ancient Queen's highway for all purposes leading from Bradford to Wakefield, which last mentioned highway joined the first mentioned highway between Newton and Wakefield. The course of this highway, where it joined the highway from Leeds to Wakefield, was also shown upon the said plan. The road running from Wakefield branched off at the particular spot in question into these two ancient highways leading to Leeds and Bradford respectively. In the 31st section of Geo. 2 1758, an Act was passed entitled "An Act for Repairing the Road from

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Leeds to Sheffield, in the County of York." By that Act, after reciting that the road leading from Leeds through Wakefield and Barnsley to Sheffield (of which the said ancient highway from Leeds to Wakefield formed part) had become deep and ruinous, trustees were appointed for enlarging, amending, and repairing the said road and keeping the same in repair, and were authorised to erect turnpikes, toll gates, and toll houses in, upon, or across the said road, and to take tolls thereat. By the said Act the right and property of the said turnpikes and toll houses were vested in the trustees, who were thereby authorised and empowered to dispose thereof as they should think proper. By the said Act the trustees were also authorized and empowered to widen any of the narrow parts of the said highway or road by opening, clearing, and laying into the said highway or road any grounds of any persons lying contiguous thereto, making reasonable satisfaction to the owners or occupiers of such ground; and it was enacted that such grounds, so as to be taken in, when the same should be ditched and fenced, should to all intents and purposes whatsoever from henceforth become and be and should be deemed and taken to be a public and common highway, and be from thenceforth a part of the said road, not only during the continuance of that Act but for every after. By another Act passed in the 10th Geo 3 (1770), the term of the former Act was enlarged and the trustees were thereby authorised and empowered to continue, remove, take down, erect, and set up such gates, turnpikes and toll houses respectively in, across, or on the side of any part of the said road, and the sole right and property of, in, and to all and every the turnpikes toll gate and toll houses erected, built, or continued by virtue of that or the former Act were vested in the trustees, who were thereby empowered to dispose thereof respectively as they should think proper and requisite.

By other Acts passed in the 32nd and 43rd of Geo. 3, the term of the two above-mentioned Acts was further enlarged.

Immediately after the passing of the first-mentioned Act the trustees had erected a tollgate and tollhouse at the point in the said plan marked "Old Toll Bar," and the same was continued down to the year 1804.

In 1804 that part of the road which lay between Newton and Wakefield was widened by the trustees by certain parts of the ground adjoining thereto being taken into the said road.

Some time before 1804 the highway from Bradford to Wakefield had been constituted a turnpike road, and the trustees thereof under the powers of their Acts had altered the direction of the said road, and in 1808 the said alterations had been completed, and were ready to be open to the public.

In 1808 the trustees of the Wakefield and Leeds turnpike road resolved to remove the old tollhouse and gate hereinbefore referred to and to erect a new tollgate and tollhouse; and in pursuance of their local Acts and of the public Acts then in force they duly, in 1808, erected a new tollgate and tollhouse. The site of such new tollhouse was denoted in the said plan by the words "present toll bar;" and, as it here appears, it was in fact built upon the site of the ancient highway from Leeds to Wakefield. Its position was at the junction of these two highways mentioned, and at a part of the road about 80ft. wide, the road

immediately becoming much narrower both nearer to and further from Wakefield. When the new tollhouse had been completed the old tollhouse was removed, and the new tollhouse, which is the subject of the present indictment, was thenceforward and until the year 1870 used as the tollhouse for collecting the tolls on the said Wakefield and Leeds turnpike road by the trustees of that road, and was known as the Newton tollhouse.

Until the sale of the said last-mentioned tollhouse as hereinafter-mentioned the said tollhouse continued to be the property of the said last-mentioned trustees; and no alteration has been made in the road since the said tollhouse was so built as aforesaid.

In the year 1821 an Act of 2 Geo. 4 was passed by which the earlier Acts of the Wakefield and Leeds turnpike hereinafter referred to were repealed and other provisions substituted. By this Act the right and property of, in, and to all the tollgates, turnpikes, and tollhouses then being upon the said road were vested in the trustees thereby appointed. This and the earlier Acts are to be taken to form part of this case.

The trusts of the said Wakefield and Leeds turnpike road expired on the 30th June 1870, in which year and shortly before which date the trustees of that road, for the sum of 120l., sold and conveyed the said toll house, and the site on which it stood, to the defendant George Lane Fox, who then was, and still is, the owner of the adjoining land, from which the land on which the said toll-house was built is separated by an ancient fence.

If on the facts herein stated, the court should be of opinion that the question can be raised whether in point of fact the Wakefield and Leeds road would have been improved by the addition thereto of any part of the site of the said tollhouse under the provisions of sect. 2 of The Annual Turnpike Act Continuance Act 1866 (29 & 30 Vict. c. 105), the following statement contained in this paragraph is to be taken as part of the case. For carriages using the Wakefield and Leeds road without turning when going from the direction of Leeds off the Wakefield and Leeds road on to the branch which connects that road with the Bradford and Wakefield road, or without turning when going in the direction of Leeds from the said branch on to the Wakefield and Leeds road, the removal of the said toll-house and the addition of the site thereof to the Wakefield and Leeds road would not have been of any material benefit or advantage. But for carriages passing when going in the direction of Leeds from the said branch on to the Wakefield and Leeds road, or passing when going from the direction of Leeds from the Wakefield and Leeds road on to the said branch, the removal of the said tollhouse and the addition of the site thereof to the Wakefield and Leeds road would have been a material benefit and advantage.

Since the aforesaid sale to Mr. Fox, the said tollhouse has been maintained by the defendants, and they still maintain it upon the site upon which it was originally built; but it has not been used for any purposes connected with any of the said roads or for the benefit thereof.

It was contended, on the part of the prosecution, that the trustees of the said Wakefield and Leeds

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turnpike road had no power to sell the said tollhouse or the site thereof to the defendant, George Lane Fox, and that the said tollhouse, not being required for the purposes for which it was originally built, is an obstruction to the highway of which the old road, on part of which the said tollhouse was built, as hereinbefore stated, now forms a part.

The court is to be at liberty to draw any inference of fact which in the opinion of the court a jury ought to have drawn.

The question for the opinion of the court is, whether the defendants are guilty of obstructing the said highway by maintaining the said tollhouse; and if the court should be of opinion that the defendants are so guilty, then the verdict for the Crown is to stand; but if the court shall be of a contrary opinion, then a verdict of not guilty is to be entered.

May 3.—Waddy, Q.C., argued for the prosecution.

Cave, Q.C., for the defendants.

Cur. adv. vult.

May 6.—BLACKBURN, J.—It appears that about 1808, a branch from the Bradford and Wakefield road, made to open into the Leeds and Wakefield road, was constituted a turnpike, and at the point of junction the two roads together covered a space between the hedges of some 70ft. or 80ft. wide. Except at this spot, in the middle of which was built the tollhouse now alleged to be an obstruction, the road was much narrower in all the three directions. There is a clear passage on each side of the house for vehicles going from Wakefield on one side to Leeds, and on the other into the branch road leading to the Bradford road; and similarly for traffic in the opposite directions. For neither of these purposes would the road be improved by the addition of the site of this tollhouse, but persons have the right to turn into this branch road to Bradford when driving from the Leeds direction towards Wakefield, and so in the opposite way towards Leeds from the branch road; in so doing they have to make a further curve round the toll house than they would have to do if the house were not there; but no one could thereby be put to great inconvenience, and the improvement to the road by pulling it down would be very slight. At all events, in 1870, when the trust came to an end, in which the toll house was included, the trustees sold this toll house and the site on which it stood to the defendant Mr. Fox. Under the old statute (4 Geo. 4 c. 95 s. 57), when a toll house became useless and was no longer required for the purposes of such road, the trustees or commissioners could not sell or dispose of the house, but they could only cause the house to be pulled down; and the site of such house, together with the garden and appurtenances thereunto belonging, might be sold in the same manner as land or ground not wanted for the purposes of the road might be sold under the regulations of a previous Act. Then followed on this subject the Annual Turnpike Acts Continuance Act 1866 (29 & 30 Vict. c. 105) which in the second section enacted the above provision of 4 Geo. 4 c. 95, and enacted as follows in two sub-divisions of the section:

(1.) If the road would be improved by the addition thereto of the whole or any part of the site of the toll house or of any garden or land belonging thereto, then the trustees or commissioners of the road shall, instead of selling the whole or such part (as the case may require) cause the same to be added to the road, and shall cause

any building standing on the ground so added to be pulled down and the materials thereof to be sold and removed: (2) Where the trustees or commissioners of a turnpike road are authorised to sell the site of a toll house they may, notwithstanding anything contained in the last mentioned Act, sell the toll house and other buildings standing on such site, unless required to pull them down by the person to whom a right of pre-emption is given by any Acts relating to turnpike roads. Subject, as aforesaid, the provisions of the said Act relating to the selling of toll houses shall be of the same force as if this Act had not passed.

In this case the right of pre-emption belonged to the defendant Mr. Fox, and the trustees sold him this toll-house standing for 120l. The question raised is whether under the circumstances the trustees of the turnpikes were entitled to sell as they did, or whether they were not compelled by this first sub-section to cause the site of the toll-house to be added to the road. It has been assumed on the argument that this is a right means of raising the question of the propriety of the sale, and without expressing any opinion as to our jurisdiction to decide the other way, we have come to the conclusion that it is a matter within the reasonable discretion of the trustees whether the addition of such a site will improve a turnpike road. It cannot be intended by sub-section 1 of this enactment to render the destruction of a toll-house absolutely necessary, when only a very slight improvement to the road can be derived from the addition of the site. The provision must be applied practically; and when a substantial value can be obtained for such a house, a real improvement should be secured before it is required to be pulled down. The proper tribunal to review the matter, whatever it may be, ought to give a wide discretion to trustees; here the price of the house was 120l., and although its destruction might have produced some slight improvement to the road, that improvement would have been very dearly purchased at that price. The trustees in our opinion were certainly not bound to do otherwise than they did, and our judgment will therefore be entered for the defendants.

Judgment for defendants.

Solicitors for prosecution, Taylor and Hales for Jansons, Banks, and Hicks. Wakefield.

Solicitors for defendants, Duncan, Murton, Warren, and Gardner.

Saturday, May 6, 1876.

GRIFFIN (app.) v. DRAYTON-IN-HALES HIGHWAY BOARD (resps.)

Exhausted parcels of land—Adjoining owner—Fair and reasonable value—Appeal—5 & 6 Will. 4, c. 50, s. 48.

The respondents sold and conveyed to the appellant, the person whose lands adjoined thereto, an exhausted gravel pit in pursuance of sect. 48 of the Highway Act 1835. The pit was valued by a land surveyor at 155l. 6s. 6d., but a person not an adjoining owner was willing to give 450l. for it. The justices at special sessions fixed the latter amount as the fair and reasonable value under the circumstances. Upon appeal, the quarter sessions fixed the lower amount as fair and reasonable between the respondents and the appellant.

Held, upon a case stated, that the quarter sessions had jurisdiction to hear the appeal, and were right in fixing the value with reference to the interests of both parties.

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GRIFFIN (app.) v. DRAYTON-IN-HALES HIGHWAY BOARD (resps.).

[Q.B. Div.]

THIS was an appeal against an order of determination of justices made at a special sessions for highways, authorising the sale of an exhausted gravel pit at a price thereby fixed by the said justices under the 48th section of the Highway Act, 5 & 6 Will. 4, c. 50. The appellant is a gentleman owning the land adjoining the said gravel pit.

The respondents are justices who made the said order, and the Highway Board of Drayton-in-Hales, on whose application the said order was made.

The appellant appealed to the General Quarter Sessions of and for the county of Stafford, held on the 2nd Jan. 1875, when the appeal was respited. And the court of quarter sessions on the 20th Oct. 1875, after hearing evidence and by consent of the above mentioned highway board respondents, the justices not appearing, gave judgment that the said order should be quashed, subject to the following case for the opinion of the Court of Queen's Bench.

By an inclosure award made in the year 1773, under an Act of Parliament passed in the 13th year of King George III., two gravel pits, one of which is the gravel pit referred to in the order of justices above mentioned, were allotted to the highway surveyor for the time being of the Staffordshire part of the parish of Drayton-in-Hales for the repairs of the highways within that part of the parish.

This gravel pit became exhausted many years ago.

The highway board for the district of Drayton-in-Hales have, under the provisions of the 43rd section of the statute 25 & 26 Vict. c. 61, become the successors of the surveyors of the highways for the said parish.

The appellant is the owner of a house and grounds abutting on the site of this exhausted gravel pit, and is the only person whose lands adjoin thereto.

Owing to the fact that this site adjoins his house and garden, and to the annoyance which might be caused to him by any other person into whose hands the land might fall, it has a special accommodation value to him far beyond the intrinsic value of the land.

At a meeting of the highway board held in the month of May 1873, it was resolved that Mr. Bright, a land surveyor, should be instructed to report on the condition and value of certain gravel pits, one of which was that adjoining the appellant's lands, with regard to which the present question arises.

Mr. Bright accordingly valued and reported to the board. He reported that the gravel pit adjoining the appellant's land was exhausted, and he valued it at 155*l.* 6*s.* 6*d.*

In due course the waywardens were authorised to apply to the justices in special sessions to fix a reasonable price for the gravel pit in question, and to give their consent to its sale.

On the 26th Oct. 1874, at a special session held at Newcastle-under-Lyme, application was made to the justices there assembled, in accordance with the resolution just mentioned.

The justices thereupon made the order of determination now appealed against, whereby they consented to the sale of the gravel pit to the appellant, and fixed the price at 450*l.*; which sum, under special circumstances which do not affect

the points of law to be submitted to the court, a gentleman, who is an owner of property in the parish, but who has no land adjoining or abutting upon the exhausted gravel pit, was willing to give.

The appellant gave notice of appeal to the quarter sessions against this order, and entered into recognisances to prosecute such appeal. And it is admitted that he complied with all necessary formalities, provided any right of appeal existed.

The appeal came on to be heard at the quarter sessions for the county of Stafford, in Oct. 1875, and the court found as a fact that the sum of 450*l.* was not a fair and reasonable price as between the parish or highway board and the appellant, but that such fair and reasonable price was 155*l.* 6*s.* 6*d.*

The court found that, looking at the interest of the parish only, the sum of 450*l.* was a fair and reasonable price for the highway board to obtain for the interest in the site of the gravel pit.

The questions for the opinion of the court are: First, Had the appellant a right of appeal to the quarter sessions against the aforesaid order of justices in special sessions made on the 26th Oct. 1874? Secondly, Was it the duty of the justices in special sessions to regard the interests of the adjoining proprietor, and to fix a fair and reasonable price as between vendor and purchaser, in relation to ordinary market value of the site of the exhausted gravel pit; or was it their duty to regard the interests of the parish or highway board only, and to fix a price higher than the ordinary market value, but which could be obtained under special circumstances from a purchaser other than an ordinary proprietor?

If the court shall be of opinion in favour of the appellant on both points, the order of justices in special sessions is to be quashed.

If the court shall be of opinion in favour of the respondents on either point, the order of the justices in special sessions is to be confirmed.

Holl (with him *Bosanquet*) argued on behalf of the appellant, in support of the judgment of Quarter Sessions.—The 48th section of the Highway Act 1835 (5 & 6 Will. 4, c. 50) upon which this question arises, is as follows: "And whereas under Acts of Parliament heretofore made and which may hereafter be made for the enclosing of waste land, parcels of land have been and may be expressly allotted to parishes, or to the surveyor of the highways for the purpose of obtaining materials for the repairs of the highways in such parish, and the materials in such parcels of land have been and may be exhausted. Be it therefore enacted that in such cases it shall and may be lawful for the surveyor of such parish for the time being, by and with the consent of the vestry, and he is hereby authorised and required, with the consent in writing of the justices of the peace at a special sessions for the highways, to sell and convey to some persons whose lands adjoin thereto, or if he refuses to purchase, to any other person, the said parcels of land from which the said materials have been so exhausted as aforesaid, at and for such price as the said justices may deem fair and reasonable, and with the money arising therefrom, and with such consent as aforesaid, to purchase other lands in lieu thereof." By 25 & 26 Vict. c. 61, s. 44, sub-sect. 3, "The highway board shall, for all the purposes of the principal Act, except that of levying highway

rates, be deemed to be the successor in office of the surveyor of every parish within the district." The special sessions deemed 450*l.* the fair and reasonable price for the disused gravel pit, but the Quarter Sessions have fixed the price at 155*l.* 6*s.* 6*d.*; the latter must be the binding value between the parties provided the Quarter Sessions had jurisdiction to hear the appeal. The right to appeal upon this order of the special sessions depends upon section 105 of the Highway Act 1835, which provides, "That if any person shall think himself aggrieved by any rate made under or in pursuance of this Act, or by any order, conviction, judgment, or determination made, or by any matter or thing done by any justice or other person in pursuance of this Act, and for which no particular method of relief hath been already appointed, such person may appeal to the justices at the next general or quarter session of the peace to be held for the county, division, riding, or place, where the cause of such complaint shall arise." . . . "And their determination in or concerning the premises shall be conclusive and binding on all parties to all intents and purposes whatsoever." The words giving the right of appeal are wide enough to embrace the order of special sessions by which the appellant was here aggrieved.

Lawrance for the respondents.—This is not, within the words of the appeal section, "an order, conviction, judgment, and determination made," or a "matter or thing done by any justice or other person in pursuance of this Act;" the sale and conveyance are directed by the 48th section to be carried out by the surveyor, with the consent of the justices, at a price which the justices may deem fair and reasonable. If the justices come to a determination at all in the matter, they do so as arbitrators between the parish and the purchaser, and their conclusion must be final; this, by analogy with the fuller provision concerning pieces of land not required by Turnpike Trusts, 3 Geo. 4, c. 126, s. 89, seems to be the proper interpretation of this enactment. The other question is, whether even if the quarter sessions had jurisdiction, the higher amount is not the fair and reasonable price under the circumstances. The enactment is for the benefit of the parish, and the parish is not compelled to sell at a price of which it does not approve. The respondents are in the position of trustees, and if they took a less value for the land in their charge than they can obtain, they would be guilty of a breach of trust. If too low an amount were fixed by the surveyor, it might be open to the ratepayers to call upon the justices to fix a fair and reasonable price; but the person who consents to purchase cannot possibly object to the fairness of the price he undertakes to give.

BLACKBURN, J.—I think we must say that the quarter sessions have in this case decided rightly. Two questions are raised upon the facts stated; first, whether this was such a determination by justices as to give a right of appeal, of which I have no doubt; the second and more important question is which of the two decisions of the justices, that of the special, or that of the quarter sessions, is right in point of law. They both turn upon sect. 48 of the Highway Act 1835 the recital of which admittedly applies to this exhausted gravel pit. The surveyor, with consent of vestry and justices is authorised and required to sell and

convey to some person whose lands adjoin thereto such exhausted parcels of land, at and for such price as the justices may deem fair and reasonable. It does not appear that the appellant, who is the only person whose lands adjoin thereto, refused to purchase, as he might have done, and the only difficulty is the price. I think the enactment means that when these exhausted pits become useless to the parish, the parish must not act like the dog in the manger, but must allow the adjoining owners to have them for a fair and reasonable price. I do not think it is a provision solely for the benefit of the parish, but it is intended to give advantage to the adjoining owners. Their interests are considered by the directions for fixing the price. The pits are not to be sold by auction or at the highest price at which personal motives might prompt any purchaser to buy, but at a fair and reasonable price, as it may be so deemed by the justices who are to deal impartially with the interests both of the parish and the adjoining owners. The right of pre-emption given to the adjoining owners would be illusory if the section were interpreted to require the parties to fix the highest price obtainable from somebody else. Here it is stated that a gentleman, not an adjoining owner, was willing to give 450*l.* for this pit. His reasons do not appear, but we must assume he had some personal motive which did not affect the fair value of the piece of land. This of course would be the fair and reasonable value, if those words meant the best value obtainable by the parish, and in that case the Special Sessions were right in so fixing the amount. But if, as I consider, the fairness and reasonableness ought to apply equally to the adjoining owner as to the parish, the lower amount estimated by the land surveyor, 155*l.* 6*s.* 6*d.*, was rightly determined by the Quarter Sessions to be the amount payable by the appellant for his purchase. The Quarter Sessions, in my opinion, had jurisdiction and full power to reconsider the amount fixed at Special Sessions, and by their decision they showed that they rightly understood the objects of the enactment.

QUAIN, J.—I am of the same opinion, and I also think the Quarter Sessions have shown a proper understanding of the objects of this 48th section. As soon as the vestry consented to sell, the surveyor was bound to carry out the conveyance to the adjoining owner, if he was willing to take it. The justices then became a kind of arbitrator between the parish and the purchaser, subject however to appeal to Quarter Sessions; and they ought to fix a fair and reasonable price in the interests of both the parties before them. There is nothing to justify them in fixing the fancy price of some other person.

Judgment for appellant.

Solicitors for appellant, *Morley and Shirreff* (for *Robinson and Dempster, Eccleshall*).

Solicitor for respondent, *A. R. Oldman*.

Saturday, May 6, 1876.

LONDON AND NORTH-WESTERN RAILWAY COMPANY
(apps.) v. CHURCHWARDENS OF IRETHLINGBOROUGH
(resps.) (a)

*Rateable value of railway—Competing lines—
Enhanced value by traffic on other part of line.*

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L. AND N.W. RAILWAY CO. v. CHURCHWARDENS OF IRTHLINGBOROUGH.

[Q.B. Div.]

Part of the appellants' line of railway passes through a district where there are two other competing lines for the carriage of passengers and goods. The appellants' gross earnings in the respondents' parish, a part of this district, were more than absorbed by the expenses chargeable for the working thereof, plus the deduction allowed by the Parochial Assessment Act; but on the basis of the receipts derived from the enhancement of the traffic on the other parts of the system, the rateable value of the appellants' line in the parish was equal to 45 per cent. of the gross receipts.

Held, upon a case reserved by quarter sessions, that the appellants were rightly rated at this amount.

This was an appeal against a rate for the relief of the poor made by the churchwardens and overseers of the parish of Irthlingborough, allowed according to law on the 9th Oct. 1874, whereby the appellants were rated for their railway in the said parish on the gross estimated rental of 1278*l.*, and of the rateable value of 1150*l.* The appeal was heard at the Epiphany Quarter Sessions, 1875, for the county of Northampton, when that court confirmed the rate, subject to the opinion of the Court of Queen's Bench on the following case:

The said parish of Irthlingborough is situate on the Blisworth and Peterborough line of the appellants' system, and the line passes through the said parish for a distance of three miles, four furlongs, and 205 yards, or thereabouts.

The said line was made by the London and Birmingham Railway Company, under Parliamentary powers obtained in the year 1843, and formed part of the undertaking of that company.

In 1846 an Act (9 & 10 Vict. c. 204), was passed to consolidate the London and Birmingham Railway Company (including the said line mentioned), the Grand Junction Railway Company, and the Manchester and Birmingham Railway Company, into one undertaking.

No separate account has been kept as to the said line, and it is in all respects dealt with as part of the company's system.

Since the construction of the said Blisworth and Peterborough line, the country through which it passes has been also occupied by the Midland Railway Company and the Great Northern Railway Company, and the said companies are in fact competing lines for the carriage of passengers and all kind of goods in this district with the London and North-Western Railway Company. The Great Northern Railway Company's main line intersects the Blisworth and Peterborough Railway at Peterborough, and the Midland Railway Company's main line intersects the Blisworth and Peterborough Railway at Wellingborough.

Upon the hearing of the appeal the court found: First, that if the appellants were willing to let the line, it might reasonably be expected to fetch a yearly rent equal to 45 per cent. of the gross receipts, the tenant paying all expenses of working and maintenance, as is customary in the cases of "working agreements" between railway companies. Secondly, that the said Blisworth and Peterborough line was constructed at a cost of 17,000*l.* per mile. Thirdly, that the gross earnings of the Blisworth and Peterborough line within the respondents' parish at the time of the making of the rate, the subject of this appeal, were more than absorbed by the expenses chargeable against the said line for the working thereof,

plus the deduction allowed by the Parochial Assessment Act. But that if neither of the above contentions is right, the rateable value of the line within the respondents' parish as land is to be taken at 40*l.* per mile, by agreement between the parties.

The respondents contended: First, that the rateable value of the line in the respondents' parish is 45 per cent. of the gross earnings in accordance with the first finding of the court. Secondly, that where, as in this case, there are no direct rateable profits, the said line is liable to be rated upon its structural cost of 17,000*l.* per mile. Thirdly, that when, as in this case, there are no direct rateable profits, the said line is liable to be rated on the basis of the receipts derived from the enhancement of the traffic on the other parts of the system.

The court decided in favour of the respondents upon their first contention, and held that the rateable value of the line in the respondents' parish was 45 per cent. of the gross earnings of the line in the said parish.

The question for the opinion of the court is: Whether either of the three contentions of the respondents is right. If the court shall be of opinion that either of the above contentions is right, then the rate is to stand, and judgment upon this case is to be entered for the respondents. But, if the said court shall be of opinion that no one of the said contentions is right, then the rateable value of the line in the respondents' parish is to be taken at 40*l.* per mile, and the rate is to be reduced accordingly to the sum of 144*l.* 15*s.*, and judgment upon this case is to be entered for the appellants.

Staveley Hill, Q.C. (with him *Ewins Bennett*), for the appellants.—The conclusion of the quarter sessions is at variance with all the principles of parochial rating. [BLACKBURN, J.—I suppose the respondents' second contention will scarcely be supported; but reading the first and third together, what objection can be made to them?] The respondents bring into the calculation of rates for this parish earnings of the company which have been made elsewhere. [BLACKBURN, J.—Surely we have decided this very point concerning this railway.] The case of *Reg. v. London and North-Western Railway Company* (L. Rep. 9 Q. B. 134), merely determined that the existence of competing lines might be taken as an element in ascertaining the rateable value of a line of railway. We admit this, but we say that when there are no rateable profits in a parish the profits outside cannot be made the basis of the rate. The judgment in that case goes no further than this: if the occupiers of a line are not getting the most they can out of it, the rating authorities may take into consideration the larger amount other persons might get out of it. In *Reg. v. Llantrissant* (L. Rep. 4 Q. B. 354), it was held that a railway company was to be rated in a parish through which their branch passed only in respect of the profits which the branch earned within the parish; and that the value of the traffic contributed by the branch to the main line ought not to be taken into consideration. Mellor, J., in his judgment at p. 357, said: "It appears to me to be immaterial whether the line be a branch or a main line. The true principle on which that ought to be made is by ascertaining what is the rateable value in each particular parish through which the railway passes, and that is to

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be based on what a hypothetical tenant would give for the line in that particular parish." This, too, was the effect of the *Haughley* case (L. Rep. 1 Q.B. 668), which was cited and followed in *Reg. v. Llantrissant*.

Maule, Q.C. and *Sills*, appeared for the respondents, but were not heard.

BLACKBURN, J.—I do not think we can say upon the facts, as we find them in this badly stated case, that the quarter sessions have been wrong. In the previous appeal concerning this line, we determined that in consequence of the competition of other lines, one element for fixing the rateable value was the enhanced traffic which the tenant would enjoy elsewhere. Now the facts here are found according to the law as we there laid it down, and we can only say that the application to such a case as this is what we intended. There is still left the apportionment amongst the several parishes, about which our opinion is not asked. The second finding of the quarter sessions is, that this line was constructed at a cost of 17,000*l.* per mile; this, however, is quite irrelevant to the question of rating, which depends only upon what a hypothetical tenant would pay by the year. Then the quarter sessions find, thirdly, that the gross earnings of the line in this parish were less than the expenses; this may be right or wrong as a matter of fact, but no question is raised upon it for our consideration. In my opinion, the third contention of the respondents, taken with the first finding of the quarter sessions, is perfectly right. When there are no direct rateable profits, the line in a parish is liable to be rated on the basis of receipts derived from traffic on the other parts of the line; and this is the test of the hypothetical tenant's rent. The respondents' second contention is wrong, but the quarter sessions were right in finding upon their first and third contention that the appellants were properly rated for their occupation of land in the respondent parish in proportion to the profits calculated upon the whole Blisworth and Peterborough line. This was the principle we established in *Reg. v. London and North-Western Railway Company* (L. Rep. 9 Q.B. 134), and although this may be a stronger case, the principle has been here rightly applied.

QUAIN, J.—I am of the same opinion. The quarter sessions find that the line, if let, might reasonably be expected to fetch a yearly rent equal to 45 per cent. of the gross receipts. There is some difficulty in understanding the exact question left for our consideration, but I take it that this 45 per cent. is arrived at by a calculation of the value of the piece of line in this parish as enhanced by the more valuable traffic in other parishes. I agree with my brother Blackburn that the quarter sessions were right in adopting that calculation.

BLACKBURN, J.—I wish to guard our decision in this case from being misunderstood. We are not deciding how this enhancement of traffic should be apportioned between various parishes. We are not asked for any opinion on that point.

Judgment for respondents.

Solicitor for appellants, *R. F. Roberts*.

Solicitors for respondents, *Sharman and Jackson*, Wellingborough.

Saturday, May 13, 1876.

ST. LUKE'S VESTRY v. NORTH METROPOLITAN TRAMWAYS COMPANY (LIMITED).

Tramway repairs—Level—Repair of road—Superintendence of road authority—33 & 34 Vict. c. 78.

The plaintiffs, as the road authority under the Tramways Act 1870, claimed against the defendants the expenses of superintending their opening and breaking up of roads under sect. 26, for the maintenance and renewal of their tramway.

Held, that so far as the defendants merely raised the sleepers and rails to the level of the road, or raised the stone packing of the road to the level of the surface of the rails, they were maintaining and keeping the road in good condition and repair under sect. 28, and were not liable to the superintendence of the road authority under sect. 26.

THIS was an action brought to recover the amount of an award, and moneys alleged to be recoverable under the Tramways Act 1870, in respect of the superintendence by the plaintiffs of works in connection with the defendant's tramways. And upon demurrer in the action coming on for argument, it was, by consent of all parties, ordered by the court that the facts should be stated for the opinion of the court in the form of the following case:

1. The plaintiffs are the road authority for the parish of St. Luke, Middlesex, in the county of Middlesex.

2. The defendants were incorporated as a tramway company by the North Metropolitan Tramways Act 1869, and are subject to the regulations of part 2 of the Tramways Act 1870. A portion of their tramway made under the powers conferred on them by the North Metropolitan Tramways Companies Act 1870, and completed before Midsummer 1872, runs through the parish of St. Luke, Middlesex.

3. The mode in which the tramway is constructed and laid is as follows: The rails are laid on longitudinal timber sleepers, about 16ft. to 26ft. in length, connected together at intervals by transverse tyerods of iron. The sleepers rest in and upon a bed of concrete about 6in., in thickness, extending under the whole distance between the sleepers, and for a considerable distance on each side. Upon this concrete also rest, both between and on each side of the rails and sleepers, granite paving stones of about the same thickness as the concrete, and which also form the surface of the roadway for general traffic, the upper surface of the stones being level with the surface of the rails.

4. A tramway constructed as mentioned in the last preceding paragraph could be used for a few days, but would not be permanently stable or durable without there being for the whole distance between the sleepers and for a distance of about 18in. on each side either granite paving stones or some other solid packing.

5. During the year commencing at midsummer 1872, and ending at midsummer 1873, the defendants on some occasions lifted and relaid paving stones between and within 18in. on either side of their rails in the plaintiff's parish, sometimes one or two, sometimes more, sometimes as many as a dozen stones at a time, in order, by slightly lifting the sleepers with a lever and thrusting ballast or

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other material under it, to raise to a proper level a sleeper which had sunk, and so brought the surface of the rail below the level of the stones, or for some other purpose directly connected with the sleepers and rails themselves.

6. On many occasions during the same year the defendants in like manner lifted and relaid stones, because the stones had sunk below the level of the rails, and it was necessary to raise them by placing ballast or other material underneath them.

7. Where stones have sunk as mentioned in the last preceding paragraph, it would be a prudent thing for the security of the sleepers and rails, to make good the defects, because if such defect were to spread and become extensive, it might in time endanger the stability of the sleepers and rails; but the sinking of a few stones would cause no immediate danger to them. For the safety of the general traffic over the road it is necessary that any such sinking of the stones below the level of the rails, and any sinking of the rails below the level of the stones, should be immediately made good. It would not be possible consistently with the safety of the general traffic to wait for the expiration of a seven days' notice before doing so, and a gang of men is constantly, or almost constantly, employed by the defendants for this purpose up and down their tramway lines, under the superintendence of the defendants' engineers.

8. Unless the matters mentioned in paragraphs 5 and 6 amount to opening or breaking up of the road there was no opening or breaking up of any road by the defendants in the parish of St. Luke during the year from midsummer 1872 to midsummer 1873.

9. During that year Mr. Joseph Niblett was surveyor to the parish of St. Luke, and as such he was paid a salary by the plaintiffs; and it was his duty as such surveyor, among other things, to superintend, and he did superintend all the roads in the parish under the charge of the plaintiffs. Mr. Niblett, was frequently up and down the line of the defendants' tramway, and from time to time inspected the condition of the tramway and the road. He from time to time called the attention of the defendants to any defects which he thought existed in the tramway or the paving for which the defendants were responsible, and called upon them to make them good; and he from time to time inspected and examined the work being done by the defendants as mentioned in paragraphs 5 and 6.

10. No notice was ever given by the defendants to Mr. Niblett or to any other person on behalf of the plaintiffs of their intention to do any of the things mentioned in paragraphs 5 and 6, nor was any such notice ever demanded or any complaint made of its not being or having been given, nor, except as mentioned in the last preceding paragraph, was any notice ever given to the defendants that Mr. Niblett or any person on the part of the plaintiffs, was superintending or claimed to superintend any work done by the defendants.

11. The plaintiffs claimed from the defendants the sum of 25*l.*, alleging that they were entitled to recover that sum as the reasonable expense of superintendence for the year from midsummer 1872 to midsummer 1873, under part 2 of the Tramways Act 1870. This sum of 25*l.* was paid

by the plaintiffs to Mr. Niblett before such claim was so made made upon the defendants.

12. The defendants declined to pay the sum so claimed, and thereupon the plaintiffs, alleging that a difference had arisen between them and the defendants with reference to the said claim within the meaning of the 33rd section of the Tramways Act 1870, applied to the Board of Trade to appoint a referee to settle such matter in difference; and the Board of Trade appointed Mr. Gabriel Prior Goldney, barrister-at-law, as such referee.

13. The defendants protested to the Board of Trade against the appointment of the said referee, and against his proceeding to hear or determine the matters in difference. The defendants in like manner protested to the said referee against his so proceeding, and all the proceedings before him were subject to such protest.

14. The facts proved before the said referee were those hereinafter stated. And it was contended on the part of the plaintiffs, and denied on the part of the defendants, that the plaintiffs were entitled to recover from the defendants a sum of money as the reasonable expense of superintending the opening and breaking up of roads by the defendants within the meaning of the 26th section of the Tramways Act 1870.

15. The said referee made his award on the 14th July 1874, by which he awarded to the plaintiffs the sum of 15*l.* and the costs of the reference.

16. The court may draw inferences of fact.

17. It is agreed that the amount of costs, if any, recoverable under the said award, and the amount, if any, recoverable in respect of superintendence apart from that award, shall be ascertained, if necessary, by the arbitrator by whom this case is stated.

The questions for the opinion of the court are: First, whether the plaintiffs are entitled to recover upon the said award; secondly, whether the plaintiffs are entitled to recover in respect of superintendence of the matters mentioned in the fifth paragraph; and, thirdly, whether the plaintiffs are entitled to recover in respect of superintendence of the matters mentioned in the sixth paragraph.

If the court shall be of opinion in favour of the plaintiffs upon the first question, judgment is to be entered for the plaintiffs for 15*l.*, and a sum for costs of the said reference to be ascertained as hereinbefore proved, and costs of suit. If the court shall be of opinion against the plaintiffs upon the first question, and shall be of opinion in favour of the plaintiffs upon the second or third question, judgment is to be entered for the plaintiffs for a sum to be ascertained in the manner hereinbefore provided. It is agreed that in such case the costs of this action, so far as relates to the last-mentioned claims, shall be in the discretion of the arbitrator by whom this case is stated. If the court shall be of opinion in favour of the defendants upon all the questions, judgment is to be entered for the defendants for their costs.

Finlay (with him *Day*, Q.C.), argued for the plaintiffs.—The three questions in the case may be considered as two only: First, whether the award is final; secondly, whether any of the matters in respect of which the plaintiffs' superintendence is charged can be subject to the provisions of the Tramways Act 1870 (33 & 34 Vict. c. 78). [*BLACKBURN, J.*—You had better first satisfy us that the Act applies to these matters.] Paragraph 3 shows

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that the granite paving stones and the concrete, together with the rails and sleepers, all form parts of the tramway. By sect. 25, "Every tramway shall be laid and maintained in such manner that the uppermost surface of the rail shall be on a level with the surface of the road, and shall not be opened for public traffic until the same has been inspected and certified to be fit for such traffic, in the prescribed manner." By sect. 26, "The promoters from time to time, for the purpose of making, forming, laying down, maintaining, and renewing any tramway duly authorised, or any part or parts thereof respectively, may open and break up any road, subject to the following regulations: (1) They shall give to the road authority notice of their intention, specifying the time at which they will begin to do so, and the portion of road proposed to be opened or broken up, such notice to be given seven days at least before the commencement of the work. (2) They shall not open or break up or alter the level of any road, except under the superintendence and to the reasonable satisfaction of the road authority, unless that authority refuses or neglects to give such superintendence at the time specified in the notice, or discontinues the same during the work. (3) They shall pay all reasonable expenses to which the road authority is put on account of such superintendence. (4) They shall not, without the consent of the road authority, open or break up at any one time, a greater length than 100 yards of any road which does not exceed a quarter of a mile in length, and in case of any road exceeding a quarter of a mile in length, the promoters shall leave an interval of at least a quarter of a mile between any two places at which they may open or break up the road, and they shall not open or break up at any such place a greater length than 100 yards." It is for the superintendence charged under the 3rd sub-section that this award was made and this action brought.

Beresford (with him *Benjamin*, Q.C.), for the defendants.—At the rate charged for this superintendence, it would cost the defendants about 750*l.* a year if they were liable under the circumstances stated in paragraphs 5 and 6. It is clear from sub-sect. 1 of sect. 26, that if the contention of the plaintiffs be correct, the defendants would be subject to indictment for every stone lifted and relaid without seven days' notice to the road authority. But it is not only by reason of its inconvenience that such an interpretation of the Act is improbable, it is at least consistent with all its provisions to limit the superintendence of the road authority to those occasions of opening and breaking up the road which interfere with the general traffic. The 4th sub-section of sect. 26, by requiring the consent of the road authority to the opening or breaking up of a greater length than 100 yards, evidently contemplates the independent action of the company in repairs of a smaller description. The provisions of sect. 27 are not applicable to such matters as those described in paragraphs 5 and 6; the words of the section are, "When the promoters have opened or broken up any portion of any road, they shall be under the following further obligations, namely: (1) They shall with all convenient speed, and in all cases, within four weeks at the most (unless the road authority otherwise consents in writing), complete the work on account of which they opened or broke up the same, and (subject to the formation, maintenance,

or renewal of the tramway) fill in the ground and make good the surface, and to the satisfaction of the road authority restore the portion of the road to as good condition as that in which it was before it was opened or broken up, and clear away all surplus paving or metalling material or rubbish occasioned thereby. (2) They shall in the meantime cause the place where the road is opened or broken up to be fenced or watched, and to be properly lighted at night. (3) They shall bear or pay all reasonable expenses of the repairs of the road for six months after the same is restored, as far as those expenses are increased by the opening or breaking up." Sect. 28, however, which omits any mention of superintendence by the road authority, and, therefore, intends that no charge shall be made for it in respect of the matters therein provided for, deals with all the proceedings of the defendants described in this case: "The promoters shall, at their own expense, at all times, maintain and keep in good condition and repair, with such materials and in such manner as the road authority shall direct, and to their satisfaction, so much of any road whereon any tramway belonging to them is laid as lies between the rails of the tramway, and (where two tramways are laid by the same promoters in any road at a distance of not more than 4 feet from each other) the portion of the road between the tramways, and in every case so much of the road as extends 18 inches beyond the rails of and on each side of any such tramway. [BLACKBURN, J.—What do you say to the plaintiffs' contention that this award is final under sect. 33?] That section is only in respect of any tramway or work, "or with respect to any other subject or thing regulated by or comprised in this Act;" and the appointment of the referee is with respect to the claim of the plaintiffs for one year's superintendence by their surveyor "of the taking up and laying down the tramways of the said company;" if, therefore, these are not matters for which the plaintiffs have any claim, the award is not valid.

Finlay, in reply.—Sect. 28 provides for the repair of the road between the rails and 18in. beyond. Paragraph 5 does not relate to any such repair. The defendants' object in doing what is there described was to raise the sleepers to the level of the road, "or for some other purpose directly connected with the sleepers and rails themselves. Sect. 28 excludes from its application the rails and the sleepers, which form part of the tramway. [BLACKBURN, J.—I do not agree with you on that point, although language more definitely including them might certainly have been used.] Sect. 25 distinguishes between the rail and the road, and provides that they shall be on the same level. I admit that the matters described in paragraph 6 are within the application of sect. 28, but I contend that the whole of that section is governed by sects. 26 and 27. [BLACKBURN, J.—What is the meaning of the last line of paragraph 5, "some other purpose directly connected with the sleepers and the rails themselves?"] That is not explained, but if the award can be justified as to any part of the plaintiffs' claim, the amount fixed by it must be final.

BLACKBURN, J.—I think we must say that the plaintiffs cannot recover on this award, but they may possibly have a valid claim against the defendants for superintendence of some of the matters mentioned in paragraph 5 of the case. First, as

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to the award being final if any part of the amount determined by it be within the jurisdiction of the referee. We must take it upon the statement of this case that the amount awarded relates partly to the 5th paragraph and partly to the 6th; and unless all the matters described in those two paragraphs are subject to the provisions of the 26th section of the Tramways Act 1870, the award cannot in our opinion be binding on the defendants. We have therefore next to consider how the provisions of that Act of Parliament are to be applied to the repairs described in the case. Sect. 25 requires the uppermost surface of the rail to be on a level with the surface of the road, and I can only construe that to mean that the road must be so kept in repair as to preserve that level. Sect. 26 relates, not to any repair of the road, but to the maintaining and renewing of the tramway; for this purpose the company may open and break up any road, subject to regulations which create the plaintiffs' claim in this case. Among the regulations there is one requiring seven days' notice to the road authority before the commencement of the work; another forbids the opening, breaking up, or altering the level of any road, except under the superintendence and to the reasonable satisfaction of the road authority; whilst another directs the expenses of such superintendence to be paid by the company. Now when the defendants or any tramway company do anything treated of by this section, I think the road authority is entitled to be paid for superintendence, even if the company should find it necessary or expedient, as is stated in paragraph 7, to make the repairs without seven days' notice. Afterwards, the 28th section provides for the repair of the road whereon a tramway is laid, and I have already said that must include the level of rails. This section requires no superintendence by the road authority. I am of opinion that no superintendence can be charged nor recovered for repairs done by the defendants which come only under this section. The matters mentioned in paragraph 6 of the case are clearly within this section; they are merely the raising of stones forming part of the road to the level of the rails. This indeed is admitted by the plaintiffs, the contention on this paragraph being that sect. 28 is governed by sect. 26. Paragraph 5 raises a more difficult question; so far as the acts described in that paragraph relate to the mere preservation of the level of the surface of the rail and the surface of the road, I think they were repairs of the road within sect. 28, and did not justify the superintendence of the road authority. But it is found that these acts were done either for this purpose "or for some other purpose directly connected with the sleepers and rails themselves." What this alternative purpose may be I think important, and the case must be sent back to the arbitrator who stated it in order that he may determine how much of what is described in the 5th paragraph was done by the defendants "for the purpose of making, forming, laying down, maintaining, and renewing" the tramway as provided for in sect. 26. The plaintiffs may or may not be entitled to recover a part of the amount charged by them for superintendence in accordance with these principles which we lay down; and the arbitrator can fix the amount, if any, to which they are entitled.

QUAIN, J.—I am entirely of the same opinion.

I think the whole of the matters in paragraph 6, and also, with the exception of those done for the other purpose connected with the sleepers and rails which is not sufficiently described, the matters in paragraph 5, are within sect. 28 of the Act, and need not be superintended by the plaintiffs.

Per CURIAM.—The first and third questions answered in the negative. Case sent back to arbitrator to ascertain if under second question anything is due for superintendence of lifting sleepers for some other purpose directly connected with the sleepers and rails themselves.

Solicitor for the plaintiffs, W. W. Hayne.

Solicitors for the defendants, Tahourdins and Hargreaves.

Saturday, May 20, 1876.

ROGERS (app.) v. ST. GERMAN'S UNION (resps.).

Poor rate—Right of sporting—Severed from occupation—Reservation of right—37 & 38 Vict., c. 54, ss. 2 and 6.

The appellant was owner of a tenement with dwelling house and other buildings, containing about 19 acres, which he had leased to a person occupying the same, excepting plantations and all timber, and all mines, &c., "and also excepting all manner of game, hares, rabbits, and wildfowl, with liberty of hunting, fowling, and fishing, over and through the said premises at all times during the said term."

Held, upon a case stated by quarter sessions, that this lease reserved to the appellant a right of sporting which was severed from the occupation of the land, and therefore rateable within the Rating Act 1874 (37 & 38 Vict., c. 54), ss. 2 and 6.

At the Michaelmas Quarter Sessions for the county of Cornwall, held at Bodmin, on the 19th Oct. 1875, an appeal by the appellant against a certain poor rate or assessment made or appearing to be made by the assessment committee of the St. Germans Union and the churchwardens and overseers of the poor of the parish of St. Stevens, by Saltash, in the county of Cornwall, bearing date the 12th June 1875, in and by which the game and sporting rights on certain hereditaments at Moditon Mill Tenement, in the said parish of St. Stephens by Saltash, in the occupation of Wm. Walters, and of which the said Henry Rogers is owner, were rated and assessed, was heard, and judgment thereon was given for the appellant, subject to the opinion of this court upon the following case:

The said Henry Rogers, the appellant, is the owner of a certain tenement, called the Moditon, otherwise Mutton Mill, in the parish of St. Stephen, by Saltash, within the said union, which tenement is occupied by one Wm. Walters as lessee thereof, under an indenture of lease, under seal granted to him by the appellant, and duly executed by both the lessor and lessee, and dated 15th Aug. 1864, a copy of the lease accompanys and forms part of this case.

So much of the said lease as is material to this case is here set forth:

He, the said Henry Rogers, doth grant, demise, and lease unto the said Wm. Walters all that tenement, together with the dwelling house and other buildings thereon, commonly called or known by the name of Mutton Mill, containing in the whole about 19a. 1r. 38p., situate in the parishes of St. Stephens by Saltash and

Botusfleming, in the said county of Cornwall, and now in the occupation of the said Wm. Walters, excepting unto the said Henry Rogers, his heirs and assigns, the plantation recently made by the said Henry Rogers on part of the said tenement, and all timber and other trees growing or to grow on the said premises, with liberty to fell, root, work up, or bark the same respectively at will. And all mines, minerals, and quarries, clay, slate, stone, and marble, on or upon the said premises, with liberty to search for, open, and work the same respectively; and also liberty to plant young trees in the waste places, in the roads, or any of the hedges of the said premises, and to fence out and preserve the same without making any satisfaction or compensation for the same. And also liberty of destroying and altering any roads and paths, or making any new ones, or carrying or altering streams of water on, over, or through the said premises, without making any compensation for the same; and also excepting all manner of game, hares, rabbits, and wildfowl, with liberty of hunting, fowling, and fishing, over and through the said premises at all times during the said term.

The entry in the rate book and valuation list of the parish relating to the said tenement stands as follows:

No. 156. Occupier, Wm. Walters; owner, Hy. Rogers; description, land, game and sporting rights; name of property, Mutton Tenement; estimated extent, 15a. 1r. 17p.; gross rental, 27l.; rateable value, 25l.

No. 157. Occupier, Wm. Walters; owner, Hy. Rogers; description, land, game and sporting right; name of property, Mutton Tenement; gross rental, 7s. 6d.; rateable value, 7s. 6d.

The following were the grounds of appeal available to the said appellant:

Because there is no game on the said farm or tenement called Moditon Mill, and the sporting rights thereon, if any, are of no value. Because of their being no game on the said farm or tenement, no injury is done to the crops thereon, and the said farm is let at its full value. Because of there being no value in the said sporting rights, there cannot in justice be any rate levied on what has no value.

At the hearing of the appeal the court ordered that the appeal be allowed, the court being of opinion that the said game and sporting rights were not severed from the occupation of the land, and that the said game and sporting rights had not been exclusively reserved by the said Henry Rogers in the lease granted by him of the said tenement to William Walters, the occupier thereof. And the court further ordered, on the application of the respondents, that they be at liberty to state a special case for the opinion of the court above as to the validity of the said rate, so far as relates to the aforesaid rating, on the point that the game and sporting rights are not severed from the occupation of the land, and that the said game and sporting rights have not been exclusively reserved by the appellant in the said lease granted by him.

The questions for the court are whether upon the true construction of the said lease, and the clause of the same set forth, the said game and sporting rights are severed from the occupation of the land, and whether the said game and sporting rights have been exclusively reserved by the said Henry Rogers in the lease granted by him of the said tenement to the said William Walters.

If the court should be of opinion that the said game and sporting rights are severed from the occupation of the land, and exclusively reserved by the appellant, the order of the court of quarter sessions is to be quashed, and the valuation list and rate are to stand, but if the court should be of opinion that the said game and sporting rights are not severed from the occupation of the land or

exclusively reserved by the said lease, the order of the court is to be confirmed, and the valuation list and rate to be amended by striking out the said rate or assessment so appealed against.

Cole, Q.C. and *Charles* showed cause for the appellant against the rule *nisi* to quash the decision of the quarter sessions.—Amongst the exemptions from rating abolished by the Rating Act 1874 (37 & 38 Vict. c. 54) sect. 3, appear (sub-sect. 2) "rights of fowling, of shooting, of taking or killing game or rabbits, and of fishing, when severed from the occupation of the land." By sect. 6 "(1) where any right of fowling or of shooting or of taking or killing game or rabbits, or of fishing (hereinafter referred to as a right of sporting) is severed from the occupation of the land and is not let, and the owner of such right receives rent for the land, the said right shall not be separately valued or rated, but the gross and rateable value of the land shall be estimated as if the said right were not severed; and in such case if the rateable value is increased by reason of its being so estimated, but not otherwise, the occupier of the land may (unless he has specifically contracted to pay such rate in the event of an increase) deduct from his rent such portion of any poor or other local rate as is paid by him in respect of such increase, and every assessment committee, on the application of the occupier, shall certify in the valuation list or otherwise the fact and amount of such increase. (2) Where any right of sporting, when severed from the occupation of the land, is let, either the owner or the lessee thereof, according as the persons making the rate determine, may be rated as the occupier thereof. (3) Subject to the foregoing provisions of this section the owner of any right of sporting when severed from the occupation of the land, may be rated as the occupier thereof. (4) For the purposes of this section, the person who, if the right of sporting is not let, is entitled to exercise the right, or who, if the right is let, is entitled to receive the rent for the same, shall be deemed to be the owner of the right." Even if this right of sporting be severed from the occupation, the appellant, who is the owner, ought not to be separately rated. [MELLOR, J.—That question is not reserved for our consideration, indeed no question under the Rating Act 1874 seems to be raised at all.] But in no case can the appellant, under the circumstances stated, be rated as occupier of the sporting rights. This appears on the face of the special case, and an amendment of the rate would not cure its invalidity. [MELLOR, J.—They seem to have confused sub-sections 1 and 3, but the appellant may have had some technical difficulty in raising a question on that point, at all events it is not reserved for us.] But the case should be sent back to be re-stated, as to whether these rights are severed from the occupation of the land. It has been held in *Wickham v. Hawker* (7 M. & W. 63) that such words as those of the lease in this case do not create a reservation properly so called, but a new grant by the lessee of rights of sporting to the lessor. That is consistent with a joint right continuing in the lessee, and unless the appellant have the exclusive right it cannot be said to be severed from the occupation of the land, within the meaning of the 3rd section of the Rating Act. Parke, B. in delivering the judgment of the court at page 76, cites *Doe and Douglas v. Lock* (2 A. & E. 705), in which Lord Denman says at p. 743 "that the privilege of hawking, hunting,

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fishing, and fowling is not either a reservation or an exception in point of law: it is only a privilege or right granted to the lessor, though words of reservation and exception are used." In this manner sporting rights are distinguished from all other exceptions or reservations in a grant. To be severed from the occupation under the Rating Act, the word "exclusive" should be applied in the lease to the right reserved. [QUAIN, J.—That word was not considered necessary for the reservation of exclusive rights in *Graham v. Ewart* (11 Ex. 326.) The two deeds in that case reserve and grant respectively the liberty and privilege of sporting in very wide terms; Martin, B., in his judgment at p. 347, says "in the conveyance of it (the Woodside allotment) by the father of the plaintiff, the right of shooting, &c., not a right of shooting, &c., is reserved to him and his heirs, and in the conveyance by John Ewart the same right is expressly granted to them in the largest and most express terms, and considering the covenant in regard to trespassers we think it was the intention of the parties, as shown by these deeds, to rest in the plaintiff and his father, and their heirs the exclusive right of shooting," &c. No such intention is to be gleaned from the words of this lease, "and also excepting all manner of game, hares, rabbits, and wildfowl, with liberty of hunting, fowling, and fishing, over and through the said premises during the said term;" they merely reserve for the lessor the right to kill all manner of game in any part of the premises jointly with the lessees.

Lopes, Q.C. and Francois, for the respondents.—The justices at quarter sessions have stated the grounds of appeal upon which only their decision is to be discussed, and have clearly manifested their intention to raise no other point than that mentioned in the question reserved. No doubt the form of the rate is not accurate, and in future the 1st sub-section of section 6 will be more strictly adhered to, but that does not affect the question for the court. The quarter sessions considered that, to be rated under this Act, the sporting rights must belong exclusively to some person other than the occupier of the land; and they also considered that the appellant's sporting rights were not exclusively reserved by this lease. On both points they were wrong.

MELLOE, J.—I do not think any good or useful result would be obtained by our sending this case back for the quarter sessions to consider whether they desire to alter the question reserved for us. They seem to have intentionally excluded from their reservation every point except the severance of these sporting rights; and upon that we can only say that by this lease the rights of sporting are severed from the occupation of the land, within the meaning of sections 2 and 6 of the Rating Act 1874. These rights are no doubt reserved only by way of regrant from the lessee, and we must construe them as if granted in a separate deed by the lessee to the lessor. This was so held in the case of *Graham v. Ewart*, but at the same time words thus reserving the rights were held to deprive the lessee of any joint enjoyment of those rights. I think the words here used are sufficient to show a similar intention in the parties, and we must hold that the appellant enjoyed the exclusive right of sporting over this land. He ought clearly to have been dealt with in the rate under sub-sect. 1 of the 6th section, and not under sub-sect. 3; but whether that

matter was discussed or not before the quarter sessions, we have nothing to do with it; and the rule to quash the decision of the quarter sessions must be absolute.

QUAIN, J.—I am entirely of the same opinion. I think there can be no doubt that this lease severed the sporting rights from the occupation of this farm; and as I understand its effect it gives the appellant the exclusive right to kill all manner of game upon the premises occupied by his lessee. When we consider the small extent of the farm, and the form of words used in the lease, we can only conclude that it was the intention of both landlord and tenant that the landlord alone should have the right to shoot. In *Graham v. Ewart* the words of the reservation are stronger in favour of the exclusive rights of the lessor, but it is a very strong authority as to the present case.

Judgment for respondents,

Solicitors for appellant, *Gregory, Bowcliffes and Co.*, for *G. A. Jenkins*, Penryn.

Solicitors for respondents, *N. Bennett*, for *F. W. P. Cleverton*, Saltash.

CHANCERY DIVISION.

(Before Vice-Chancellor MALINS.)

Reported by F. GOULD and J. E. HOBBS, Esqrs.,
Barristers-at-Law.

June 26 and 27, 1876.

HOLDSWORTH v. DAVENPORT.

*Charitable bequest—Pure or impure personality—
Debenture of waterworks company—9 Geo. 2,
c. 36.*

Debenture of a waterworks company held to be pure personality.

DANIEL HOLY made his will, dated the 23rd Sept. 1869, and thereby bequeathed all the residue of his personal estate to the plaintiffs Albert Holdsworth and Walter Brown, upon trust to convert and get in the same, and the testator declared that his said trustees should hold the money arising from the conversion of such parts of his personal estate therein before bequeathed as might not by law be given by will for charitable purposes (subject as therein mentioned), upon trust thereon in exoneration of all his other property both real and personal, to pay the costs of and incident to the conversion into money of all his personal estate and his just debts, funeral, and testamentary expenses, and subject thereto as aforesaid upon trust for his sister, Caroline Davenport absolutely, and the testator declared that his trustees should hold the moneys which should arise from the conversion into money of such parts of his personal estate as might by law be given by will for charitable purposes upon trust to invest the same as therein mentioned, and out of such investments to pay certain annuities therein mentioned, and subject thereto to pay and transfer the trust fund to the burgesses or free tenants and trustees of certain messuages and hereditaments vested in them for charitable and public purposes, within the town of Sheffield, commonly called the Sheffield Town Trustees, upon and for the trusts and purposes thereafter in the second part of his will expressed, contained, or referred to (the particulars of which it is not necessary to state.)

The testator died on the 31st Dec. 1870, and a suit was instituted by the trustees for the administration of the estate.

[CHAN. DIV.]

HOLDSWORTH v. DAVENPORT.

[CHAN. DIV.]

The decree for administration was made on the 22nd July 1871, and inquiries were directed as to the testator's personal estate which might not by law be given for charitable purposes.

By the chief clerk's certificate it appeared that part of the testator's residuary personal estate consisted of two sums of 2275*l.* and 200*l.* owing on two mortgage debentures of the Sheffield Waterworks Company.

The mortgage debentures were in the form following:

ACT OF 1864.

Company of proprietors of the Sheffield Waterworks. Debenture No. 69 under Act of 1864, 2275*l.* By virtue of the Sheffield Waterworks Act 1864, the Company of Proprietors of the Sheffield Waterworks, in consideration of the sum of 2275*l.* paid to us by Daniel Holy, of Newbould, near Chesterfield, in the county of Derby, gentleman; Francis Hobson, the elder, of Sheffield, in the county of York, merchant, Francis Hobson, the younger, of Sheffield, aforesaid, merchant; and William Fisher, of Sheffield, aforesaid, horn merchant, out of moneys belonging to them on a joint account, do assign unto the said Daniel Holy, Francis Hobson, the elder, Francis Hobson, the younger, and William Fisher, their executors, administrators, and assigns, the undertaking called the Sheffield Waterworks, and all future calls on shareholders, and all the rents, rates, and sums of money arising by virtue of the several Acts relating thereto, and all the estate, right, title, and interest of the said company in and to the same, to hold unto the said Daniel Holy, Francis Hobson, the elder, Francis Hobson, the younger, and William Fisher, their executors, administrators, and assigns, until the said sum of 2275*l.*, together with interest for the same at the rate of 5*l.* for every 100*l.* by the year shall be fully paid and satisfied. And it is hereby stipulated that the said principal sum of 2275*l.* shall be repayable and repaid on the 21st day of June, which will be in the year 1868, and that in the meantime the said company shall in respect of the interest on the said principal sum pay to the bearer of the coupons of interest warrants hereto annexed respectively, the several sums mentioned in such warrants respectively at the several times therein respectively specified.

Given under our common seal this 21st day of Dec. A.D. 1865. Sealed by order of the Board of Directors.

WILLIAM WATERFALL, (L. S.)

Registered this 22nd day of Dec. 1865.

ALBERT SMITH, Clerk.

The debenture fell due on the 21st June 1868, but by agreement the time for payment was extended to the 21st June 1871. It was paid off in August 1871.

The debenture for 200*l.* was paid off in June 1871.

On the hearing on further consideration the question to be determined was whether the two sums of 2275*l.* and 200*l.* were pure personalty which could be bequeathed by will for charitable purposes, or impure personalty, in which latter case they would become the property of the testator's sister, Caroline Davenport.

Miller, Q.C. and Chapman Barber, for the plaintiffs.—The debentures are a charge on the land of the waterworks company, and are, therefore, impure personalty, and could not be bequeathed for charitable purposes. They cited

Taylor v. Linley, 3 De G. F. & Jo. 84; 1 Giff. 67; 32 L. T. Rep. O. S. 232;

Ashton v. Lord Langdale, 4 De G. & Sm. 402;

Re Langham's Trusts, 10 Ha. 446;

Thornton v. Kempson, 23 L. T. Rep. O. S. 185; Kay 592.

Cary, for an annuitant, supported the plaintiffs' view.

Glasse, Q.C. and Bunting, for the Sheffield Town Trustees.—The debentures are pure personal estate, and not within the Act 9 Geo. 2, c. 36. The instrument itself gives no right of entry on the

land, but merely a right to have a receiver of the tolls appointed in case the company makes default.

Bunting v. Marriott, 19 Beav. 163;

Myers v. Perigal, 16 Sim. 533;

Gardiner v. London, Chatham, and Dover Railway Company, 15 L. T. Rep. N. S. 552; L. Rep. 2 Ch. 201;

decided what is the true nature of these bonds. *Ware v. Cumberlege* (25 L. T. Rep. O. S. 138; 20 Beav. 503) was expressly overruled in *Edwards v. Hall* (26 L. T. Rep. O. S. 170; 6 De G. Mac. & Gor. 74). Debenture holders have only a right to a share in the profits after keeping down the expenses; their right is like that of the shareholders. The profits of the company which are the subject of the mortgage do not arise from land at all; they arise from the water which the company collect and sell at a certain place. They also cited

Walker v. Milne, 11 Beav. 507;

Jarm. on Wills, 3rd edit. 205.

Miller, Q.C. in reply.—*Myers v. Perigal* was heard on appeal before Lord St. Leonards (2 De G. M. & G. 599). The true test is there laid down at page 620. The whole corporation can do just what the Lord Chancellor there says an individual shareholder cannot do.

Hayter v. Tucker, 4 K. & J. 243.

The whole question is, can the debenture holder get a receiver appointed? If he can he differs from a shareholder, and must be held to have an interest in the land of the company.

The VICE-CHANCELLOR.—My own view is very clear, but I will look into the authorities before giving judgment.

June 27.—The VICE-CHANCELLOR.—The question in this case is whether certain debentures of the Sheffield Waterworks Company are or are not within the operation of the Mortmain Acts? The testator in the suit by his will so bequeathed his residuary personal estate as to leave all of it which could not be lawfully given by will for charitable purposes to his sister, Caroline Davenport. Part of his estate consisted of a debenture of the company already mentioned for securing the sum of 2275*l.*, and also of a debenture to secure the sum of 200*l.* The debentures themselves are in the ordinary form. In the case of *Sparling v. Parker* (9 Bea. 450) shares in a gaslight and in a dock company, which possessed real estate for the purpose of their undertaking, were held by Lord Langdale not to be within the Statutes of Mortmain, and in the case of *Tomlinson v. Tomlinson*, decided in 1823, and of which a report is published in the same volume of Beavan, p. 458, canal shares, which by Act of Parliament were declared to be personal estate and transmissible as such, were held by Sir John Leach to be within the Mortmain Acts. The more recent authorities, however, have held that such shares as those are not within the Acts. In *Walker v. Milne* dock and canal shares and bonds secured by an assignment of the rates were held not to be an interest in land within the Statutes of Mortmain. The question arose also in *Myers v. Perigal*. There it was in the first instance held that a debenture of the Newcastle and Carlisle Railway Company was not within the Statutes of Mortmain, but shares in a joint-stock bank, the property of which consisted of freehold and copyhold estates and mortgages for terms of years, were held to be within the statutes; on appeal, however, Lord St. Leonards reversed the

latter part of that decision, and held, in accordance with the certificate of the Court of Common Pleas, that the bequest of the shares to the charities in that case was a valid legal bequest within the 9 Geo. 2, c. 36. Lord Truro took the same view of the law in that case. In *Taylor v. Linley* a bequest for charitable purposes of shares in a railway company, which at the testator's death had granted a lease of its railway property, and undertaking for 999 years to another railway company at a fixed rent and with an option of purchasing on notice, was held not to be void under the Statutes of Mortmain. Lord Campbell there thought that the shares retained their quality of pure personal estate, and so were not an interest in land under the statutes. The contrary view of the law, however, as taken by Lord Romilly in *Ware v. Cumberlege*, was reversed by Lord Cranworth in *Edwards v. Hall*. In *Ashton v. Lord Langdale*, Lord Justice Knight Bruce, when Vice-Chancellor, held that mortgages of turnpike tolls and of railway undertakings were interests in land within the Mortmain Acts, but that railway debentures (not being mortgages), shares in railway, canal, waterworks, and banking companies, and scrip shares in projected railway companies, were not within the Acts. So in *Langham's trusts*, a bequest of shares in a canal navigation company for charitable uses was held to be good, but a bequest of securities upon the tolls, rates, and duties, and upon the general estate of the company created by assignment thereof by way of mortgage, as being a charge upon land, was held to be void under the statutes. But, whatever might have been till recently the correct view of the law on this subject, the case of *Gardiner v. The London, Chatham, and Dover Railway Company* decided these very important points, viz., that an ordinary debenture issued by a railway company in the form given in Schedule C of the Companies Consolidation Act 1845, gives the holder a charge upon the undertaking generally as a going concern, and the tolls and sums of money earned by the company, but does not give any specific charge upon the surplus lands or upon the rolling stock. The railway is to be considered to be mortgaged as a going concern not to be interfered with or broken up by the mortgagees, and the right of the mortgagees is to have a receiver of the earnings of the company only, and not to have a manager appointed by the court. That case is really conclusive on the subject, and as it appears from the decision there that the debenture holders have no charge upon the lands, the interest which a debenture holder has cannot be an interest in land within the Statutes of Mortmain. The result on the whole is that, as the testator here has only given his sister such of his personal estate as cannot by law be given by will for charitable purposes, and as I am clearly of opinion that these debentures can be so given, I must make a declaration that they pass to and are now the property of the Sheffield Town Trustees.

Solicitors, *Walter Moojen and Son* (for *Brown and Son*, Sheffield); *J. W. Hickin*.

QUEEN'S BENCH DIVISION.

Reported by M. W. McKELLAR, J. M. LELY, and R. H. AMPELST, Esqrs., Barristers-at-Law.

Tuesday, Jan. 18, 1876.

R. v. JUSTICES OF THE WEST RIDING OF YORKSHIRE.

Public Health Act 1875 (38 & 39 Vict. c. 55), s. 343—*Rate made by local board under repealed Act.*

A local board of health gave notice of their intention to make a district rate under the Public Health Act 1848 (11 & 12 Vict. c. 63) and amending Acts. At the time the rate was made the Acts in question were repealed (though the local board were unaware of the fact) by the Public Health Act 1875 (38 & 39 Vict. c. 55), which, however, provided that the repeal should not affect anything "duly done" under any enactment thereby repealed. The new Act authorised the levying of a rate for substantially the same purposes as the repealed Acts upon giving similar notices.

Held, that the rate was good as a rate under the new Act, and that the notice given was a thing "duly done" under the saving clause.

RULE calling upon the justices of the West Riding of Yorkshire to show cause why a *mandamus* should not issue commanding them to enter continuances and hear an appeal, in which the Elland-cum-Greeland Gas company were the appellants, and the Elland Local Board of Health were the respondents.

The rate (the subject matter of the appeal) was a general district rate, made under the Public Health Act 1848 (11 & 12 Vict. c. 63). On the 2nd August 1875, notice was duly given under sect. 99 by the respondents of their intention to make a general district rate on 11th Aug., and an estimate deposited for inspection, showing the sums of money which were required for the various purposes of the rate as required by sect. 98, and also the rateable value of the property assessed, and the amount of the rate. On 11th Aug. the Public Health Act 1875, came into operation. This Act, by Sect. 343, repealed the Public Health Act 1848 (11 & 12 Vict. c. 63) and amending Acts, but contained the following saving clause:

Provided always that this repeal shall not effect

- (a) Anything duly done or suffered under any enactment hereby repealed; or
- (b) Any right or liability acquired, accrued, or incurred under any enactment hereby repealed; or
- (c) Any security given under any enactment hereby repealed; or
- (d) Any penalty or forfeiture or punishment incurred in respect of any offence committed against any enactment hereby repealed; or
- (e) Any investigation, legal proceeding, or remedy in respect of any such right, liability, security, penalty, forfeiture, or punishment as aforesaid; and any such investigation, legal proceeding, and remedy may be carried on as if this Act had not been passed.

On the same day (viz., Aug. 11), the respondents, in conformity with the notices given on the 2nd Aug., proceeded to make the district rate "for defraying such expenses as are, by the Local Government Act 1858, charged upon the rate, and such other expenses of carrying into execution the said Acts in the said district as are not provided for by any other rate or chargeable upon the district fund." Notice of the making of the rate was published on the 12th Aug. The rate was made

and published by the board, in ignorance of the Public Health Act 1875, having come into operation. On 24th Aug. payment of the rate was demanded of the appellants, who refused to pay. On the case coming on for hearing at the sessions at Leeds, the justices were of opinion that the rate was invalid in consequence of the Public Health Act 1848, and amending Acts having been repealed, when the rate was made, and accordingly declined to hear the appeal.

Subsequently a rule for *mandamus* was granted, against which

Maule, Q.C. and *Tennant* showed cause on behalf of the respondents, and contended that the rate was a nullity, having been made without proper authority, and cited

Millward v. Caffin, 2 W. Black, 1330;
R. v. Wavell, 1 Doug. 115.

M. W. Whittaker and *Forbes*, for the appellants, supported the rule, and contended that notwithstanding that the Act of 1875 came into operation before the rate was made, the rate which was for the usual purpose was good by virtue of the saving clause (sect. 343), which expressly excepted from the repeal anything "duly done."

COCKBURN, C.J.—The question here is whether the quarter sessions should entertain an appeal against a general district rate, made by the Local Board of Elland. The circumstances under which the rate was made are certainly very peculiar. The Local Board of Health, it appears, intended to make the rate under the Public Health Act 1848. That Act requires certain notices to be given; and the Local Board accordingly, in conformity with the Act, issued the necessary notices, while the Act of 1848 was still in force. But it so happened that, before the time for which the notices were given had expired, the Act of 1848 was repealed, and the Act of 1875 came into operation. Ignorant of this fact, and of the repeal, the Local Board proceeded to make the rate under the Act of 1848; and hence the question arises which we are now called upon to decide. Now it is clear that by the Act of 1875 they had power to make this rate, and the purposes of the rate are substantially the same under both Acts, as well as the notices which are required to be given. It has also not been disputed, and is indeed indisputable, that had the notices been given under the later Act they would have been binding. Can these notices, given under the Act of 1848, enure so as to make this a good rate? That is undoubtedly a question of some nicety, and I own my mind has fluctuated considerably during the argument. Still, on the whole, I have come to the conclusion that the rate in question was well made, and that the court of quarter sessions ought not to have refused to hear this appeal. If the Act of 1848 had been simply repealed, and there had been no saving clause, the case would then have been different, and I rather think my opinion would have been that the notices to be good must have been given under the second Act. But I find it expressly enacted that things "duly done" are excepted from the repeal by the saving clause. What was done here was done in exercise of the powers conferred on the Local Board by the Act of 1848, and in due form. I think it would, therefore, be unjust and mischievous if that which was properly done under the Act of 1848 were

allowed to be treated as a nullity, and fresh notices had to be given. The Legislature intended to give effect to anything duly done. The case must, therefore, go back to the court of quarter sessions.

MELLOR, J.—I am glad to be able to come to the same conclusion, and on much the same grounds, as the Lord Chief Justice. It would be a strange construction of the Act if we were compelled to hold this rate invalid. The rate was made by the same persons who had authority to make it under the provisions of the Act of 1875, and the rate itself is valid unless it was precluded by the want of the requisite notices. Now sect. 210 of the Act of 1875 enacts that "public notice of intention to make any such rate, and of the time when it is intended to make the same, and of the place where a statement of the proposed rate is deposited for inspection, shall be given by the urban authority in the week immediately before the day on which the rate is intended to be made, and at least seven days previously thereto." Though I, too, have not been free from doubt during the argument, I have come to the conclusion that this rate is good. There is no doubt the purposes are the same, and there is nothing at all misleading. I think, therefore, we should act in contravention of the intention of the Legislature were we to hold this rate to be invalid.

FIELD, J.—I, too, have come to the same conclusion. The rate is made for purposes in accordance with the provisions of the 210th section of the Act of 1875, and admittedly made by persons who, on 11th Aug., had power to make it under that Act. The question is whether the rate is a nullity for any other reason? It is said to be so, because it was made under the Act of 1848. Now, if the object and purposes of the rate under those two Acts had been different, there would have been some force in the objection; but as the objects are identical, I confess I cannot see how the ratepayers can suffer inconvenience or injustice. I think the estimate was a thing "duly done" under the saving clause, and the same observation applies also to the notices. Is there anything in the rate then which shows it to be a nullity? I think not, and it would be very inconsistent to hold that this rate was bad. No doubt it is important that the object of the rate should be stated in the rate; and if, as in *Reg. v. Wavell* (*ubi sup.*), any of the objects were illegal, there would be a difficulty in supporting it. In the present case, however, all the objects are warranted by law, and the fact that *per incuriam* a mistake was made which could not mislead, ought not, I think, to be held a sufficient ground for upsetting this rate.

Rule absolute.

Solicitors: *Torr, Janeway, Taggart, and Co.*, for Lancaster and Wright, Bradford, for appellants.

Williamson, Hill, and Co., for Norris, Foster, and England, Halifax, for respondents.

Thursday, April 20, 1876.

FINCH v. THE GUARDIANS OF THE YORK UNION.

Pauper lunatic—Order for maintenance—Action—Striking out defence—Statutes 16 & 17 Vict. c. 97; 30 & 31 Vict. c. 12; 38 & 39 Vict. c. 77.

An action was brought on an order made by justices under 16 & 17 Vict. c. 97, s. 96, directing the guardians of a union to pay certain costs for the maintenance of a lunatic pauper in an asylum.

Q.B. Div.]

FINCH v. THE GUARDIANS OF THE YORK UNION.

[Q.B. Div.]

The guardians defended the action. An application was then made to have the statement of defence struck out under Order XXVII., rule 1.

Held (by Blackburn, J. and Lush, J.) that though the order itself could not be appealed against, yet where such order formed the subject-matter of an action a defendant was entitled to plead to such action, and if such plea affords no answer to the statement of claim the proper mode of objection is by demurrer.

THIS was a motion to strike out a defence under Order XXVII., rule 1.

The following was the plaintiffs' particulars of claim indorsed on the writ of summons:

"The plaintiffs' claim is for 102l. 14s., due to the plaintiffs under an order of two justices of the county of Wilts, dated the 23rd Oct. 1875, by virtue of powers conferred upon them by the Criminal Law Lunatics Act 1867, and the Lunatic Asylum Act 1853, and ordered to be paid by the defendants to the plaintiffs for the lodging, medicine, maintenance, clothing, and care of a certain lunatic, named James Powell, and a further sum of 11l. 18s., being the sum due to the plaintiffs at the rate of 17s. per week, from the 23rd Oct. 1875 to the 29th Jan. 1876, and ordered by the aforesaid order to be paid by the defendants to the plaintiffs."

The following was the statement of defence complained of:

"The defendants deny that the said sums of money set out in the plaintiffs' particulars of claim are due from them to the plaintiffs.

"The defendants say that the said order of the two justices of the county of Wilts, dated the 23rd Oct. 1875, mentioned in the writ, and referred to in the particulars of claim, is invalid, and is not conclusive upon them.

"It is contended by the defendants that the said justices had no such powers to make the said order conferred upon them by the Criminal Lunatic Act 1867, and the Lunatic Asylum Act 1853, or by any other Acts.

"It is further contended by the defendants that as the said order is for the payment of 102l. 14s. part of the money claimed in respect of the lodging, maintenance, clothing, medicine, and care of the said lunatic James Powell, for a period of four years and eight months prior to the date of the said order, the said order is bad and of no force whatever, because in the first place the justices had no power to make a retrospective order at all, and in the second place, that if they had such power, they were only entitled to make a retrospective order for the expenses incurred with reference to the said lunatic during the last preceding twelve months.

"Before the making of the said order no settlement of the said lunatic has been adjudged, and up to the present time there has been no adjudication whatever as to the settlement of the said lunatic. The plaintiffs have waited an unreasonable time before the obtaining of the said order, and up to that time no claim whatever was made by the plaintiffs upon the defendants for the maintenance, &c., of the said lunatic, nor did they in any way communicate to the defendants the fact of their having the said lunatic under their control.

"The books of the defendants were, according to the order of the Poor Law Board, closed on the 28th March 1875, and no proceeding was taken for the recovery of the said sums mentioned, or any

part thereof, nor was any claim made on the defendants whatsoever within the half year ending the 25th March 1875, or within three months thereafter, so that the defendants, if they are compelled to pay the said sums of money, are precluded from reimbursing themselves for the payment thereof by levying a rate upon the ratepayers of the said union, as they would have been entitled to do if the proceedings or claim had been instituted and made earlier. The defendants have no other means of obtaining the money which will be required to satisfy the plaintiffs' demand, and will, therefore, if the verdict of the action is against them, have to pay the money and costs out of their own pocket.

"The defendants say that, assuming the plaintiffs are entitled to be paid anything in respect of the said lunatic, the amounts inserted in the said order are unreasonable and excessive."

It appeared that J. Powell was a criminal who was convicted at the York Assizes in 1869, and that he became a lunatic whilst undergoing his term of imprisonment. He was sent to Salisbury Asylum and was detained there beyond the term of his sentence, as he continued insane. During such imprisonment, and for a considerable time afterwards, the Guardians of the York Union paid a considerable sum for his maintenance, when they refused to continue it. An order was then obtained against the guardians under 16 & 17 Vict. c. 97, s. 96, which enacts that "it shall be lawful for the justice by whom any pauper lunatic is sent to an asylum under the powers of this Act, or for any two justices of the county or borough in which the asylum in which any pauper lunatic is confined is situate, or from any part of which any pauper lunatic has been sent, or for any two justices, being visitors of such asylum, to make an order upon the guardians of the union or parish, or the overseers of the parish (if not in a union or under a Board of Guardians), from which, at the instance of any officer or officiating clergyman, such lunatic is or has been sent for confinement, for payment to the treasurer, officer, or proprietor of the asylum, of the reasonable charges of the lodging, maintenance, medicine, clothing, and care of such lunatic in such asylum, and such order may be retrospective or prospective, or partly retrospective and partly prospective; and the guardians or overseers, on whom such order shall be made, shall from time to time pay to the said treasurer, officer, or proprietor, the charges aforesaid."

Section 121 of the same statute enacts—

If any overseer, or any treasurer of any county, upon whom any order of justices for the payment of money under the provisions of this Act, or any Act hereby repealed, as such, shall refuse or neglect for the space of twenty days next after due notice of such order to pay the money so ordered to be paid, the said money, together with the expenses of making the same, shall be recovered by distress and sale of the goods of the overseer or treasurer so refusing or neglecting, by warrant under the hands and seals of any two justices hereby authorised to make the order for payment of the money aforesaid, or by an action at law, or by any other proceeding in any court of competent jurisdiction against such overseer or treasurer; and if the guardians upon whom any such order is made refuse or neglect for such time as aforesaid to pay the money so ordered to be paid, the same, together with the expenses of recovering the same, may be recovered by an action at law or by any other proceeding in any such court; and in case of any such action or proceeding no objection shall be taken to any default or want of form in any order of admission or

maintenance, or in any certificate or adjudication under this Act, if such order or adjudication shall not have been appealed against, or, if appealed against, shall have been confirmed.

By 30 & 31 Vict. c. 12, s. 6, sub-sect. 1: A criminal lunatic confined in any asylum to which lunatics may be sent under 16 & 17 Vict. c. 97, and whose sentence expires before such evidence of his sanity has been given as justified his being discharged, is to be "deemed a pauper lunatic, and shall be in the same position in all respects as if he were a lunatic who, immediately previous to the expiration of his term of punishment, has been found wandering at large within the parish or place where the offence was committed in respect of which he became a criminal lunatic."

Bromley, for the plaintiff.—The order made upon the defendants is in the nature of a judgment *in rem*, and cannot be questioned. At all events the only defence available would be to produce evidence showing that the justices have no jurisdiction to enter upon the inquiry. In *Kettering v. Northampton* (34 L. J. 198, M. C.) the majority of the court held that no appeal lay against an order made under 16 & 17 Vict. c. 97, s. 96. He referred also to *Reg. v. Seaton* (7 Durn. & East, T. R. 373.)

Grain, for defendants, was not called upon.

BLACKBURN, J.—It by no means follows that because an order made under sect. 96 is final, an action such as this cannot be defended. Whether the defence is an answer or not is another question; but the proper way of raising the point would have been by demurrer. I am clearly of opinion it is not so frivolous as to justify us in setting it aside.

LUSH, J., concurred.

Motion refused.

Solicitors for plaintiff, *Bell and Co.*

Solicitors for defendants, *Sharp and Ullithorne*, for *Brearey*, York.

Wednesday, May 3, 1876.

REG. v. ST. ALBANS SANITARY AUTHORITY, ON THE PROSECUTION OF THE SANITARY AUTHORITY OF BARNET.

Notice of appeal, time for—Whether time runs from date of order or service of order—"Cause of appeal"—Public Health Act 1875, s. 48.

The time for giving notice of appeal against an order of justices runs from the date of the making of the order appealed against, and not from the date of service of a written form of order upon the appellant.

By the Public Health Act 1875, s. 48, where any ditch lying near the boundary between the district of any local authority and any adjoining district is foul, a justice may, on the application of the local authority whose district is injuriously affected thereby, summon the local authority of the adjoining district to show cause why an order should not be made for cleansing the ditch; and the court, "after hearing the parties, or *ex parte* in case of the default of any of them to appear, may make such order," as to the cleansing of the ditch as may seem reasonable.

By sect. 269, a person deeming himself aggrieved by any rate, order, conviction, or thing done under the Act, may appeal, first, to the next sessions held not less than twenty-one days "after the demand of the rate or the decision of the court;"

and, secondly, on giving notice to the other party and the court within fourteen days "after the cause of appeal has arisen":

Held, that "cause of appeal" means the determination of the justices to make the order, and not the service of the order upon the appellant.

THIS was a special case stated for the opinion of the court by the Hertfordshire Quarter Sessions. It appeared from the case that an order had been made upon the appellants by two justices of Hertfordshire, to cleanse a certain ditch. The order was made under the 48th section of the Public Health Act 1845, which section is as follows:

Where any watercourse or open ditch lying near to or forming the boundary between the district of any local authority and any adjoining district is foul and offensive, so as injuriously to affect the district of such local authority, any justice having jurisdiction in such adjoining district may, on the application of such local authority, summon the local authority of such adjoining district to appear before a court of summary jurisdiction, to show cause why an order should not be made by such court for cleansing such watercourse or open ditch, and for executing such permanent or other structural works as may appear to such court to be necessary; and such court after hearing the parties, or *ex parte* in case of the default of any of them to appear, may make such order with reference to the execution of the works, and the persons by whom the same shall be executed, and by whom and in what proportions the costs of such works shall be paid, and also as to the amount thereof, and the time and mode of payment, as to such court may seem reasonable.

The order was made on the 6th Sept., but was not served upon the appellants till the 24th of the same month. On the 2nd Oct. the appellants served notice of appeal to quarter sessions. It was contended at the hearing that the notice was too late, within the meaning of the 269th section of the Public Health Act 1875, the material portion of which is as follows:—

Where any person deems himself aggrieved by any rate made under the provisions of this Act, or by any order, conviction, judgment, or determination of or by any matter or thing done by any court of summary jurisdiction, such person may appeal therefrom, subject to the conditions and regulations following:—

(1) The appeal shall be made to the next court of quarter sessions for the county, division, or place in which the cause of appeal has arisen, holden not less than twenty-one days after the demand of the rate or the decision of the court from which the appeal is made.

(2) The appellant shall within fourteen days after the cause of appeal has arisen give notice to the other party, and to the authority or court of summary jurisdiction by whose act he deems himself aggrieved, of his intention to appeal, and of the ground thereof.

The quarter sessions overruled the objection, and quashed the order of the justices below (no evidence being offered on the part of the respondents), subject to the opinion of this court whether the notice of appeal given by the appellants was within the time limited by the 269th section of the Public Health Act 1875 or not.

Clarke (Croome with him), for the appellants, argued that the notice was in time. The time limited by the 2nd sub-section of sect. 269 of the Public Health Act 1875 begins to run from the service of the order. So it has already been decided upon the meaning of "cause of complaint" in various statutes:—

R. v. Devonshire JJ., 1 M. & S. 411;

R. v. Derbyshire JJ., 7 Q. B. 198;

R. v. Lancashire JJ., 8 B. & C. 593;

Leeming and Cross's Quarter Sessions, 2nd edit. p. 264.

In *R. v. Derbyshire* (*ubi sup.*) the statute 4 & 5 Vict. c. 59, s. 1, empowered a party, upon whom an

Q.B. Div.] REG. (on the prosecution of J. Johnson) v. THE INHABITANTS OF GREENHOW. [Q.B. Div.]

order for payment of money had been made by justices, to appeal "within six days after such order shall be made or given." It was held that the time ran from the making of the order, not from the date of service. But Lord Denman, C.J., observed: "The cause of complaint may well be taken to mean something directly affecting the party appealing, or at least brought to his knowledge; but the period fixed in the present Act is the making of the order." He also referred on this point to *Ex parte Johnson* (3 B. & S. 947; 32 L. J. Rep. M. C. 193) [MELLOR, J.—*R. v. Lancashire* (8 B. & C. 593) would seem to be an exception to the general rule.] The phraseology of the two sub-sections of sect. 269 of the Public Health Act 1875 was advisedly varied in order to meet cases like the present. In sub-section 1 "the decision of the court" is spoken of; in sub-section 2 the term "cause of appeal" is used. The use of a different term implies a different object. And "appeal to next sessions" has often been held to mean "next practicable sessions."

R. v. Southampton, 6 M. & S. 394.

Michael for the respondents.—All the cases in which it has been decided that "cause of complaint" or a similar term means service of an order appealed against, were decided upon statutes empowering the justices to make an order on the appellant *ex parte*. He cited

Ex parte Simkin, 2 E. & E. 396, decided on the Nuisances Removal Act, 1858 (18 & 19 Vict. c. 121, s. 40).

He was then stopped.

BLACKBURN, J.—One could perhaps wish that the terms of the enactment which we have to construe had been otherwise expressed, but I have no doubt as to their meaning. The 269th section contemplates in its opening clause three subjects of appeal—a rate, an order or conviction, and a "thing done" by the court of summary conviction. The first subject of appeal, the rate, would first come into existence behind the back of the party affected, and it is therefore from the demand of the rate that the time of appeal begins to run. The first sub-section accordingly provides that the appeal shall be to the next sessions, held not less than twenty-one days after the demand of the rate or the decision of the court. Then comes the second sub-section, which enacts that the appellant "shall within fourteen days after the cause of appeal has arisen give notice." For the sake of grace of style, or for some other object best known to themselves, the framers of the Act have varied the language, speaking of "rate or decision of the court" in the one case, and of "cause of appeal" in the other. But in my opinion these terms have precisely the same meaning. *R. v. Lancashire* (*ubi sup.*) is distinguishable, on the ground that there the judgment was behind the back of the appellant. Where there is a conviction or order it is different, for neither of them can take place without the appellant having notice of their effect at once. The notice, therefore, was given too late, and the appeal ought not to have been entertained.

MELLOR, J.—I am of the same opinion. The appellants had had an order made upon them under sect. 48 of the Public Health Act 1875, which enacts that a justice of the peace may, on the application of a local authority, summon the local authority of an adjoining district to appear before a court of summary jurisdiction, to show cause

why an order should not be made for the purpose mentioned in the section. It appears that the order may be made *ex parte* in case of default of appearance, and this is very reasonable, for otherwise authorities which had brought themselves within the section might escape orders by merely not appearing. The hearing in default has all the incidents of a hearing in presence of the parties. As to the question in this case, where there is a party aggrieved by an order, it has been argued that the change of expression from "decision of the court" to "cause of appeal" shows that the meaning is different; but with this I cannot agree, although I fail to see the object of the change of expression. The appellants were present here. It has never been held that a formal order is necessary before the time for giving notice begins to run. The appellant knows that there is an order made against him as soon as the decision of the court is pronounced, and that is the "cause of appeal" within the meaning of the statute.

Judgment for the respondents.

Solicitor for the appellants, *Beal*.

Solicitors for the respondents, *Harris, Barnett*.

Wednesday, May 10, 1876.

REG. ON THE PROSECUTION OF JOHN JOHNSON v. THE INHABITANTS OF GREENHOW.

Highway—Portion of road carried away by landslip—Liability to repair.

The inhabitants of the defendant parish were indicted for the non-repair of a highway. It appeared that a portion of the highway in question had been carried away by a landslip, and its place supplied and filled up with earth, stones, and other debris. No trace remained of the old metalled road, but the line of it was known and admitted. At the trial a verdict of guilty was entered, subject to the report of an engineer on certain points, leave being given to either party to state a special case on such report. The engineer found that the road was absolutely destroyed to an extent of 252 yards, but that it was practicable to form a permanent and passable road along the old track at a cost of 341l. A special case was afterwards stated. The court had power to draw inferences of fact.

Held (per Blackburn, and Quain, J.J.) that though the metalled portion of the road had been carried away, the line itself was still known, and that consequently there was no such total destruction of the road as would extinguish the liability which ordinarily attaches to a parish.

This was an indictment against the inhabitants of the township of Greenhow, in the North Riding of the county of York, for the non-repair of a highway, in the said township.

The indictment was removed by *certiorari* into this court, and came on to be tried before Amphlett, B. at the spring assize, 1875, held at York, when a verdict of guilty was found by consent, subject to the opinion of the court upon the following

CASE.

1. The prosecutors are John Johnson, Matthew Smith, and other inhabitants of Bilsdale, and the defendants are the inhabitants of the township of Greenhow, one of three townships in the parish of Ingleby Greenhow, which parish forms part of the

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highway district of Langbaugh West, in the North Riding of the county of York. And it is admitted for the purposes of this case, that the defendant township of Greenhow is liable to maintain its own highways.

2. The road is properly described in the indictment, copy of which is hereto annexed, to be a common Queen's highway, called or known by the name of Broughton Bank Top, leading from Stokesley towards and unto Bilsdale, in the North Riding of the county of York.

3. The indictment alleges that a certain part of the same road, situate, lying, and being in the said district or township called Greenhow, being in length divers, to wit 251, yards, and in breadth divers, to wit six, yards on the 1st July 1873, and from thence continually afterwards until the date of the said indictment, was very ruinous, miry, deep, broken, and in great decay, for want of due reparation and amendment.

4. The highway in question is an ordinary metalled road, and that portion of it mentioned in paragraph 3, and now in dispute, runs north and south along the slope of a hill several hundred feet above the level of the valley beneath the slope, being at right angles to the direction of the road, and very precipitous.

5. Up to the time of the landslip hereinafter mentioned, the said road was a highway repairable by the parish or township of Engleby Greenhow, and was, except as hereinafter mentioned, and now is in good and proper repair.

6. In April and June 1872, two landslips of great magnitude occurred on the said slope of the said hill, the second being a continuation of the first, the two landslips together comprising many acres of land, and extending from the top of the said slope to about 170 yards below the said highway.

7. The portion of the said highway now in dispute and out of repair was absolutely destroyed by the said landslip, that is to say was carried away into the valley below, and its place supplied and filled up with earth, stones, and other débris of landslip.

8. A large portion of the hillside was moved bodily downwards to the valley beneath, and the ground on which the old road stood was broken up and carried away as stated.

9. The depth and level of the débris along the line of the old road differs much. The débris is at one point 25ft. above and at another 2ft. below the level of the old road, and now occupies the line or tract of the old highway.

10. This débris consists of loose soil, stone, and shale, and there is water coming from springs on the hillside which percolate through and over it, and from the time of the original landslips up to the present time in dry weather both horses and some carts and conveyances still continue to pass over it nearly in but higher up the hill than the line of the old road, and of course with great danger and difficulty. In wet weather the débris is at times so full of water as to be impassable, as there are no drains.

11. At the point where the débris is 25ft. above the level of the old road it has been ascertained by boring that for a depth of 31½ft. from the surface there is nothing but soil, shale, and stones, and that there is no trace of the old metalled road, but the line of it is known and admitted.

12. The metal, consisting of broken stones of

the old road, was carried away at one point 55yds. down the hill into the valley from its original position, and a wall which ran along the east or lower side thereof as a fence or boundary on that side was carried downwards along with the road, and is visible among the débris for about 50yds. of its length.

13. At the north edge of the landslip, at the point where the same meets the uninjured portion of the said highway, the side of the old road is scooped out and lowered so that there is a fall of some few feet from the uninjured metalling to the débris on the line or track of the old road.

14. By an order at Nisi Prius a verdict of guilty was entered, subject to the finding of Mr. Richard Cail, of Newcastle-on-Tyne, engineer, on the following questions, namely:

First. What had become of the old road, and whether and to what extent had it been carried away from its former position?

Secondly. Whether and to what extent it had been absolutely destroyed?

Thirdly. Whether it was practicable and at what cost to make a permanent and passable road along the old track of a similar character to the adjoining parts of the old road? And it was ordered that upon such finding a special case might be stated at the request of either party.

15. Mr. Cail having viewed and inspected the *locus in quo*, and taken such evidence and obtained such information and assistance as he thought fit made his report on the 4th Nov. 1875, and found the facts as follows:—

First. The old road had been carried away and overlaid by a landslip at a point called Broughton Bank Top to an extent of 252 yards or thereabouts.

Secondly. The road is absolutely destroyed for the extent to which it is carried away and overlaid, amounting in the whole to the said length of 252 yards.

Thirdly. It is practicable to form a permanent and passable road along the old track of a similar character to the adjoining part of the old road, and the cost of doing so would be 341l.

16. The rateable value of the whole parish is 4756l., and a rate of 5d. in the pound on this amount produces 100l. or thereabouts.

17. There is in existence a good road from Bilsdale to Stokesley, which diverges from the destroyed road at a point on the Bilsdale side of the landslip, and reaches Stokesley by way of Engleby Greenhow, but by this road, from the point of divergence, the distance to and from Stokesley is increased by one mile and two-thirds of another mile, and persons using the same have also to pass through, open and close several gates.

18. On this road the defendant township has, since the said landslip, expended a considerable sum in improving it so as to render it more convenient.

19. There is also a road from Bilsdale to Stokesley by way of Carlton. The said roads are both of them longer in distance than the destroyed road, but the gradients are somewhat better.

20. The court is to be at liberty to draw inferences of fact.

21. The question for the opinion of the court is, whether there exists a legal duty or obligation upon the defendants to make and maintain an available carriage road in the line or track of the old road, so as to form and continue a permanent and

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passable highway from Stokesley to Bilsdale at the part so destroyed, as aforesaid.

If the court shall be of opinion that such legal duty or obligation exists, then the verdict of Guilty is to stand.

If the court shall be of a contrary opinion, then the verdict is to be set aside and a verdict entered for the defendants.

Wills, Q.C. and *Forbes*, for the prosecution.—The question that arises here is whether, under the circumstances, the parish are relieved of their liability to repair this road which attaches to them by the common law of England. We say that the obligation to repair the road still subsists. The line or trench of the old road exists, and is known, and it is found by the arbitrator that it is practicable to make and maintain a permanent and passable road along the same at a reasonable cost. The cases which at first blush appear to lean in favour of the defendants, are all distinguishable from the present one. In *E. v. Paul* (2 Moo. & R. 307) it was held that a parish could not be convicted for not rebuilding a sea wall washed away by the sea, over the top of which the alleged way used to pass. Maule, J., there said, "The interruption of the passage is not from the want of repair, but from the sea having washed away the wall or embankment, and there is no longer anything to repair. The parish cannot be liable to rebuild the wall." The facts in *E. v. Bamber* (5 Q. B. 279; 13 L. J. 13, M. C.) were very similar. There a portion of the highway was swept clean away by the sea, or, as Lord Denman, C.J., expressed it in his judgment, "All the materials of which a road could be made had been swept away by the act of God," and the parish were held not liable to make good the damage that was done. The last case on the subject is *E. v. Hornsea* (1 Dears. C. C. 291; 23 L. J. 59, M. C.), where the indictment charged that certain part of a highway was out of repair. It appeared that there, also, part of the road had at the time when the indictment was preferred, been destroyed by the encroachments of the sea, and that the surface of the existing road was in good repair up to the time when the same had been so destroyed, at which part the road was terminated by a perpendicular cliff caused by excessive encroachments. No part of the road was then out of repair. The slope on which the road was had there been washed away by the sea, and if anybody had stood on the top of the cliff he could not possibly have seen any subsisting road to the beach. Moreover, to have restored the road in that case would have been an engineering work of considerable difficulty and expense.

Cave, Q.C. for the defendants.—The road here would have to be re-made and not repaired, and, consequently, no obligation attaches to the defendants. No harm will happen if the defendants are held not liable. This highway is under the jurisdiction of a highway board, who are authorised under 27 & 28 Vict. c. 101, s. 47, to make improvements in roads within their jurisdiction, one of which, by sect. 48, sub-sect. 3 is "the doing of any work in respect of highways beyond ordinary repairs executed to place any existing highway in a proper state of repair." [BLACKBURN, J.—Have the public any power to compel them to do these works?] No, it is a matter within their discretion. Here the road for 252 yards is absolutely destroyed

and the case is within the authorities that have been cited by the other side.

BLACKBURN, J.—There is great difficulty in laying down a principle generally applicable, but I think from the statement contained in this case there has not been so much done as would amount to a total destruction of the road so as to relieve the parish from liability. When a piece of ground is swept clean away into the sea common sense tells you that you cannot call on the inhabitants of a parish to repair the mischief. Again, in the case of the sea wall which is washed away by the sea over which the road passed, it is plain that the conclusion arrived at by Maule, J., was correct, and that you could not compel the parish to rebuild the wall. Landslips such as this may occur from floods, or by a convulsion of nature, or by the act of God. The metalled surface was ploughed up so that no trace of it remains; a large quantity of debris has been brought down and piled on the line of the road; still I can see here no such total destruction as would be sufficient to relieve the defendants. The facts here are not in dispute. There was a landslip, and a portion of the highway was carried away into the valley below, and its place supplied by stones and other debris; the depth and level of the debris along the line of the old road differs. At this spot there is no trace left of the metalled road, but it is stated that the line of it is known and admitted. Now the court has power to draw inferences of fact, but can we draw the inference that the road is totally destroyed? The engineer states that the old road at this point had been carried away, but that it is practicable to repair the road at a moderate cost. The metalled surface is undoubtedly gone, so that carts and conveyances cannot go along it as they should do. Bearing in mind that the expenses would not be heavy, and having a power to draw inferences of fact given us, I think there has been no such distinction here as ought to relieve the parish from further liability. Our judgment should therefore be for the Crown.

QUAIN, J.—I am of the same opinion. The difficulty in these cases is to say exactly when a road is so destroyed as to extinguish the liability which ordinarily attaches to a parish. The cases cited are all distinguishable from the present. What we have to ask ourselves is whether, as a jury, we can come to the conclusion that there has been here such a complete destruction as to bring it within the authorities? Now, the extent of the damage done here is set out in paragraphs 7 and 8 of the case which has been submitted to us. It appears the metalled part of the road has been carried away. The only destruction that I can see is that the place where the old metalled road was is filled up with stones and debris, but the line is still remaining. I confess I cannot see how this road was so destroyed as to relieve the inhabitants of the parish from all further liability with respect to it. I think, therefore, that judgment must go for the Crown.

Judgment for the prosecution.

Solicitors for the prosecution, *Bell, Brodrick, and Gray*, for *Arrowsmith and Richardson*, Thirsk.

Solicitors for the defendants, *Williamson, Hill, and Co.*, agents for *F. H. Wilcox*, Stokesley.

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[Q.B. Div.]

June 20 and Nov. 7, 1876.

HOLBORN GUARDIANS v. ST. LEONARD'S VESTRY,
SHOREDITCH.*Duty of vestry—Want of consideration—Action for breach—Metropolis Local Management Act 1855 (18 & 19 Vict. c. 120), s. 125.**The plaintiff's workhouse had been built on land in the defendants' parish under 22 Geo. 3, c. 56, by which it was provided that the building should not be liable to be charged with any greater taxes or assessments than to such amount as the land and tenements were assessed before they became vested in the plaintiffs.**By 18 & 19 Vict. c. 120, s. 125, the vestry of each metropolitan district is required to appoint and employ a sufficient number of persons, or to contract with any company or persons for collecting and removing all dirt, ashes, rubbish, ice, snow, and filth in or under houses and places within the parish.**Upon defendants' refusal to collect or remove the dirt from the plaintiffs' workhouse, the plaintiffs employed persons to do so, and brought this action for the amount charged by them.**Held, that the plaintiffs' exemption from increased rates did not exempt the defendants from performing the same duties in respect of the plaintiffs' premises as of all other householders; that this duty was not that of a surveyor of highways, and therefore the defendants were liable for a non-feasance concerning it; and that the amount claimed by the plaintiffs was recoverable in this action.**THIS was a special case, stated in an action between the parties.*

The plaintiffs, as such guardians, are and were, at the time of the occurrence of the defendants' acts and defaults, hereinafter complained of, the occupiers of, and entitled to certain lands, with a workhouse and other buildings thereon, known as the City-road Workhouse, and situated within the said parish of St. Leonard, Shoreditch, and of a dust-hole within and under or connected with the said workhouse, also situated in the said parish.

The said workhouse was, under the provisions of the statutes 22 Geo. 3, c. 56, and 48 Geo. 3, c. 97, built for the parish of St. Luke, in the county of Middlesex, on land situated in the said parish of St. Leonard, Shoreditch. By the said Act of 22 Geo. 3, c. 56, intituled "An Act more effectually to enable the inhabitants of the parish of St. Luke, in the county of Middlesex, to purchase, hire, or erect a workhouse within or near the said parish, for the better reception and employment of the poor of the said parish," it was among other things enacted, by sect. 1, that the rector, churchwardens, and overseers of the poor for the time being, and the vestrymen of the said parish, and their successors for ever, should be appointed trustees for the purposes of the said Act; and, by sect. 11, that it should be lawful to and for them, or any seven or more of them, after the time therein mentioned, to treat and agree with the owners and occupiers of all and every other person and persons interested in any freehold, leasehold, or copyhold grounds, tenements, or hereditaments within the said parish of St. Luke, or within the said parish of St. Leonard, Shoreditch, for the purchase or hire of such lands,

grounds, tenements, and hereditaments; and they were thereby enabled to take a conveyance thereof to them and their successors, upon lease or for ever, for the purposes in the said Act mentioned; and in the said sect. 11 it was further enacted that the said lands or grounds, tenements, or hereditaments, so to be leased or purchased from and immediately after the same should be conveyed or leased to the said rector and churchwardens, and their successors, or any workhouse or other buildings which should be erected or built thereon for the reception and employment of the poor of the said parish of St. Luke should not be liable to or be charged with any greater parochial or Parliamentary taxes, rates, or assessments (during such time and as long as the same shall be used and occupied for those purposes) than to such amount as such lands and grounds, tenements, or hereditaments were assessed before the same became vested in the said rector and churchwardens as aforesaid.

The aforesaid Act of 48 Geo. 3, c. 97, entitled "An Act for making more effectual provision for maintaining, regulating, and employing the poor of the parish of St. Luke, in the county of Middlesex," repealed the said Act of 22 Geo. 3, c. 56, and by ss. 10, 11, and 12, provisions were made for the election of forty-eight vestrymen, to be with the rector, churchwardens, and overseers of the poor of the said parish for the time being, guardians of the poor of the parish.

Sect. 74 enacted that all and every the messuages or tenements, poorhouses, workhouses, edifices, buildings, lands, hereditaments, moneys, and securities for moneys, rates, assessments, and arrears of rates and assessments, goods, chattels, and effects which by virtue of the said recited Acts, or one of them, the persons acting in the execution thereof, and their successors, or any other person or persons whomsoever were entitled unto or possessed of, in trust for the parishioners or vestrymen of the said parish, or which were vested in such persons and their successors, or other person or persons whomsoever for and towards the relief, maintenance, use, and benefit of the poor of the parish, or for any other purpose whatsoever in which the said parish is interested, shall from and immediately after the passing thereof be vested in, possessed by, paid, delivered, and belong to the guardians of the poor, acting in the execution of this Act, and their successors, as fully, effectually, and beneficially, and in as large and ample a manner and form, to all intents and purposes whatsoever, as they the said persons acting in execution of the said recited Acts or any of them, and their successors or other person or persons, were entitled to be possessed of such messuages or tenements, poor houses, workhouses, edifices, buildings, lands, hereditaments, moneys, and securities for moneys, rates, assessments, and arrears of rates and assessments, goods, chattels, and effects, or as the same respectively were vested in such persons acting in execution of the said recited Acts or any of them, and their successors or other person or persons, but subject, nevertheless, to be used, possessed, applied, and disposed of only upon the trusts and for the uses and purposes and in the manner by and in this Act directed, declared, and appointed.

The effect of this section was to preserve the exemption from increased rating given by sect. 11 of 22 Geo. 3, c. 56, notwithstanding the repeal of

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that statute: (*Reg. v. St. Leonard Shoreditch*, 13 Q. B. 964.)

In the year 1836 part of the parish of St. Andrew's, Holborn, the parish of St. George-the-Martyr, and the liberty of Saffron-hill, Hatton-garden, Ely kents, and Ely-place, were united under the name of the Holborn Union, for the administration of the poor laws. Afterwards part of the parish of St. Sepulchre, Furnival's Inn, and Staple Inn, were added to the union; and, finally, in 1869, the parish of St. James, Clerkenwell, and the parish of St. Luke, were by order of the Poor Law Commissioners also added to the said union.

Upon such union the said workhouse and the workhouses of the other parishes comprised in the union, became and still are for the common use of the union; and the Poor Law Commissioners under the powers of the Poor Law Amendment Act (4 & 5 Will. 4, c. 76, s. 26), issued rules, orders, and regulations, for the classification of the poor of the united parishes, and for their reception, maintenance, and employment in the various workhouses of the united parishes, without reference to the particular parishes in the union to which the poor may belong.

On the 25th Jan. 1873, the Court of Queen's Bench decided on a special case that notwithstanding the incorporation of the said parish of St. Luke into and with the Holborn Union, the exemption from increased rating given by sect. 11 of 22 Geo. 3, c. 56, was still preserved to the said workhouse.

By sect. 125 of an Act of Parliament passed in 18 & 19 Vict. c. 120, entitled an Act for the better Local Management of the Metropolis, the defendants were, as such vestry as aforesaid, required to appoint and employ a sufficient number of persons, or to contract with any company or persons for, amongst other purposes, collecting and removing all dirt, ashes, rubbish, ice, snow, and filth, in or under houses and places within their parish; and it was thereby enacted that such company or persons, and who were thereafter referred to as scavengers should, on such days and at such hours and in such manner as the vestry should from time to time appoint, sufficiently execute and perform all such works and duties as they respectively should be employed, or contract to execute or perform, and if any such company or person should fail in any respect properly to execute and perform such works and duties, such company or person should for every such offence forfeit a sum not exceeding 5*l*.

On or about the 13th March 1875, the clerk of the defendants, with their authority, and at their desire, wrote and sent to the plaintiffs' clerk the following letter:

St. Leonard, Shoreditch, Vestry Offices,
Town Hall, Old-street, E.C.
March 13th 1875.

Dear Sir,—I have to inform the guardians of the Holborn Union that after Lady Day next it will be necessary for them to make their own arrangements for the removal of the dirt from St. Luke's Workhouse and Infirmary.—I am, yours truly,

G. PARKER, Vestry Clerk.

The St. Luke's workhouse and infirmary referred to in the above letter is the said City-road Workhouse.

From and after the said Lady Day 1875 (*viz.*, the 25th March 1875), the defendants have ceased and neglected to appoint and employ, or to con-

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tract with anyone to remove the dirt, ashes, rubbish, and filth from the said dusthole, within and under or connected with the City-road Workhouse.

On or about the 3rd May 1875, the solicitors of the plaintiffs, with their direction and authority, wrote and sent to the defendants' clerk a letter, of which the following is a copy:

23, Ely-place, London, E.C.
3rd May 1875.

Dear Sir,—We have been consulted by the guardians of the Holborn Union with reference to the neglect of the contractor employed by the vestry of St. Leonard, Shoreditch, to take away the dust, &c., from St. Luke's Workhouse. It would appear from your letter to Mr. Hill of 13th March last, that the contractor's neglect is consequent on the instructions given to him by the Shoreditch Vestry; but as the duty of the vestry under the 125th section of the Metropolis Local Management Act appears to be very clear, we are inclined to think the instructions in question have been given under some mistake. We, therefore, write on behalf of the guardians of the Holborn Union, to demand of the vestry of St. Leonard, Shoreditch, the performance of their duty under the 125th section of the Metropolis Local Management Act, in respect of the guardian's workhouse in the City-road, and within the said parish, by causing to be removed therefrom the dirt, ashes, rubbish, &c., in one of the ways directed by the said Act. Since your contractors ceased to remove the dust from the workhouse, our clients have had it removed at their own expense, and they will require the repayment of all such expenses from your vestry.—We are, dear Sir, yours truly,

JAMES, CURTIS, and JAMES.

To G. Walker, Esq., Vestry Clerk,
St. Leonard, Shoreditch.

On or about the 4th May 1875, the clerk of the defendants, with their direction and authority, wrote and sent to the plaintiffs' solicitors a letter, of which the following is a copy:

St. Leonard, Shoreditch, Vestry Offices,
Town Hall, Old-street, E.C.,
May 4, 1875.

St. Luke's Workhouse dust removal.

Gentlemen,—In reply to your note of yesterday, I may say that the vestry is quite aware of the obligation of the 125th section of the Act alluded to, but they consider that the workhouse of St. Luke is by the Local Act rendered extraparochial. You will see that the contractor has nothing to do with it. If, therefore, the guardians of the Holborn Union think that the ratepayers of Shoreditch ought to pay the cost of removing the refuse, the Holborn ratepayers not contributing one farthing towards the cost, the guardians must take such steps as they may be advised to compel this vestry to do so.

I am, Gentlemen, yours obediently,
G. WALKER, V.C.

Messrs. James, Curtis, and James.

By reason of the premises the plaintiffs were damaged and obliged to employ, and did employ, persons to remove the said dirt, ashes, rubbish, and filth, and became liable to pay, and paid them for so doing, and the expenses incurred by the plaintiffs in removing the same, amounted to 50*l*. 1*s*.

The plaintiffs claim as damages that amount.

The questions for the opinion of the court are:

First, whether the defendants are bound to appoint and employ a sufficient number of persons, or to contract with any company or persons for the removal of the dirt, ashes, rubbish, and filth from the said dusthole within and under, or connected with the said City-road workhouse?

Secondly, whether the plaintiffs can recover from the defendants the damages sustained by them by reason of the expenses incurred by the plaintiffs in the removal of the said dirt, ashes, rubbish, and filth during such time as the defen-

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dants have neglected and refused to provide for the removal of the same?

In case the opinion of the court shall be in the affirmative of the above questions, then judgment shall be entered for the plaintiff for damages to the amount of the said 50*l.* s., and costs of suit.

In case the opinion of the court shall be in the negative, then judgment shall be entered for the defendants with costs of defence.

Murphy, Q.C. (with him *Sutton*) argued for the plaintiffs.—It cannot be contended that the exemption by statute from an increase of rates should deprive the plaintiff of their ordinary rights as shareholders. This is a breach of the defendants' duty as specifically defined in sect. 125 of the Metropolis Act 1855, and an action will lie for damage caused by their breach of it. In *Couch v. Steele* (3 E. & R. 402), the declaration alleged that the defendant neglected to supply and keep on board his vessel a proper supply of medicines, whereby plaintiff, who was a seaman engaged by him, suffered in his health. It was held on demurrer that, as 7 & 8 Vict. c. 112, s. 18 makes it the duty of the shipowner to have on board such medicines, although the Act imposes a penalty, recoverable by a common informer, as the specific punishment for the breach of that duty as to the public, yet sailors sustaining a private injury from the breach of that statutable duty are entitled to maintain an action to recover damages, and that the declaration was good. A similar conclusion was arrived at in *Ruck v. Williams* (3 H. & N. 308). The following sections of the Metropolis Act 1855 tend to support this contention: for s. 126 provides a penalty for obstructing scavengers, and sect. 127 vests the refuse collected in the vestry or district board, [*Lush*, J.—At common law I suppose the action would lie for the removal of a nuisance caused by the defendants.] That is our point.

Lanyon (with him *Lane*) for the defendants.—The defendants are a vestry, which by sect. 96 of this Metropolis Act, is to exercise the office of and to be the surveyor of highways for the district, and they cannot be liable for anything from which such surveyor would have been exempt. It has been held that no surveyor nor vestry can be liable for non-feasance of any kind, and *Parsons v. St. Mathew, Bethnal Green* (L. Rep. 3 C. P. 56), is an authority on this very point that an action for the non-repair of a highway will not lie against a vestry appointed under this Act. Willes, J., is reported to have said, at p. 59, that the defendants must act in this respect either as officers of the parish, and then the parish must answer as principal for the neglect of their duties, and *Young v. Davis* (7 H. & N. 760; in error 2 H. & C. 197) is an express authority that the officers are not liable; or else they must act as representatives of the parish, and then their liability will be a reflection of the liability of the parish which they represent, and against the parish no such action as this could be brought. The case of *Mackinnon v. Pearson* (8 Ex. 319; in error 9 Ex. 609), would, then, be in point. On either supposition, then, no action will lie against them for mere non-feasance, such as is the ground of the present action." And further on, "I cannot bring myself to think that it was the intention of the Legislature in transferring to the vestry the duties of the surveyor of highways, to give to everyone who may meet with any accident from an imperfection in the road

a right of action which he never previously possessed, and thus open a wide door to continual litigation." It was conceded in a recent case in the Court of Appeal (*Pendlebury v. Greenhalgh*, L. Rep. 1 Q. B. Div. 32), that no action for non-feasance would be against a surveyor of highways. [*Lush*, J.—Here the action is brought against the vestry upon their obligations created by the statute, not upon the duties of the surveyor of highways.] The work required to be done here by the plaintiffs was the duty either of the parish or surveyor. [*Lush*, J.—I think not. This was an especial duty of metropolitan districts. No parish could be indicted for not sweeping up ashes, &c.] To keep streets clean is part of the duty to repair a highway. Sect. 125 is merely a detailed description of the duties which the vestry is to perform as the surveyor of highways. The cases cited on the other side are applicable only when the statute is for the benefit of individuals, and not when for the benefit of the public generally. In such a case as this no action will lie at the suit of an individual:

Gorris v. Scott, L. Rep. 9 Ex. 125;

Atkinson v. Newcastle and Gateshead Waterworks Company, L. Rep. 6 Ex. 404.

Murphy, Q.C. in reply.

Mellor, J.—I am of opinion that the plaintiffs are entitled to succeed in this action. The defendants are incorporated by the 42nd section of the Metropolis Management Act 1855 (18 & 19 Vict. c. 120), and are empowered to sue and be sued in the name thereby given them. This does not rest upon their authority to execute the office of surveyor of highways given them by sect. 96 of the same Act, and there is nothing in the Act to limit their duties and position to those pertaining to that office. I think, therefore, this case is not analogous to those cited by Mr. Lanyon, which relate only to the inhabitants of a parish or the surveyor of highways. The duties which the defendants have to fulfil are given at length in the 125th section of the Metropolis Act of 1855, and are beyond those which were ever undertaken by a surveyor of highways; every vestry and district board are required "to appoint and employ a sufficient number of persons, or to contract with any company or persons for the sweeping or cleansing of the several streets within their parish or district, and for collecting and removing all dirt, ashes, rubbish, ice, snow, and filth," &c.; and such scavengers or their servants shall sufficiently execute and perform their duties or incur a penalty. The next section, the 126th, provides a penalty for obstructing scavengers in the performance of their duty; and the 127th vests all the refuse collected in the vestry or district board, who may dispose of the same towards defraying their expenses. With respect to these duties, I do not think the defendants can claim the exemptions applicable only to those of a surveyor of highways. It appears to me also that the defendants have misunderstood their obligation with respect to the plaintiffs' buildings, which are situated within their district. The old Act of 1782 provided that the plaintiffs should never be liable for any rates beyond those at that time payable, and this exemption from increased rates has been preserved by subsequent legislation, but the duties imposed upon vestries and district boards by the Metropolitan Management Acts have no regard to that limitation of rates. Whatever rates the plaintiffs pay, there is

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nothing to interfere with the rights which they enjoy as owners or occupiers of premises in the defendants' district. The plaintiffs have a sufficient interest in the district to claim the performance of the duties imposed upon the defendants, and they cannot be met by the answer that they do not pay enough rates. I think that under the circumstances, the plaintiffs' remedy is not by indictment only, but that the amount expended by them in performing the defendants' duties may well be recovered in this action.

LUSH, J.—I am of the same opinion. I see no analogy here with the case of *Parsons v. The Vestry of St. Matthew, Bethnal-green*. That decision is clear, upon the effect of the 96th section of the Metropolis Act of 1855, that there can be no liability for nonfeasance upon a vestry when acting as a surveyor of highways. But this action is founded upon a breach of the specific duty imposed upon vestries and district boards by section 125, quite apart from the duty of a surveyor. This is a duty towards the householders of the district and not merely a duty to the public, which is the limit of the liability of the inhabitants of a parish or the surveyor of highways. The plaintiffs are entitled to the same rights as any other householders in the district, although they are by express statutory enactment exempted from the payment of the full rates for which other householders are liable. There is a specific duty upon the defendants to do this work by the 125th section, and other sections of the Act have the effect of depriving the occupiers of any right to interfere with the defendants' duties. This being so why should not an action lie for damage caused by the breach of this duty? The case finds that "by reason of the premises the plaintiffs were damaged and obliged to employ and did employ persons to remove the said dirt, ashes, rubbish, and filth, and became liable to pay and paid them for so doing; and the expenses incurred by the plaintiffs in removing the same amounted to 50*l.* 1*s.*" The defendants are not a fluctuating body, but are liable to be sued, and the plaintiffs are therefore entitled to the ordinary remedy by action for the damage so caused by breach of the defendants' statutory duty.

Judgment for plaintiffs.

Solicitors for plaintiffs, *James, Curtis, and James*.

Solicitors for defendants, *Mills and Lockyer*.

DIVISIONAL COURT FOR APPEALS FROM INFERIOR COURTS.

Reported by M. W. McKELLAR, J. M. LELY, and R. H. ANFELT, Esqrs., Barristers-at-Law.

Friday, May 12, 1876.

BIRNIE (app.) v. MARSHALL (resp.)

Trespass in pursuit of game—Bona fide claim of right—Identity of land—1 & 2 Will. 4, c. 32, s. 30.

The appellant was charged with trespass in pursuit of game, under 1 & 2 Will. 4, c. 32, s. 30, and was proved to have shot game on glebe land over which the rector of the parish had always exercised the privilege of sporting. The appellant's defence was that he was game watcher, employed by three gentlemen who were proved to rent shooting from the lord of the manor, and that the lord

claimed the shooting over part of the glebe under an Inclosure Act. He proved that his employers ordered him to go upon this land, but he produced no evidence, although an adjournment was offered for that purpose, that the land upon which the alleged trespass was committed was included in the lands over which his employers' shooting extended, nor in the disputed part of the glebe. The magistrate decided that the appellant had no bona fide claim of right to shoot on this particular land, and convicted him of the trespass.

Held, upon a case stated (Field, J. dissenting), that under the circumstances, the magistrate was justified in convicting.

THIS was a case stated by a justice of the peace in and for the county of Cumberland, under the statute 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of the court on questions of law which arose before him, as hereinafter stated.

At a petty sessions, holden at the public office in Workington, in and for the division of Workington, in the county of Cumberland, on the 1st Dec. 1875, and by adjournment on the 9th Feb. 1876, an information preferred by Joseph Marshall (hereinafter called the respondent), against Robert Birnie (hereinafter called the appellant), under the Act 1 & 2 Will. 4, c. 32, s. 30, charging that he, the said Robert Birnie, did, within three calendar months then last past (to wit) on the 13th Nov. 1875, at the parish of Workington, in the said county, unlawfully commit a certain trespass, by entering and being, in the daytime of the same day, upon a certain close of land, in the possession and occupation of Jacob Waugh and James Armstrong, in pursuit of game, without the license or consent of the owner of the land so trespassed upon, or of any person having the right of killing the game upon such land, or of any other person having any right to authorise the said Robert Birnie to enter or be upon the said land for the purpose aforesaid, contrary to the statute in such case made and provided, was heard and determined by the said justice, the said parties respectively, or their respective attorneys, being then present; and upon such hearing the appellant was duly convicted before the said justice of the said offence, and he adjudged him for his said offence to forfeit and pay the penalty or sum of 1*s.*, to be paid and applied according to law, and also to pay to the respondent the sum of 3*l.* 14*s.* 6*d.* for his costs; and if the said several sums were not paid forthwith he adjudged the appellant to be imprisoned in the House of Correction at Carlisle, in the said county, for the space of seven days, unless the said several sums, and all costs and charges of the commitment and conveying of the appellant to the said house of correction should be sooner paid.

Upon the hearing of the information it was proved on the part of the respondent and found as a fact that on the 13th Nov. last (the day named in the information) the appellant was upon certain inclosed land in the parish of Workington aforesaid, in the occupation of Jacob Waugh and James Armstrong, with a gun in his possession, with which he there shot a partridge and a hare. And it was further proved on the part of the respondent and not denied by the appellant that the land where the game was shot formed part of the glebe land belonging to the rectory of Workington.

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On the first day of hearing it was alleged on behalf of the respondent, and not denied, that the rector of Workington or his licensee had always exercised the privilege of sporting over the land in question; but it was contended on behalf of the appellant that he (the appellant) was the game watcher for Messrs. Peter Iredale, Thomas Harrison, and William Carruthers, three gentlemen who claimed to be the lessees of the right of sporting upon the land in question under Henry Fraser Curwen, Esq., the lord of the manor of Workington, who it was alleged by the appellant was entitled to exercise sporting privileges over the land by virtue of a certain Inclosure Act passed in 49 Geo. 3, intituled "An Act for Inclosing Lands in the Townships of Workington and Winscales and manor of Workington, in the parish of Workington, in the County of Cumberland;" but as the appellant was not then prepared with any evidence in support of his allegation, the said justice did upon the application of the appellant's attorney adjourn the hearing of the said information; and the same information next (by virtue of successive adjournments) came on for hearing on the 9th Feb. last, and it was incumbent on the appellant to prove his right to go on this land. The first witness called by the appellant's solicitor was Mr. Tom Milburn, the clerk of the magistrates, and the solicitor to Henry Fraser Curwen, Esq., who deposed that Mr. Curwen was the lord of the manor of Workington, and as such lord claimed the right of shooting over those lands in the parish of Workington which were within the manor of Workington, and also that Mr. Curwen had let all the rights of shooting within a certain defined area which was outlined blue on a plan then produced to witness. Witness also produced a draft lease which had been prepared and agreed to between the appellant's employers and Mr. Curwen, in which the parcels were described as follows: "Secondly, all that the right and liberty of shooting, hawking, fowling, coursing, hunting, and sporting over all and singular that portion of the Curwen estates and manor of Workington, situate in the parishes of Workington, Distington, and Dean, in the county aforesaid, which are particularly specified, delineated, and described in the plan drawn upon the front skin of these presents, and therein outlined with a blue colour, now belonging to or vested in the lessors, or which they have any right or title to use or enjoy." No questions were asked this witness as to whether the land trespassed upon was within the manor or Workington. Another witness was then called by the appellant, who stated that he had lived almost all his lifetime in the neighbourhood of Winscales, and had farmed land there under the lord of the manor. That he remembered the commons before they were inclosed, and knew the land occupied by the respondent. That some of it belonged to the Rector of Workington and some of it to Mr. Henry Fraser Curwen, but that he thought that the rector would claim the common. That witness did not know where the trespass had been committed. Mr. Thos. Harrison, one of the appellant's employers was then examined, and deposed that he was one of the parties to the agreement for taking the game on Workington and Winscales Commons. That the appellant was their gamekeeper, and they authorised him to go upon that land; it was not Marshall's (the respondent's) land, but land in the occupation of Messrs. Waugh and Armstrong.

The portion of land in question was in the township of Workington. The respondent's attorney objected to this evidence, as Mr. Harrison did not see the trespass committed, but he ordered the man to go on the land.

It was contended by the appellant's attorney that the said justice had no jurisdiction in the matter, as a *bonâ fide* question of title was raised by the proceedings, and that the appellant had a *bonâ fide* right to shoot over the land under the agreement with Mr. Curwen, who, it was alleged, was entitled to the game by virtue of the provisions in the above-mentioned Inclosure Act. The respondent's attorney thereupon proceeded to address the said justice in reply, and in the first place, referring to the draft lease, he contended that when persons other than the lessees sported upon the land included in the lease, such persons must be accompanied by the lessees. But the said justice stopped him, and he then contended that no evidence had been produced by the appellant to show that the land upon which the trespass was alleged to have been committed was included in the draft lease, or was within the manor of Workington; and the said justice being of opinion that no evidence had been produced by the appellant to show the connection of the land trespassed upon with that referred to in the draft lease, or that the land trespassed upon was within the manor of Workington, did intimate such opinion to the appellant's attorney, and did offer to adjourn the case again to enable the appellant to produce such evidence; but the appellant's attorney declined to accept a further adjournment of the case, insisting that he had set up a *bonâ fide* claim of title; whereupon the said justice convicted the appellant in manner before stated, being satisfied that no *bonâ fide* claim of title had been set up by the appellant.

The question of law arising on the above statements for the opinion of this honourable court, therefore, is, whether the said conviction was legally and properly made. If this honourable court should be of opinion that the said conviction was legally and properly made then it is to stand; but, if otherwise, it is to be quashed.

Bompas argued for the appellant.—It is to be observed that the magistrate, in referring to the adjournment until the 9th Feb., says, in the case, that "it was incumbent on the appellant to prove his right to go on this land." That statement, upon which only can this conviction be justified, is contrary to law. There was no dispute as to the *bonâ fide* nature of the appellant's claim, and that being so, the magistrate's jurisdiction was thereby ousted. The question which the magistrate further considered, and which was beyond his jurisdiction, was whether the appellant showed any *primâ facie* evidence of the right which he admittedly claimed in good faith. [GROVE, J.—Was it not a question of fact for him to decide whether the place of the alleged question was within the bounds of the right he claimed?] *R. v. Cridland* (7 E. & B. 853) was decided upon another point, but the opinions expressed concerning this one have since been approved and acted upon; the general rule was there said to be that in case of summary convictions justices have jurisdiction to determine whether the claim of title to real property is set up *bonâ fide*; but if it is *bonâ fide* set up, they have no jurisdiction to proceed further in the matter and that the pro-

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viso in statute 1 & 2 Will. 4, c. 32, s. 30, viz., "that any person charged with any such trespass shall be at liberty to prove by way of defence any matter which would have been a defence to an action at law for such trespass," does not give justices jurisdiction upon a charge of trespass in pursuit of game, to determine a claim of title to land against the wish of the defendants. The jurisdiction of justices under this statute has been recently considered in the Court of Common Pleas; although the conviction was affirmed, the question was admitted to be only whether a reasonable and honest claim of right was involved: (*Watkins v. Major*, 33 L. T. Rep. N. S. 352; L. Rep. 10 C. P. 662). That the claim of right to shoot under this Inclosure Act was a reasonable question appears from the similar question raised before the Exchequer Chamber in *Sowerby v. Smith* (31 L. T. Rep. N. S. 309; L. Rep. 9 C. P. 524).

Henry, for the respondent.—The magistrate was right in demanding some proof of a *bonâ fide* claim to the particular land over which the appellant was shooting. A man claiming to shoot over the land belonging to another ought to do more than produce a lease of the shooting over some lands therein described—he should give some evidence at least of the identity of the land described with the place in which he was alleged to be trespassing. An opinion was expressed by Williams, J. in *Morden v. Porter* (7 C. B., N. S., 641), that the party trespassing is not the less guilty of the offence under this Act because he *bonâ fide* believes that he has the licence of the occupier to shoot over the land. And this was the conclusion of the Court of Queen's Bench in *Cornwell v. Sanders* (3 B. & S. 206).

Bompas, in reply.—It sufficiently appears that a *bonâ fide* claim on the appellant's part existed, and the magistrate had no right to consider its nature or its limit: (*Reg. v. Justices of Derbyshire*, 11 W. R. 780). Justices are judges only of whether the claim is *bonâ fide* and reasonable: (*Leatt v. Vine*, 30 L. J. 207, M. C.; *Legg v. Pardoe*, 9 C. B., N. S., 289) and this was admitted by everybody.

CLEASBY, B.—The question for us is whether this conviction was legally and properly made. It appears to me that it was, for I think the facts as they are stated justify the magistrate's conclusion that his jurisdiction was not ousted by any *bonâ fide* claim of title. It is not sufficient for a person charged under this Act to say, I claim title to this land. Neither the claim is to be allowed, nor the magistrate's decision is to be supported without some substantial foundation, and I conclude from the facts stated, that the materials upon which the magistrate was justified in exercising his discretion by finding no *bonâ fide* claim, were sufficient. No doubt this gentleman, the rector, had always enjoyed the right of shooting over this ground; but it was contended that the appellant, being the game watcher of three gentlemen who leased some shooting from the lord of the manor, was exercising the lord's right under an Inclosure Act to shoot over the same; on the first day, the appellant being unprepared with his evidence, the magistrate adjourned the further hearing of the information, and, as he states, when it came on again, it was incumbent on the appellant to prove his right to go on this land; in this the magistrate was quite right, at

least, to the extent that the appellant had to show a *bonâ fide* claim to shoot upon the particular land on which he was alleged to be trespassing. A plan and a draft lease were produced as evidence on his behalf, and we must take it that at this period of the case before the magistrate the onus of proof rested upon the appellant. No question, however, was asked by him as to whether the land on which he was shooting was included in the demise of which the document produced was a draft. It did not appear, indeed, that any of the appellant's witnesses knew where the alleged trespass had taken place. The magistrate intimated to the appellant's solicitor his opinion of this deficiency in the defence, and offered an adjournment to supply it; but the appellant declined the offer, and elected to stand upon what he had proved. The magistrate may fairly have presumed that his inability to establish this identity of the land was the cause of his refusal to accept another adjournment. He at all events held that the appellant's omission to prove what, if possible, must have been very easy, was sufficient to throw doubt upon the good faith of his claim of right. The magistrate, concluding that the appellant had no *bonâ fide* excuse for the trespass, exercised his jurisdiction and convicted him; and I think, under the circumstances, he was justified in doing so.

GROVE, J.—I am of the same opinion. I am not prepared to say this case might not be read in a different way, but I think it is capable of being interpreted so as to justify the conclusion of the magistrate. It seems to me, we may fairly take it that at the first hearing the rector was proved to have always exercised the right of shooting over this ground; and it became then the duty of the appellant to show a *bonâ fide* claim of right to shoot at the same place. This I assume is all the magistrate meant when he said, "it was incumbent on the appellant to prove his right to go on this land." Instead of showing a *bonâ fide* claim which would answer the charge against him, the appellant called a witness who gave some evidence of his right to shoot over some land not identified with the *locus in quo* of the alleged trespass, but he never asked him a question about that particular spot; and his other two witnesses carried his case no further. The magistrate, upon this, and upon the appellant's refusal of another adjournment, not unreasonably, I think, concluded that the appellant's claim of right was not *bonâ fide*, and that he was trespassing upon the particular land concerning which he was charged, although he might have some claim to shoot elsewhere. I regret that the case is not stated more clearly and decidedly; it certainly is not free from ambiguity, but reading it as I do, I think there is enough in it to show that the magistrate might have been right.

FIELD, J.—I am not able to come to the same conclusion. There is no distinction in the principles of law upon which we base the inferences we draw from the case, but the statements are so ambiguous that we differ as to their effect. Lord Campbell said in *Reg. v. Oridland* (at p. 867), "Though no evidence of title was actually offered, it was quite clear that a *bonâ fide* claim of title was set up; and when such a claim is so set up, it seems to me that justices have no longer jurisdiction to proceed to a summary conviction." And in *White v. Feast* (L. Rep. 7 Q. B. 353),

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Blackburn, J., said, at page 360, with respect to a fair and reasonable supposition of right, "I am far from saying that there may not be many cases where orders of a superior might well afford fair and reasonable ground," and he held the justices were right in their conviction there, because, on the evidence, there was no fair or reasonable ground shown for the appellant's supposition. I think, upon the strength of those authorities, that when the *bona fides* of a defendant's claim of title is ignored by a magistrate, he is bound to state clearly his grounds for arriving at such a conclusion. I doubt, upon the statements in this case, whether the magistrate understood what was sufficient for the appellant to prove, or even what a *bona fide* claim of right means. I can well imagine a claim of this kind being raised upon a good foundation, even although the rector has long enjoyed the shooting. It was proved that the appellant was authorised to go upon this land by the people who rented the shooting from the lord of the manor, and who seemed to have a *bona fide* claim to it. Considering the terms of the lease, and all the circumstances, I do not think the magistrate was justified in drawing the inference that an omission to put a particular question was proof of the appellant's bad faith with respect to his defence. This summary jurisdiction in such cases ought not, in my opinion, to be extended, and the exercise of it in this matter ought not, I think, to be affirmed.

Judgment for respondent.

Leave to appeal was refused.

Solicitor for appellants, *Bischoff, Bompass, and Bischoff.*

Solicitors for respondent, *Helder and Roberts, for J. Webster, Whitehaven.*

Friday, April 28, 1876.

BURY (app.) v. CHERRYBOHN (resp.)

School board bylaw—Attendance at school—Workshops—30 & 31 Vict. c. 146, s. 14; 33 & 34 Vict. c. 75, s. 74.

A byelaw made by a school board, with the approval of the Education Department, under the Elementary Education Act 1870 (33 & 34 Vict. c. 75), s. 74, provided that all children in the district subject to the Act should attend school for thirty hours a week.

The justices refused to convict the respondent for neglecting to cause his son, between five and thirteen years of age, to attend school as required by that byelaw, because the son was employed in a boot manufactory, and attending school more than ten hours a week, pursuant to the Workshops Regulation Act 1867 (30 & 31 Vict. c. 146), s. 14.

Held, upon a case stated, that this byelaw was not contrary to the said section of the Workshops Act, which requires every child who is employed in a workshop to attend school for at least ten hours a week; and that the respondent ought to have been convicted.

THIS was a case stated for the opinion of this court by two justices of the peace in and for the West Riding of the County of York under the statute 20 & 21 Vict. c. 43, on the application in writing of the said Reginald Bury, the appellant, who was dissatisfied with their determination, the appellant having duly entered into a recognisance to prosecute the appeal.

On the 19th Feb. 1876, the said Reginald Bury duly laid information in due form of law as follows:

To Joseph Cherrybohn, of Barnsley, in the County of York, shoemaker.

West Riding of Yorkshire.—Whereas information hath this day been laid by Reginald Bury on behalf of the School Board for the district of the Borough of Barnsley in the said Riding before one of the said justices acting in and for the West Riding of the County of York for that you the said Joseph Cherrybohn, residing within the said district of the said School Board, and within the said borough of Barnsley, being the parent of a certain child called John Cherrybohn, residing with you within the said district, and being not less than five nor more than thirteen years of age, did within six months last past, to wit on the 18th Feb. inst., unlawfully neglect and omit to cause the said child to attend school as required by the bye-laws of the said School Board, made and confirmed in pursuance of the Elementary Education Act 1870, there being no reasonable cause for such non-attendance, contrary to the said bye-laws.

On the 8th March 1876, the said information came on to be heard before the said justices at a petty sessions at Barnsley in the West Riding of the County of York, when the said Reginald Bury appeared before the said justices, and also the wife of the said Joseph Cherrybohn.

Upon the hearing of the information, Benjamin Clegg, school warden to the said board, proved the non-attendance of the child at school on the day named, and that the child was twelve years of age on the 11th May 1875, also the bye-laws of the said school board, and that the child was in the third standard of the Government code of February 1871.

It was proved by the wife of the said defendant, and admitted by the said informant Reginald Bury, that the said child was employed in the boot manufactory of Charles Rollinson, in Barnsley aforesaid, and attended school half time regularly, pursuant to the Workshops Regulation Act 1867 (30 & 31 Vict. c. 146.)

On the part of the appellant it was contended that by virtue of the bye-laws of the said board made in pursuance of the 74th section of the Education Act 1870, the said board could, if they thought fit, compel children to attend school full time, notwithstanding that such children were working at a workshop and attending school in conformity with the provisions of the aforesaid Workshops Regulation Act. That there was nothing in the Workshops Regulation Act restraining the compulsory powers conferred on the board by the Education Act, as the former Act merely provided that children should not work except on certain conditions as to time and education. That there was nothing contrary in the said bye-laws to anything contained in any Act for regulating the education of children employed in labour, and that the said Education Act overrode the said Workshops Act.

The said justices, after hearing the whole of the evidence, dismissed the information, they being of opinion that as the said child was fulfilling the conditions and provisions of the said Workshops Regulation Act, the School Board could not compel him to attend school full time under the said byelaws.

The question of law arising is, are the Barnsley School Board able to enforce their byelaws against children under thirteen years of age, who, although not obeying such byelaws, attend school and otherwise observe the conditions of the Workshops Regulation Act?

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Does the Education Act 1870 override this and other Acts regulating the education of children employed in labour?

The opinion of the court is therefore asked upon this point.

The bye-laws of the Barnsley School Board had been duly approved by the Education Department. By one of them the time required for the attendance at school of children, subject to the provisions of the Elementary Education Act 1870, was thirty hours a week. Another bye-law, the third, repeated the provisions contained in sub-sect. 2 of sect. 74 of that Act, the last being that nothing in the bye-laws was intended to be contrary to anything contained in any Act for regulating the education of children employed in labour.

Hugh Shield argued for the appellant, the clerk of the School Board.—The question is whether the bye-law of this School Board, requiring the attendance of all children within the district for thirty hours a week, is contrary to the provisions of the Workshops Regulation Act 1867 (30 & 31 Vict. c. 146), and therefore invalid. By sect. 14 of that Act "The following regulations shall be made (subject to the provisions hereinafter mentioned) respecting the education of children employed in workshops: (1) Every child who is employed in a workshop shall attend school for at least ten hours in every week, during the whole of which he is so employed. (2) In computing for the purpose of this section the time during which a child has attended school there shall not be included any time during which such child has attended either (a) in excess of three hours at any one time, or in excess of five hours on any day; or (b) on Sundays; or (c) before eight o'clock in the morning, or after six o'clock in the evening: provided that the non-attendance of any child at school shall be excused—(1) For any time during which he is certified by the principal teacher of the school to have been prevented from attendance by sickness or other unavoidable cause; (2) for any time during which the school is closed for the customary holidays, or for some other temporary cause; (3) for any time during which there is no school which the child can attend within one mile (measured according to the nearest road) from the workshop or the residence of such child." The bye-laws are subject to sect. 74 of the Elementary Education Act 1870 (33 & 34 Vict. c. 75), by which "Every school board may from time to time, with the approval of the Education Department, make bye-laws for any of the following purposes: (1) Requiring the parents of children of such age, not less than five years nor more than thirteen years, as may be fixed by the bye-laws, to cause such children (unless there is some reasonable excuse) to attend school; (2) Determining the time during which children are so to attend school; provided that no such bye-law shall prevent the withdrawal of any child from any religious observance or instruction in religious subjects, or shall require any child to attend school on any day exclusively set apart for religious observance by the religious body to which his parent belongs, or shall be contrary to anything contained in any Act for regulating the education of children employed in labour; thirdly, providing for the admission or payment of the whole or any part of the fees of any child, where the parent satisfies the school board that he is unable from poverty to pay the same; fourthly, imposing penalties for

the breach of any bye-laws; fifthly, revoking or altering any bye-law previously made. Provided that any bye-law under this section requiring a child between ten and thirteen years of age to attend school shall provide for the total or partial exemption of such child from the obligation to attend school, if one of her Majesty's inspectors certifies that such child has reached a standard of education specified in such bye-law. Any of the following reasons shall be a reasonable excuse, viz.:—First, that the child is under efficient instruction in some other manner; secondly, that the child has been prevented from attending school by sickness or any unavoidable cause; thirdly, that there is no public elementary school open which the child can attend within such distance, not exceeding three miles, measured according to the nearest road from the residence of such child, as the bye-laws may prescribe. The School Board, not less than one month before submitting any bye-law under this section for the approval of the Education Department, shall deposit a printed copy of the proposed bye-laws at their office for inspection by any ratepayer, and supply a printed copy thereof gratis to any ratepayer, and shall publish a notice of such deposit. The Education Department before approving of any bye laws, shall be satisfied that such deposit has been made, and notice published, and shall cause such inquiry to be made in the school district as they think requisite. Any proceeding to enforce any bye law may be taken, and any penalty for the breach of any bye law may be recovered in a summary manner, but no penalty imposed for the breach of any bye law shall exceed such amount as, with the costs, will amount to 5s. for each offence, and such bye laws shall not come into operation until they have been sanctioned by her Majesty in Council. It shall be lawful for Her Majesty, by order in council, to sanction the said bye laws, and thereupon the same shall have effect as if they were enacted in this Act." With respect to this particular point, the Workshops Act merely limits the common law right of parents to employ their children in the various kinds of labour there mentioned. They are bound, at the same time, to make their children attend school for ten hours a week at least, or are otherwise liable to a penalty. The whole statute is a restraining, not an enabling piece of legislation; the preamble says, "Whereas by the Factory Acts Extension Act 1867, provision is made, amongst other things, for regulating the hours during which children, young persons, and women are permitted to labour in any manufacturing process conducted in an establishment where fifty or more persons are employed. And whereas it is expedient to extend protection so far as respects the regulation of the hours of labour to children, young persons, and women working in smaller establishments."

The respondent did not appear.

BRAMWELL, B.—I certainly wish we could have heard what arguments might have been advanced on the respondent's side; but I hope another appeal may be brought upon a similar case, and in that hope I am prepared to give my judgment now upon the best consideration we have been able to give to the matter. It seems to me our judgment should be for the appellant. I think *Mr. Shield* took an accurate view of the Workshops Regulation Act 1867, when he contended that it was not an enabling, but only a restraining

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statute. It provides that a parent shall not work his children at a certain age except upon certain terms. Amongst other restrictions no child under thirteen is to work unless he attends school for ten hours a week. The object of the statute is to regulate the labour of children, and incidentally it provides them with a certain amount of education. The Elementary Education Act 1870, was passed with an entirely different object. It aims at and provides for education only, and applies not only to children employed in labour but to all children. Unless there were an express limitation, this Act would govern all previous Acts relating in any way to the same subject; and it is perfectly clear that this byelaw would be justified, except for certain words in the Act itself. Let us consider what it is that limits the effect of the Act. The question turns more upon the provision in the Act than the restriction in the byelaws. The 3rd byelaw has not so much effect upon the question as the proviso in the 74th section, being merely a precautionary limitation. They may, therefore, be both of them interpreted together by the meaning of the words in the section providing that no byelaw "shall be contrary to anything contained in any Act for regulating the education of children employed in labour." In one sense, it is impossible to say that this does not introduce a state of things contrary to that which existed before; it is, at all events, different, but to my mind it is not contrary in the sense intended by the Act. I think, with respect to the hours for attendance at school, the effect is that a school board may determine the required number of hours per week, provided that in the case of children employed in workshops those hours are not less than ten hours a week. If the time fixed for all children were less than ten hours, that would have been "contrary" to something contained in the Workshops Regulation Act 1867. This interpretation, no doubt, gives rise to a difficulty; for under the Workshops Act, a child employed in labour must attend school ten hours a week until he is thirteen, without qualification, but under the Education Act he is exempt from that duty after ten years of age, if he attains to a particular standard, and receives a certificate. It certainly seems, looking at the two Acts together, that even with such certificate a child employed under the Workshops Act must attend ten hours a week at school until he is thirteen, although not required to do so by the School Board. Notwithstanding this possibly unintended consequence of the combined working of the two Acts, I can entertain no doubt that these provisions ought to be read together. Is it conceivable that a school board should be compelled to limit the better education to children not employed in certain particular kinds of labour, when the education of those children has hitherto been better provided for than that now subject to its control? When one looks at the objects of both statutes, it cannot be supposed that the children brought up to certain named trades should be worse off in the way of education than those employed in trades not mentioned in the Workshops Regulation Act. Looking at the words of the two enactments, these bye-laws are not contrary to, although making some alteration in, the previous legislation concerning children employed in labour. In no sense can they be said to repeal or to oppose the provisions of the

Workshops Act, and therefore they are valid. I think the appeal must be allowed.

MELLOR, J.—I am of the same opinion. It strikes me that this Elementary Education Act 1870, was intended to increase the amount of education which had been required by preceding legislation, and we have merely to see whether these bye-laws are in excess of the power conferred upon school boards by sect. 74. The principal object of the Workshops Regulation Act 1867, was to limit the hours of children's work, parents and employers being made liable to carry out that object. Incidentally, as I understand, some provision was made for children engaged in the work concerning which this enactment was passed, the penalty for breach of this provision being imposed upon the parents only and not upon the employers. The statute, however, only applied to handicrafts, and contained no enactments for the education of children otherwise employed. The Elementary Education Act, on the other hand, applies to all children, and there is nothing contrary to any Act for regulating the education of children employed in labour in enabling school boards to compel such children to attend school for longer periods than those required by such Acts. It would be monstrous to hold that, because children are employed in handicrafts, their parents are to be absolved from affording them so good an education as if they had adopted other kinds of labour, or were not at work at all. We should circumscribe the effect of the Education Act in a manner which I think was never intended if we were to hold that because the labour laws required of these children ten hours' attendance at school a week, therefore they should be excused from the thirty hours' attendance demanded of all children by the bye-laws under the Education Act. I think there is nothing in these bye-laws contrary to the Workshop Act, and I arrive at the same conclusion as my brother Bramwell that the refusal of the justices to convict the respondent was wrong. I should have been glad to hear argument of counsel on the other side, but I entertain no doubt at all on the subject.

DENMAN, J.—I quite agree that it is unfortunate we have had no argument for the respondent, but I feel no doubt about the matter, and I fully concur in allowing this appeal. The magistrates have decided on the ground that this bye-law was bad in that by its general words it required children employed in workshops to attend school thirty hours a week instead of the ten hours necessary under the Workshops Regulation Act. The magistrates consider that this bye-law is contrary to the ten hours' provision of the statute; but in order to adopt that view we should have to read the words "ten hours at least" to mean "ten hours and no more." That difficulty is a sufficient reason for me, but I agree also on the other grounds given by my brothers Bramwell and Mellor.

Judgment for appellant.

Solicitors for appellant, Sanderson and Corpe.

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HOUSE OF LORDS.

Reported by C. E. MALDEN, Esq., Barrister-at-Law.

June 30 and July 3, 1876.

(Before Lords CHELMSFORD, HATHERLEY and O'HAGAN.)

REG. v. THE CHURCHWARDENS OF WIGAN AND OTHERS.

ERROR FROM THE COURT OF EXCHEQUER CHAMBER IN ENGLAND.

Loan for repairing church—Assignment of rates—Rate after lapse of twenty years—5 Geo. 4, c. 36, s. 1—Mandamus.

By 5 Geo. 4, c. 36, s. 1, the churchwardens of any parish are empowered to borrow money of the Public Works Loan Commissioners for specified purposes, and from time to time to make such annual or half-yearly rates for the repayment of the loan, in such proportions and at such times as shall be directed by the commissioners, and to assign the rates so to be made as a security for the repayment of the loan in such manner as the commissioners shall appoint, and so as to secure the repayment of the principal with interest at the rate of 4l. per cent. per annum, by annual or half-yearly instalments within the period of twenty years at farthest from the advancing of the loan.

In 1849 the churchwardens of W. duly borrowed £540l., and by indenture, reciting that the commissioners had directed them to make annual or other rates to secure the repayment, they assigned to the commissioners all the rates from time to time to be made pursuant to such directions or otherwise, under the provisions of the Act, with a proviso that on the repayment of the principal sum by twenty yearly instalments of 227l., together with interest, then the assignment should be void. Four instalments were paid, but after 1853 no payment was made, and in 1871 the commissioners obtained leave to issue a mandamus to the churchwardens to make a rate to pay the instalment and interest due in 1854.

On a return to the mandamus setting out the facts and dates:

Held, on demurrer (affirming the judgment of the court below), that the return was a good answer to the writ, for the statute expressly and implicitly forbade the making of a rate after the lapse of twenty years from the advance of the loan.

A peremptory writ of mandamus issued by the Queen's Bench being, in effect, a decision upon the merits of the case, is subject to review by a Court of Appeal.

This was a proceeding in error from a judgment of the Court of Exchequer Chamber (Lord Coleridge C.J., Bramwell, Cleasby, and Pollock, BB., Keating, Grove, and Denman, JJ.), reported *ante*, vol. 9, p. 53; L. Rep. 9 Q.B., 317; 30 L. T. Rep. N. S. 569, reversing a decision of the Court of Queen's Bench upon a demurrer to returns to a writ of mandamus.

The facts appear briefly in the headnote above, and the writ and returns are fully set out in the reports in the court below.

The Attorney-General (Sir J. Holker, Q.C.) and Cowie appeared for the appellants.

Manisty, Q.C., Lopes, Q.C., Edwards, Q.C., Fitzadam, Kenelm Digby, and Parl, for the various respondents.

The argument turned almost entirely upon the

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construction of the Act 5 Geo. 4, c. 36. The following authorities were cited or referred to:

Cortis v. Kent Waterworks Company, 6 A. & E. 794;
Reg. v. St. Michael, Southampton, 6 E. & B. 807;
Reg. v. Hurstbourne Tarrant, E. B. & E. 246;
Reg. v. St. Michael, Pembroke, 5 A. & E. 603;
Reg. v. Dursley, 5 A. & E. 10;
Piggott v. Bearblock, 4 Moo. P. C. 399;
Harrison v. Stickney, 2 H. of L. Cas. 108.

At the conclusion of the arguments their Lordships gave judgment as follows:

LORD CHELMSFORD.—My Lords, the determination of the question upon this appeal depends entirely upon the powers of the Public Works Loan Commissioners, and the obligations of the churchwardens of Wigan under the 5th Geo. 4, c. 36. These powers and obligations are clearly explained and limited by the first section of that Act. "It shall and may be lawful for the churchwardens and overseers of the poor in any parish," with certain consents, "to make application to the commissioners authorised and empowered to make advances for public works, for any loan or advance under the powers, authorities, provisions, and regulations of the said Acts, and this Act, of such sum or sums as shall be necessary for defraying the expense, or any part of the expense, of rebuilding, repairing, enlarging, or otherwise extending the accommodation in any church or chapel of any such parish; and if such commissioners shall think fit to entertain such application, and shall be satisfied that such consent as required by this Act has been given and obtained, it shall and may be lawful for such commissioners, and they are hereby authorised and empowered to make and grant any such loan or advance for the purposes aforesaid, in such manner as such commissioners are empowered to make any loan or advance under the authority of the said recited Acts, or any of them, and it shall be lawful for such churchwardens, together with the overseers of the poor of or for any such parish, with respect to which such application shall be made and granted to receive the sum or sums so advanced, and to apply the same for the purposes mentioned in such application; and from and after the grant of any such loan or advance it shall be lawful for the churchwardens and the overseers of the poor of the parish, in respect of which such loan or loans shall be advanced as aforesaid, and their successors from time to time, for the time being, and they are hereby authorised and required to make such annual or half yearly rates for the repayment of the sums so advanced in such proportions and at such times as shall be directed and appointed by the said commissioners in that behalf, and to assign the rates so to be made as aforesaid as a security for the repayment of the sums so advanced, in such manner and form as the said commissioners shall direct and appoint, and so as to secure the repayment of all sums so advanced, with interest hereon at and after the rate of 4l. per centum per annum, by annual or half-yearly instalments, on the amount of the principal money advanced, within twenty years at farthest from the advancing of any such sums respectively." It was argued, for the commissioners, that these provisions are merely directory. It is difficult to understand in what sense this is meant, for nothing can be clearer to my mind than the imperative character of the Act to prevent the commissioners making a loan on any other terms than the securing the repayment of it by annual or half-yearly instalments

within the period of twenty years. It is said that the commissioners might have directed the rates to be made in different proportions, and also at different times in each year. It is true they might, but it certainly would not have been so convenient as what they have done in fixing the annual payment at a certain amount, and in requiring, in general terms, yearly or half-yearly rates to be made. But it is useless to consider what might have been done. The question is, whether the parties have acted in obedience to the Act. The churchwardens, by the indenture of 17th Sept. 1849, assigned to the commissioners the annual or other rates which should from time to time be made under or in pursuance of the direction and appointment of the commissioners, by virtue of the provisions of the 5th Geo. 4, c. 36, with a proviso making void the assignment on payment of the 4540*l.* borrowed by annual instalments of 227*l.*, which would amount to that sum in twenty years. It was argued that by the terms of this proviso the commissioners might accept, and the churchwardens might pay, the 4540*l.* in any other manner than by these annual instalments. That proviso provides for the payment first of all of the interest on the amount borrowed; "and the further sum of 227*l.* in or towards the discharge of the said principal sum of 4540*l.*, until the whole of the said principal sum of 4540*l.*, and the interest thereof, shall be discharged; then, and in that case, or on any other acceptance of the said sum of 4540*l.*, and the interest thereof, by or under the order or direction of the said Public Works Loan Commissioners, the assignment hereby made as aforesaid shall become absolutely void." Now, it appears to me perfectly clear that any stipulation for the payment of the loan otherwise than is prescribed by the Act, cannot possibly have any effect. The rates having been thus assigned to the commissioners, rates were duly made for four years, and the annual sum of 227*l.*, amounting together to 908*l.*, was paid to the commissioners, the last instalment being paid on the 13th Dec. 1853. It is hardly necessary to advert to the creation of new parishes out of the parish of Wigan, as by sect. 15 of the 5 Geo. 4, this makes no difference in the question. It is stated in the special case that the commissioners applied from time to time for payment of the instalments subsequently due. The nature of those applications is not stated, nor down to what time they were continued. Nor does it appear that the commissioners took any action upon them. The discontinuance of the payment of the instalments was occasioned by the refusal of the vestry in 1854 to levy a church-rate, and no church-rate has been raised in the parish of Wigan since. No proceeding on the part of the commissioners took place until the year 1867, when the Court of Queen's Bench, upon their application, granted a rule calling on the churchwardens to show cause why a writ of *mandamus* should not issue commanding them to make a rate or rates for payment of 484*l.* 15*s.* 10*d.*, interest and instalments due of the principal moneys secured by the indenture of the 17th Sept. 1849. This rule was enlarged in order that a special case might be stated for the opinion of the court. Upon the argument of the case the court ordered a *mandamus* to issue commanding the churchwardens to make, levy, and collect a rate for payment of the sum of 227*l.*, one year's instalment of the loan of 4540*l.* due on the 17th Sept.

1854, and interest on the balance of the principal sum. Returns were made to the *mandamus* which were demurred to. The Court of Queen's Bench gave judgment for the prosecutors on the demurrer, and ordered the peremptory *mandamus* to issue, which is the subject of our consideration. It is unfortunate that there is not the slightest report of any of these proceedings in the Queen's Bench, so that we are deprived of the advantage of knowing the reasons which led the court to the conclusion that the peremptory *mandamus* ought to be issued. The Court of Exchequer Chamber has decided unanimously that it ought not to have issued. In considering the case, it is necessary to clear the way of a difficulty which has been raised as to the power of any other court to question the issuing of a writ of *mandamus* by the Queen's Bench, which it is said is a matter entirely of discretion. The Chief Justice of the Common Pleas appears to me to give some countenance to this suggestion. His Lordship says (L. Rep. 9 Q. B. 325; 30 L. T. Rep. N.S. 574), "There is nothing shown save that the money has not been paid, and this, it may be, by consent of the commissioners; though, indeed, some years ago they appeared to have asked for it, but to have made no attempt to enforce compliance with their request by any legal measure. Had this been shown, and if there was a question whether they had come in a reasonable time, calling on the parish, the same persons as near as might be, to make good their default, then if the right is discretionary the judgment of the Queen's Bench on the motion for the *mandamus* would be final. But no question of discretion of this nature arises in this case." And in another part of his judgment his Lordship says (L. Rep. 9 Q. B. 323; 30 L. T. Rep. N.S. 573), "The Court of Queen's Bench, supposing it to be a matter of discretion, do not state that they have in fact exercised that discretion upon the particular circumstances of this case, or whether they were of opinion that the commissioners were entitled to the writ *ex debito justitiæ*, and that no question of discretion arose." Now there appears to me to have been some little confusion upon this subject, which can easily be removed. A writ of *mandamus* is a prerogative writ, and not a writ of right, and it is in this sense in the discretion of the court whether it shall be granted or not. The court may refuse to grant the writ not only upon the merits, but upon some delay, or other matter personal to the party applying for it; in this they exercise a discretion which cannot be questioned. So in cases where the right in respect of which a rule for a *mandamus* is granted upon showing cause appears to be doubtful, the court frequently grants a *mandamus* in order that the right may be tried upon the return, this also is a matter of discretion. But where the court grants a peremptory *mandamus*, which is a determination of the right, and not a mere dealing with the writ, they decide according to the merits of the case, and not upon their own discretion, and their judgment must be subject to review, as in every other decision in actions before them. Now ought this *mandamus* to have issued? That question depends entirely, as I have already said, upon the Act of Parliament. The commissioners could only make loans upon certain conditions. The churchwardens could only borrow upon certain conditions. The condition upon the commissioners is that they must lend on security of rates for

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the repayment of annual or half-yearly instalments within twenty years at the farthest. They have no power to lend on any other terms. The condition on the churchwardens is that they must borrow on the terms of repaying the loan by annual or half-yearly rates within twenty years. They can borrow upon no other terms. The intention of the Act with respect to these loans appears to be that the ratepayers in the parish, a fluctuating body, should be chargeable for twenty years with rates in discharge of the loan, but that ratepayers after twenty years should not be liable, which could not be unless after the twenty years the rates were no longer chargeable with repayment of the loan. This is carefully provided for by the direction as to annual payments to be made in twenty years. Now the *mandamus* issued in 1871 is to levy a rate for the payment of the instalment due on the 14th Sept. 1854. This rate must necessarily be levied more than twenty years from the advancing of the loan in 1849, and, as it appears to me, in the teeth of the Act. If this can be supported it will follow that the churchwardens may be called upon year by year for fifteen years to levy rates for the payment of the instalments; for it was not considered by the Queen's Bench that the whole arrears can be required to be discharged by a single rate, which, however, would be equally objectionable. It is unnecessary to examine the cases which have been cited, none of which appears to me to have any application; nor is it necessary to consider whether it was incumbent upon the Commissioners to be active in enforcing their rights, nor whether they had any remedy personally against the churchwardens under the indenture of the 17th Sept. 1849. I confine myself entirely to the Act upon which the whole question turns, and, looking at that alone it seems to me to be perfectly clear that not by implication only, but by the most express language, it prevents a rate for the repayment of the loan by the commissioners being made after twenty years from the time when the money was advanced. I submit to your Lordships that the judgment of the Court of Exchequer Chamber ought to be affirmed.

LORD HATHERLEY.—My Lords, I have come to the same conclusion after hearing the able arguments which have been advanced at the Bar on both sides of this question. I may put out of the case at once what I may call the incidental question, which my noble and learned friend has touched upon, namely the question of how far the direction of the Court of Queen's Bench is to be regarded as a point of discretion on the part of the Court. I entirely agree in the view taken by my noble and learned friend that, when the Court of Queen's Bench are invited to make an order by way of *mandamus*, it is no more in the power of that Court than of any other court to direct that to be done which is not lawful. Upon a prerogative writ there may arise many matters of discretion which may induce them to withhold it, matters connected with delay, matters connected in certain cases possibly with the conduct of the parties, and when they have exercised their discretion in directing that which is in itself lawful to be done, I apprehend that no other court can question their discretion in so directing. But with regard to that which is in itself lawful to be done, they are open to correction, as every other court is, by the Court of Appeal, or by a

higher authority. The question we have really to consider in this case is whether or not that which the churchwardens were directed to do by the *mandamus* in question was a thing which they could by law be ordered under any circumstances to do. That must depend entirely upon the authority derived from the special Act of Parliament under which they professed to act. Undoubtedly they have not at common law any right to raise, or direct to be raised, a rate which is for purposes which are in themselves retrospective. The principle of that is very clear. It is not right on the one hand that those who have had the benefit of work done should be exempt for several years, and perhaps exempt altogether, from the change and fluctuation which takes place among the inhabitants, from making any contribution to the expense of the work, and should throw upon those who succeed them the whole of that duty. And again, as regards the general law, it has been held that with reference to retrospective rates, except under special powers contained in special Acts of Parliament for that purpose, it is not right to throw any past expenditure upon a succeeding class of inhabitants of the district affected by the work. But it was found by the Legislature that there were certain works of a permanent character which it might be wise to execute, and in such cases those who came after would have the benefit of the work proposed to be done; and therefore from time to time Acts of Parliament have been passed with this view, and public moneys have been vested in certain commissioners, called "the commissioners of loans." These commissioners have been authorised to make advances under Acts of Parliament, but Parliament has at all times carefully made provision, according to what seemed to the wisdom of the Legislature to be right at the moment, for the repayment of those moneys by charges which would affect subsequent inhabitants of the district which would obtain the benefit which was to be secured by the loan to be advanced. Among other things the object of building or repairing churches has been considered to be a proper object for such advances; and, accordingly, in the Act of Parliament before your Lordships on the present occasion, among various objects for which the power is given of charging the rates upon the parish, we find that one is the repairing of churches, and that is the object we have before us for consideration to-day. Another object, dealt with in the 3rd section, is the building of new churches, and another is increasing the accommodation for students in colleges at the universities. But in all those cases very careful provision is made for the mode in which the loan is to be raised, and the security to be given. My Lords, we find in the 1st clause of the Act, which is the clause we have to construe now, the loan being one for the repairing of a church, that provision is made in the first place that the commissioners may lend moneys, and in the next place that the churchwardens and the overseers of the poor of a parish may receive a loan, under certain provisions as to consents and the like, which have been complied with in this case; and they having received the loan, then comes this clause, under which the commissioners must now seek the repayment of the money lent, if they can obtain it at all. [His Lordship read the latter part of sect. 1 of the Act, as set out above, and continued:] Now, without looking in the

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first instance to the deed which has been executed under the authority of this clause, let us just see what the authorities and powers of the churchwardens were. They could do nothing except under this Act; let us see what the Act authorises them to do. They were authorised to assign the rates, and they were authorised to assign them in such a manner, and the instalments of the loans were to be payable in such proportions, and at such times, as should be directed by the commissioners. But both the commissioners and the churchwardens were limited, as it appears to me, plainly and distinctly by the close of this sentence, which tells you in what manner the repayment was to be secured. It was to be repaid with interest thereon by instalments spread over a "period of twenty years at farthest" from the advance. It appears to me that they could, therefore, give no security beyond a security for the repayment within that particular time; they could give no security which should postpone the repayment, by instalments or otherwise, to any later period than twenty years from the advance. In giving to the commissioners full authority to direct how and in what form the annual or half-yearly payments should be made, the Legislature appears to have thought they could trust a public body like the commissioners with the power of seeing that all should be done justly and fairly; otherwise it might be said that it would be possible, under the particular words of this section, for the commissioners to say, you can begin to pay the instalments at the tenth year from the date of the advance, paying none in the interim, and so, by means of an operation of double instalments, as it were, secure the payment of the advance by the end of the twenty years. But I apprehend that that would not be a reasonable exercise of their duty, and it would not be one which we ought to impute to them, or which the Legislature contemplated as possible on the part of the commissioners. I make the observation that they have considerable powers given to them as to proportions and as to times, for they are to be such proportions and such times as the commissioners may direct, and I apprehend that that power was given for the express purpose of enabling the commissioners, in a reasonable and proper manner, to take the best steps they could for securing to themselves the repayment of the money within twenty years from the advance. They would have to see what a reasonable rate to be raised in each succeeding year would be in the particular parish in question, whether there should be an increase or a diminution in the amount, according as the parish might increase or might diminish in population, or the like. At all events this power furnishes an answer among other things to the objection which has been raised as to the difficulty that might occur with respect to the payment of the last instalment, that difficulty having been of this nature. It was said in the course of the argument, you cannot apply for a rate until the money is due, and if the last instalment will be due at such a time that you cannot secure to yourself the payment by a rate, you will have to lose the last instalment altogether. It is an answer to that to say that the commissioners have power to make such arrangements as to proportions and as to times of making payments as would enable them to have the last instalment paid by means of a rate levied at a time when it

would fall within the twenty years. Under this provision in the Act arrangements would be made whereby the commissioners could secure themselves against a loss of that description. Then we come back again to the question what is the power the churchwardens have of levying rates, and what is the power the commissioners have of directing payments? They appear to have acted very properly in their mode of having the deed prepared. I need not go through its details; the deed is so prepared as to recite that it is intended that the payment shall be made in the manner and in the proportions afterwards directed by the commissioners. Then there comes the assignment of the rates; then there is a provision which would be called in an ordinary mortgage deed a proviso for redemption, which points out the particular periods at which the instalments shall be paid. The deed being dated September 1849, the first instalment of a portion of the principal together with interest is directed to be paid in September 1850, and then in each succeeding year the payments of 227*l.* of principal, and an amount of interest, diminishing in proportion as the debt itself would diminish, are to be paid by successive instalments. If everything had been rightly and properly done according to the provisions of the deed this would have been the mode of paying off the debt. Then it says the deed will be completely avoided by paying all those instalments. I apprehend that that was a very proper form of deed, and that all that can be claimed by the commissioners is that which alone the Act authorises them to receive, and that which they have provided should be paid to them by their deed. The case is clear of all the authorities which have been cited, because they appear to have been decided upon the simple ground that if there is an express power of charging indefinitely the rates that power will not be diminished because there is a provision made for the payment of the debt in a certain manner, there being no proviso that if the debt is not paid in that manner, it is to be acquitted or discharged. If there is a charge upon the whole of the rates indefinitely and in perpetuity, then the mode of making the payment which is pointed out will not invalidate the charge. But if you find in an Act of Parliament like this one particular power of effecting the object, and that power cannot now be further pursued, because the time has been allowed to pass, then I apprehend that all that one can say is that the security is not one which will carry and proceed further than the very form and extent in which it is framed, which is in pursuance of the Act, and that, therefore, the commissioners, having been directed to take steps to provide for the payment of these sums as they become due, cannot now, in the year 1876, obtain payment of those instalments which were due under the deed in 1854. I do not think that any argument arises from any of the other clauses in the same Act of Parliament. In fact it is only *idem per idem* to a great extent. If anything they would rather incline my mind against the view contended for by the appellants, because after the 4th clause has directed that the colleges shall have the power to borrow money, and make provision by their deeds for the assignment of the college property, so that the debt may be paid off like parochial debts, in the course of twenty years, the following clause, the 5th, contains an express proviso that no other instruments and no

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other powers of charging college estates shall have any effect under the Act. It is not necessary for me to say any more with regard to those later clauses on the present occasion, for the case we are disposing of is not one of a college at all; but it appears to me that if it were necessary to decide upon the effect of them it would be open to great question and argument whether the successors in the college could not say: "There is no authority to extend this security beyond the period pointed out by the Act of Parliament." However, I say no more upon the other matters contained in the Act of Parliament beyond this, that they do not convince me that one is wrong in coming to the conclusion to which my noble and learned friend has come, and to which I have also come, upon the clause we are called upon to construe, namely the first clause.

Lord O'HAGAN.—My Lords, I concur in the judgment of the Exchequer Chamber, but I do not desire to be understood as adopting all the reasons on which that judgment was grounded. Twenty-seven years have elapsed since the loan was made, of which the Public Works Commissioners seek now the repayment, and twenty-three years ago the parishioners of Wigan and the adjacent townships appear to have repudiated liability for that loan, and declined to pay any instalments upon it, and have ever since been allowed by the commissioners to succeed in their passive resistance to a claim which was apparently made more than once, but when exactly, how often, or under what circumstances, your Lordships are not at all informed. The commissioners in no way account for this singular delay and inaction, which is the more remarkable as the statute (5 Geo. 4, c. 36) cast upon them the duty of enforcing the discharge of the debt by yearly or half yearly rates, "in such proportions and at such times as they should think proper to direct and appoint." Within the lengthened period during which the commissioners have been so strangely quiescent it is stated in the various returns to the *mandamus*, and not denied, that several districts have been severed from the pariah to which the loan was made, on the requisition of a majority of its inhabitants, and have become separate parishes for the purpose of levying rates, and entitled to the benefit of the exemption from liability to contribute to the repair of their respective parish churches, under 58 Geo. 3, c. 45, s. 71, after twenty years from the dates of their consecration. So that if the contention of the appellants be sustained, the debt incurred by one set of people will be enforced against another. Those who have received the benefit will not bear the burden. A new generation, affected by new Acts of Parliament, and holding a new ecclesiastical position, will be visited with the well-defined and limited liability of their predecessors, in whose enjoyment of the advantages to which it was originally referable they may not, possibly, in their new circumstances participate at all, and all this seeming injustice will be accomplished because public officers have failed to do their duty in enforcing a public claim, not from any want of power to do it, or from any suggestion that the parish, which contracted to pay under the statute year by year, had not ample means available for the purpose, but from the unexplained and unwarrantable neglect to take effectual proceedings, which would have been easy and simple, and must

have been effectual. In this state of facts we come to consider whether the terms of the statute require us at this time, and after all the events which have taken place, to give effect to a claim so questionable in its staleness, and in its practical operation, if established, so capable of working injustice. I quite adopt the view of the Attorney-General that a retrospective rate is not necessarily illegal, and that if this be a case of the exercise of discretion by the Court of Queen's Bench, *cadit quæstio*. Neither the Exchequer Chamber nor your Lordships' House has the power to interfere, and the appellant must prevail. But for the reasons already given, there was no exercise of discretion here which could oust the control of this House. In my view the statute, if rightly construed, does not warrant a retrospective rate, but contemplates and requires that the loan should be repaid from rates leviable within a specified period; then the argument as to discretion does not arise, and we are bound to enforce the intention of the Legislature. The dictum of Lord Wensleydale (when delivering, as Parke, B., the unanimous opinion of the judges in *Harrison v. Stickney*, *ubi sup.*), on which reliance has been placed, not only in the court below, but by the learned counsel who have addressed your Lordships, points to that intention as the determining consideration in the case; and if it be, as I think it is, the words of the Act seem to me decisive. Sect. 1, by the imperative words "it shall be lawful," casts on the churchwardens and overseers the duty of making, for the payment of the loan obtained on the demand of a majority of the inhabitants of the parish, or of four-fifths of the select vestry, if there be such a body, "such annual or half yearly rates" for the payment of it "in such proportions and at such times as shall be directed and appointed" by the commissioners, and to assign them, so as to secure the repayment of all sums so advanced with interest, by annual or half yearly instalments, "within the period of twenty years at farthest" from the advancing of such sums. Could a clause have been framed with more elaborate care to secure the payment within the twenty years? It has not a negative provision, but its affirmative words are very stringent. The rates are to be made "so as to secure repayment"—of what?—"of all sums," that is, of everything which has been advanced "within the period of twenty years." This seems clear enough, but to render the purpose of the Act if possible, more unmistakeable, it adds, "at farthest," and fixes the period so as to make it run from the time of the first advance made to the parishioners. And this emphatic declaration of intention to have the payment made within the twenty years is repeated over and over again in the 3rd and 4th sections with equal force. I decline to give an opinion upon the construction of the 3rd and 4th sections, because it is not required for the case which is now before the House for consideration. I therefore reserve my opinion, as has been done by my noble and learned friend opposite. But if an opinion were to be given at this moment, I should say that the other section ought to be construed as I construe the first section, and not according to the view presented by the Attorney-General and Mr. Cowie, that those two sections ought to be interpreted as not limiting the period of payment. I do not know how language could have made the intent more clear, and I can see no sufficient reason for holding the clause directory. Words,

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though affirmative, are not necessarily so if they are absolute, explicit, and pre-emptory; and so, in my opinion, they are here. No doubt express words forbidding any action after twenty years might have been added, and then there would have been no room for controversy. But Lord Wensleydale held of course that the prohibition of a retrospective rate might well be made either impliedly or expressly, and if the intention here is indicated by words which are unequivocal, and if the Legislature has supplied all facilities for carrying that intention into effect by compelling the parish to make the rate, and arming the commissioners with ample authority to regulate the making of it, so as to have full payment assured within the time specified, the implication seems to me natural and reasonable that the Legislature did not mean to allow the making of it after that time had passed. I, therefore, agree with the Exchequer Chamber as to the construction of the statute, and I do so the more willingly because it is in manifest accordance with its policy and, as I conceive, essential to its equitable operation. It is of importance that public officers should not be encouraged to sleep at their posts, and postpone the fulfilment of their duties in the expectation that their delays will be condoned and their demands conceded, whatever may have been the lapse of time or the change of circumstances. It is important to the community that the public funds, advanced for meritorious purposes, should not be lost from neglect in enforcing the repayment of them; and it is of equal importance that persons who never sought the advance or derived benefit from it should not be made responsible when those who became liable at their own instance have passed away. As to the 19 & 20 Vict. c. 104. sect. 15, it leaves the legal liabilities of borrowers under Acts of Parliament where it found them, and does not, in my judgment, operate the least to revive the claim of the commissioners if it ceased to be enforceable at the end of the twenty years. As to the authorities which have been cited for the appellants, my noble and learned friends have dealt with them sufficiently. In all cases of construction like this, the specific terms of each statute must be carefully considered, and those authorities will be found to apply to Acts quite distinguishable from that before us. Lord Coleridge has pointed out that in *Reg. v. St. Michael's, Southampton* (*ubi sup.*), and *Reg. v. Hurstbourne Tarrant* (*ubi sup.*), the amounts in question were charged upon the rates, whereas in this case they were not. In the first of these cases, Erle, J. relies on the fact that the obligee of the bond was not required to enforce annual payments, as he hopes, in justice towards future rate-payers, future legislation may provide. In the second case, Lord Campbell, C.J., takes notice of the fact that the rates are charged; Erle, J., and the other judges note that no duty to enforce payment is imposed on the bondholder, and Erle, J., says, "It would I think be highly satisfactory if it were in all such cases made obligatory on the creditor to enforce payment at once. If the Act had said that the charge should be paid off within five years, and not otherwise, it would have made it the duty of the creditor to secure it in time." Here the Act clearly says that the debt shall be paid "within twenty years at furthest," and the commissioners get power to have payment made

"in such proportions and at such times as they shall direct and appoint." I shall only add that in those cases, and in every other which has been relied on, the phraseology of the Acts has been very different from that with which we are dealing, and in none of them will be found the strong, clear, and unequivocal limitation which warrants us in adopting a view consonant, in my opinion, at once with legal principle and natural justice.

Judgment of the Court of Exchequer Chamber affirmed, and appeal dismissed with costs.

Solicitors for the appellant, *Barnes and Bernard.*

Solicitors for the respondents, *Paterson, Snow, and Burney; Sharpe, Parkers and Co.; Chester and Co.*

ARCHES COURT OF CANTERBURY

Reported by A. H. BITTLETON, Esq., Barrister-at-Law.

(Before the Right Hon. Lord PENZANCE, Dean of Arches.)

Jan. 4, 5, and 6, and Feb. 3 and 26, 1876.

CLIFTON v. RIDSDALE.

Illegal Communion—Number of communicants—Ceremonial observance—Crucifix—Unauthorised decorations—Appeal no stay—37 & 38 Vict. c. 85.

It is not lawful for a minister to consecrate or receive the Sacrament in his church when there is only one communicant besides himself.

On the top and in the centre of a screen, stretching across a church at the entrance to the chancel, was placed a figure of Our Saviour on the Cross, in full relief, and about eighteen inches long, facing the congregation. A row of candles at distances of about a foot apart ran along the top of the screen, and were continued up the central portion, which was raised, the last candles coming close up to the crucifix on either side:

Held, in a proceeding under the Public Worship Regulation Act 1874, that, as it was not proved that the candles were used for other than lighting purposes, their position and the manner in which they were used, did not constitute a ceremonial observance, and were not, therefore, illegal; but that the figure, being in danger of becoming the object of superstitious reverence, must be removed from the cross.

Attached to the walls of the same church were fifteen groups of figures in coloured relief, purporting to represent scenes of Our Lord's Passion, and such as are commonly used in Roman Catholic churches, where prayers are said before them, and they are known as the "stations of the Cross." No faculty having been obtained to authorise their erection:

Held, that upon this ground they must be removed; and, further, that being in danger of being used for the purposes for which they have been used among Roman Catholics, they were decorations forbidden by law.

An application to the Court of Arches to suspend the execution of a monition, issued under the Public Worship Regulation Act 1874, pending an appeal to the Queen in Council, will only be granted on special grounds; and where the decision appealed from follows a decision of the Supreme Court of Appeal, or where obedience to the monition, pending the appeal, cannot be painful

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to the consciences of those against whom it is directed, the application will be rejected.

In cases under this Act the court will hear two counsel on each side.

Construction and jurisdiction of the court explained.

THIS was a proceeding under the Public Worship Regulation Act 1874, in which the complainants were three resident parishioners of the parish of St. Peter's, Folkestone, who were members of the Church of England, and the respondent was the Rev. Charles Joseph Ridsdale, perpetual curate of the same parish.

A requisition from the Archbishop of Canterbury to the judge of this court to hear and determine the matters complained of, the parties having failed to state their willingness to submit to the directions of the Archbishop touching those matters, had been received in the registry of the court from the registrar of the diocese of Canterbury.

The following is the material portion of the representation put forward by the complainants:

1. The Rev. Charles Joseph Ridsdale, the incumbent or perpetual curate of the said district chapelry (over which he has the exclusive cure of souls), on Sunday, the 4th July 1875, in his church or chapel of St. Peter, being the church or chapel of the said district chapelry, at the early service commencing at 7.30 a.m., and again at the mid-day service commencing at 10.30 a.m., and also on Sunday, the 11th July 1875, at the like mid-day service, unlawfully used lighted candles on the Communion Table at which the Communion was at the said times respectively being celebrated, or on a ledge immediately over the same, during the celebration by him of the Holy Communion, and when such lighted candles were not wanted for the purpose of giving light.

2. At all the said services on the said days the said Rev. C. J. Ridsdale, when officiating in his said church in the Communion Service and in the administration of the Communion, unlawfully wore certain unlawful ecclesiastical vestments other than or besides and instead of those appointed and allowed by law, to wit, a vestment known as an alb, and a vestment known as a chasuble.

3. At all the said services on the said days the said Rev. C. J. Ridsdale, when officiating in the said church in the Communion Service, unlawfully mixed water with the sacramental wine used in the Communion, and also then administered or caused to be administered wine mixed with water to the communicants at the Lord's Supper.

4. At all the said services on the said days the said Rev. C. J. Ridsdale, when officiating in his said church in the Communion Service and in the administration of the Communion to the communicants, unlawfully used in such service and administration wafer bread or wafers, to wit, bread or flour made in the form of circular wafers, instead of bread such as is used to be eaten.

5. At the said mid-day services, commencing at 10.30 a.m., on the said 4th July and on the said 11th July, the said Rev. C. J. Ridsdale, when officiating in his said church in the Communion Service, unlawfully stood, while saying the prayer of consecration in the said service, at the middle of the west side of the Communion Table (such Communion Table then standing against the east wall, with its shorter sides towards the north and south), in such wise that, during the whole time of his saying the said prayer, he was between the people

and the Communion Table, with his back to the people, so that the people could not see him break the bread or take the cup in his hand.

6. At the said mid-day services, on the said 4th July 1875, and the said 11th July 1875, the said Rev. C. J. Ridsdale, when officiating in his said church in the Communion Service, and saying the prayer of consecration in the said service, did not continue in a standing position, but twice unlawfully knelt or bent the knee during the reading thereof.

7. At the said mid-day service, commencing at 10.30 a.m., on the said 11th July 1875, immediately after the conclusion of the Prayer of Consecration in the Communion Service, the said Rev. C. J. Ridsdale unlawfully caused to be sung in his said church the words, or hymn, or prayer, commonly known as "The Agnus," that is to say, "O Lamb of God, that takest away the sins of the world, have mercy upon us."

8. At the said mid-day service, commencing at 10.30 a.m., on the said 4th July 1875, and at the like service on Sunday, the 1st Aug. 1875, the said Rev. C. J. Ridsdale, when officiating in his said church, unlawfully celebrated the Lord's Supper in the course of divine service, and himself then consecrated and received the elements when only one person communicated with him.

9. At the said mid-day service, commencing at 10.30 a.m., on the said 4th July 1875, the said Rev. C. J. Ridsdale, in his said church, after the conclusion of morning prayer, and immediately before the commencement of the Communion Service, and as connected with such Communion Service, and in the presence of the congregation then assembled in the said church for such service, unlawfully formed and accompanied a procession consisting of the choir and of two acolytes in short surplices and red cassocks, and four banners and a processional cross, were carried in such procession, and it proceeded from the chancel down the north aisle and up the nave back to the chancel again, the choir singing a hymn while walking in the procession, and the said Rev. C. J. Ridsdale, while taking part in such procession, wore a chasuble, and had a cap called a biretta upon his head, and on the return of the procession to the chancel, the Communion Service at once commenced.

10. On the occasion of the evening service on the evening of Sunday, the 4th July, 1875, and immediately after an offertory, which took place at the conclusion of the sermon, and without any break or interval, and as connected with such service, and in the presence of the congregation assembled for such service, the said Rev. C. J. Ridsdale, in his said church, unlawfully caused a like procession to that before mentioned, as having taken place at the morning service, to be formed, and accompanied the same round the church, in like manner singing, and at one period of such procession all those who took part in it fell upon their knees and remained kneeling for some time, and after their return to the chancel the general thanksgiving was intoned, and the congregation were then dismissed.

11. The said Rev. C. J. Ridsdale, without lawful authority, and unlawfully, and since the consecration of his said church, that is to say, in the year 1872, set up and placed upon the top of the screen separating the chancel of the said church from the body or nave thereof, and still unlawfully

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retains there, a crucifix and twenty-four metal candlesticks with candles, and at the ordinary evening service on Sunday, the 4th July, 1875, the said candles were lighted on either side of such crucifix, and so continued during such service, although the other lights in the church were amply sufficient to light the church, and the said candles were not wanted for that purpose.

12. The said Rev. C. J. Ridsdale, without lawful authority, and unlawfully, set up and placed in his said church, since the consecration thereof, that is to say, in the year 1871, and still unlawfully retains therein, certain representations of figures in coloured relief of plastic material, purporting to represent scenes of our Lord's Passion, attached to the walls of the said church, and forming what are commonly called stations of the cross and passion, such as are commonly used in Roman Catholic churches, and not in churches of the Church of England, and some of the said representations relate to legendary and superstitious scenes not part of the gospel history, and not accepted or recognised as authentic by the Church of England, and the said representations as a whole tend to encourage ideas and devotions of an unauthorised and superstitious kind, and are unlawful.

13. The said acts, matters, and things hereinbefore mentioned are respectively alterations in, or additions to, the fabric, ornaments, or furniture of the said church, made without lawful authority, decorations forbidden by law, unlawful ornaments of the minister of the said church, failures on the part of the incumbent to observe, and cause to be observed, the directions contained in the Book of Common Prayer, relating to the performance in such church of the services, rites, and ceremonies ordered by the said book, or unlawful additions to and alterations of such services, rites, and ceremonies.

There was no prayer at the close of the representation; but it was intimated by the court that a representation under the Public Worship Regulation Act, 1874, should conclude with a prayer, as in other cases.

The answer of the respondent commenced by admitting the charge in the 6th article of the representation, and that such kneeling during the prayer of consecration was unlawful, but stating that it had been discontinued. It proceeded to require the complainants to prove every charge made in the representation; and to deny the illegality of the alb and chasuble. With regard to the 8th article of the representation, the answer stated that there were on the days mentioned present in the church a convenient number to, and every opportunity was given to them to, communicate with the priest. With regard to the crucifix, it was alleged to be part of a screen for which a faculty had been granted by the Commissary Court of Canterbury, and erected at the same time as the rest of the screen; and further, that the parishioners were necessary parties to any suit in which any order might be made for the removal of any part of the said screen. It was submitted that the paintings called the stations of the cross were not unlawful; that the allegations in the 12th article of the representation, commenting upon those paintings, were irrelevant, immaterial, calculated to prejudice, and improperly made against the respondent; that the parishioners were necessary parties to any

suit for their removal; and that the court should grant a faculty to confirm their erection. The answer concluded with a prayer that the respondent might be dismissed from all further observance of justice in the matter of the said representation.

A. J. Stephens, Q.C. and *B. Shaw*, for the complainants.

Fitzjames Stephen, Q.C., *A. Charles*, *Jeune*, and *W. G. F. Phillimore*, for the respondent.—

For the complainants witnesses were examined to prove the charges made in the representation. For the respondent, the deputy registrar of the diocese of Canterbury proved the granting of the faculty mentioned in the respondent's answer; and the respondent himself was examined. At the close of the respondent's case his counsel stated that, having regard to the decisions of the Judicial Committee of the Privy Council in

Hebbert v. Purchas, L. Rep. 3 P. C. 605; and

Martin v. Mackonochie, L. Rep. 2 P. C. 365; 21 L. T. Rep. N. S. 512;

it was not proposed that any argument should be offered by them in this court, except with reference to the charges contained in the 8th, 11th, and 12th articles of the representation.

A. J. Stephens, Q.C. for the complainants.—It was illegal for the celebrant in the Communion Service to consecrate the elements and receive the Communion unless he *bonâ fide* believed that at least three persons, as to whom he had reason for his belief, would communicate at the same service: (*Parnell v. Roughton*, 31 L. T. Rep. N. S. 594; L. Rep. 6 P. C. 46.) The second and third rubrics after the Communion Service contain the whole law on the subject. The object of these rubrics was the prevention of a solitary Communion. Before commencing to read the second of the two portions into which the Communion Service is divided, the respondent was bound to have ascertained that a sufficient number of persons were present and about to communicate with him: (*Wynn v. Davies*, 1 Curt. Rep. 69, 63; *Priestley v. Lamb*, 6 Ves. 421.) [Lord PENZANCE.—How is the minister to ascertain this?] The rubric before the exhortation in the Communion Service requires that those about to communicate shall be conveniently placed to receive the Communion; and, therefore, the minister should require persons intending to communicate to separate themselves then from the rest of the congregation. This could be done either through the pulpit or the churchwardens. With regard to the crucifix and the lighted candles on the screen, the parishioners can have no interest in articles which are illegal. There is abundant evidence that the candles were not required for the purpose of giving light. The faculty relied on by the respondent does not specify with sufficient particularity what screen it was intended should be erected. All crucifixes in churches of the Church of England are illegal. The Homilies are directed against their use, and the judgment of the Judicial Committee of the Privy Council in *Phillpotts v. Boyd* (L. Rep. 6 P. C. 435; 32 L. T. Rep. N. S. 73), does not sanction them. In *Westerton v. Liddell* (Moore's Sp. Rep.), a distinction is drawn between crosses and crucifixes. Mr. Justice Keating, in *Boyd v. Phillpotts* (L. Rep. 4 A. & E. 297), says, "It is clearly to be gathered from *Westerton v. Liddell*, that the Judicial Committee thought a crucifix

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would be illegal." At the Hampton Court Conference, in 1603, James I. referred to the material crosses which existed before the Reformation as demolished. A crucifix is within the prohibition of 3 & 4 Edw. 6, c. 10, a statute held by the Privy Council in *Phillpotts v. Boyd* (*ubi sup.*), to be still in force. Using lighted candles near and about the crucifix is an unauthorised ceremonial addition to the services prescribed by the Book of Common Prayer. The pictures described in the 12th article of the representation were put up without a faculty, and are obviously placed in the church for no other than superstitious purposes. [He proposed to refer to two Roman Catholic books of devotion, entitled *The Key of Heaven*, and *The Crown of Jesus*, but *Fitzjames Stephen*, Q.C., objected that no foundation for using them had been laid, and that at any rate a witness should be called to prove that they were works of authority. Lord Penzance having, under the circumstances, given permission for a witness then to be called, one of the clergy attached to the Roman Catholic Church of St. Peter's, Hatton Garden, was examined, and stated that each of the two books in question contained fourteen pictures known to the members of the Roman Catholic Church as the Stations of the Cross and Passion, and prayers to be repeated before each picture; that the drawings produced of the pictures in the respondent's church were similar to those in the books, and that the books in question were devotional works approved by the authorities of the Roman Catholic Church. They were then put in evidence, and passages from them cited for the purpose of showing that the Stations of the Cross were in the Roman Catholic Church turned to uses which the Church of England would consider illegal and superstitious.] Five of these pictures are clearly illegal, as they do not even represent any historical incidents in our Lord's life. The 23rd of the Inquisitions of Queen Elizabeth orders the destruction of all pictures and paintings, and all other monuments or feigned miracles, pilgrimages, idolatry, and superstition (Cardwell's Documentary Annals, vol. 1, pp. 221, 222); and when it is remembered that the stations were first introduced into churches in order that prayers might be said before each in turn, instead of at the actual spots intended to be represented by them, it is evident that they are monuments of pilgrimages. One of them is also a monument of a feigned miracle. He also referred to

Martin v. Macknochis, L. Rep. 2 A. & E. 209, 116; 2 P. C. 365; 3 P. C. 409; 21 L. T. Rep. N. S. 512; *The Easter Reredos case*, revised report by Burch, Exeter, 1874; Wallot's Sacred Archaeology, voce Rood; The Catholic Layman, vol. 5; Fulke's Defence of the Translation of the Bible, Parker edition.

LORD PENZANCE intimated that in cases coming before him under the Public Worship Regulation Act 1874, he would hear two counsel on each side, and one in reply.

Shaw, on the same side, cited *Delegal v. Highley*, 3 Bing. N. C. 950; Keeling's Liturgies Compared; Scott v. Withman, 3 Stark, 168; *Elphinstone v. Purchas*, L. Rep. 3 A. & E. 66.

Fitzjames Stephen, Q.C. for the respondent.—The respondent had a *bonâ fide* belief that several members of his congregation would receive the

Communion at the midday service on the 4th July last. All the congregation present in the church are exhorted to partake of the Communion by the preparatory exhortations which form part of the Communion Service, and it has been held that the rubric requiring previous notice to be given by those who propose to attend is merely directory (*Parnell v. Boughton*, 31 L. T. Rep. N. S. 594; L. Rep. 6 P. C. 46), and that the minister cannot refuse to administer the Communion on the ground of no such notice having been given: (*Stewart v. Crommelin*, a judgment in the Consistorial and Metropolitan Court of Armagh, by the Rev. Alexander Irvine. Hodges and Smith, Dublin; Rivingtons, London, 1852.) The rubric directing that there shall be no communion unless three persons communicate with the priest, is only to insure a *bonâ fide* administration of the communion. No blame can attach to the minister if the spirit of the rubrics is complied with. The respondent exercised his discretion *bonâ fide*, and the fact that one person did communicate with him shows that that discretion was not quite unfounded. If, as is the custom in the respondent's church, the congregation remain to the end of the communion service, the officiating minister, unless he takes some unauthorised means of ascertaining the fact, thus incurring grave responsibility, cannot, at the commencement of the second portion of the service, be certain of the number of persons about to communicate with him. With respect to the candles on the chancel-screen, only two of them were placed so as to be close to the crucifix, and it has not been proved that any of them were ever lighted except at the evening service. The crucifix in this case is an architectural portion of the screen on which it stands, and is not an abused image. It has not been abused, and it is not likely to be abused, to superstitious uses. *Westerton v. Liddell* (Moore's Sp. Rep.) really decided nothing more than that crosses, as architectural ornaments, were lawful. It follows, from the decision in *Phillpotts v. Boyd* (L. Rep. 6 P. C. 435; 32 L. T. Rep. N. S. 73), that a crucifix in stone, set up as an architectural decoration in a parish church, is no more unlawful than a crucifix painted on glass, such as that in St. Margaret's, Westminster, which still remains (*Pierson v. Gell*: Return of Causes before the Delegates, p. 85, No. 171); and that crosses and crucifixes set up for the purpose of decoration are alike not illegal, unless it is shown that they are in some way or other liable to abuse. The proclamations and the injunctions of Edward VI. and Elizabeth, with respect to the destruction of abused crosses and images, were merely executive acts directed to an evil then existing; and the statute 3 & 4 Edw. 6, c. 10, is entirely spent. What has been said with respect to the crucifix applies with equal force to the series of pictures called Stations of the Cross. They have not been, and are not likely to be, abused. It is no evidence of their unlawfulness that similar pictures are usually to be found in Roman Catholic churches.

A. Charles, on the same side, cited the 29th injunction of Edward VI., Cardwell's Documentary Annals, p. 17; Liturgies of Edward VI., p. 85, Parker Society, 1844; *Campbell v. Spottiswood* (3 B. & S. 769); *Hebbert v. Purchas* (L. Rep. 3 P. C. 605); Wilson's Ornaments of Churches.

A. J. Stephens, Q.C., replied. *Our. adv. vult.*

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Feb. 3.—Lord PENZANCE.—Some misconception, I fear, exists as to the functions, powers, and duties of this court. Some, also with regard to the source of its jurisdiction. It is not well that this should be so; for those who, however unadvisedly, question the authority or jurisdiction of the court, can hardly be expected to yield to its decrees that readiness of obedience in which the true force of all tribunals resides. I think it, therefore, not out of place that before proceeding to the details of the case before me, I should try to set in their true light some matters that have been by some unwittingly but grievously distorted, and in the interests of the many who conscientiously desire to yield obedience to an authority which they perceive to be lawful, to remove the misconceptions set on foot by the very few who may have no desire to submit to any authority at all. It has been said, and I fear widely accepted, that this court is a new court; that its authority is independent of the church; that the Bishops' Courts, which ought properly to entertain such questions as those now before me, have been by Parliament suppressed, and that a lay tribunal has been set up in their place, to sit in judgment not only upon ritual, but on soundness of doctrine and the mysteries of religion. If these things were true, they might afford ground for criticism upon the statute, though they could not affect the duty of obeying it. I hope, however, that those who may be inclined to act upon their truth will be at the pains of reading the statute for themselves. They will then perceive that every one of these four propositions is absolutely incorrect in fact. In the first place, the Public Worship Regulation Act 1874 (37 & 38 Vict. c. 85), did not, from one end to the other of it, create any new court, or indeed any court whatever. By the 7th section it is enacted that a person with certain legal qualifications should be nominated and appointed by the two archbishops, with Her Majesty's approval, to be a "Judge of the Provincial Courts of Canterbury and York." "The provincial courts" here spoken of are of course the existing provincial courts, namely, what is commonly called the Court of Arches, in the southern province, and the Chancery Court in the province of York. At the time the statute passed there were very learned judges presiding in each of these courts, though they have both since then retired, and the enactment which thus created a new judge to be a judge in both of them, without defining his relation to the existing judges, may be fairly criticised on that score, but is not open to the opposite charge of having created a new court. This explanation removes also the objection that the courts upon which the powers given by the statute are conferred, are courts independent of the church, unless, indeed, those who make this objection are willing to contend that the provincial courts of the two archbishops deserve that designation. The next objection, as to the suppression of diocesan courts, is equally incorrect in point of fact. These courts are not named or referred to, directly or indirectly, in the statute; their rights, their powers, and their jurisdiction remain to them, since the Act passed, as they existed before it was passed, untouched and unrestricted. What has really been done by the statute is to confer on the provincial courts (with a more speedy and less costly procedure than heretofore) the right to entertain questions of ritual concur-

rently with but not to the exclusion of the diocesan courts. This jurisdiction is no more than the provincial courts exercised before the statute upon letters of request from the bishop—they may exercise it now without those letters of request; but the necessity for the bishop's assent which is thus withdrawn in one direction, is restored in another, for by sect. 9 of the Act, no suit can be carried into this court if "the bishop shall be of opinion that proceedings should not be taken." The provincial courts, therefore, have substantially gained no new jurisdiction by the statute. But if they had, the question I am considering is, not what addition has been made to the powers of the provincial courts, but whether the diocesan courts have been suppressed to make way for another tribunal, and what I have here advanced (which anyone may verify for himself on reading the statute) will, I hope, serve to show that their suppression by this statute is purely imaginary, and contrary to the fact. There may, I dare say, be some to whom the arming of the provincial courts, as courts of concurrent jurisdiction, with a more expeditious and efficient procedure, will appear to be the same thing in substance as suppressing the diocesan courts. To others, on the contrary, it may appear that the rendering a court less likely to be resorted to than before, by bringing another and more effective court into competition with it, is hardly the same thing as suppressing or abolishing it. I have no desire to entertain the question which of these two views is the more correct. Provided that the matter be truly stated and understood according to the fact, and not according to conclusions drawn from the fact, every one can judge for himself, and my end will have been attained. I am no further concerned with the remaining suggestion, that a lay tribunal has been set up to deal with doctrine as well as ritual, than to affirm that in all matters of doctrine this court has now precisely the same jurisdiction, and no more than it had before the statute was passed; nothing has been added, and nothing taken away. There are some, I believe, who contend that all questions touching the clergy in their ministrations ought to be referred only to a synod or some other tribunal composed of ecclesiastics. With such a proposition, I have nothing here to do, and I will dismiss the subject with the remark that those who assert it must needs go further, and either point out where in the judicature of this country such a tribunal is to be found, or contend that the Church of the State has no laws to govern it, or, what is the same thing, no laws capable of being enforced. I now address myself to the merits of the present case. It is a proceeding taken under the Public Worship Regulation Act 1874 (37 & 38 Vict., c. 85). Three parishioners of the parish of St. Peter's, Folkestone, have transmitted to the Archbishop of Canterbury a representation under that statute complaining of certain proceedings and matters, which they allege to be unlawful in the conduct of the respondent on the 4th and 11th July 1875. On the 1st Nov. 1875, and after the duties of judge under the statute had become merged in the office of official principal (or Dean of Arches) of the Provincial Court of Canterbury, this representation was transmitted to me, and, consequently, the proceedings before me, by virtue of the 7th section of the Act, became at once a proceeding in the Court of Arches. The

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representation complains of many things done by the respondent, which, at the hearing of the case, he did not deny, nor did he deny that these things were unlawful in the present state of the law, as enunciated by the Judicial Committee of the Privy Council, reserving to himself the right to question that state of the law, so far as he may be allowed to do so by that tribunal, should he appeal to it in the present case. I will shortly enumerate these offences: 1. The use of lighted candles on the Communion Table, or on a ledge immediately over it, at the time of the celebration of the Holy Communion, when those candles were not required for giving light. 2. The mixing of water with wine for the service of the Holy Communion. 3. The use of wafer bread, instead of bread such as is usually eaten, in the administration of the Holy Communion. 4. Standing at the middle of the west side of the Communion Table with his back to the people, so that the people could not see him break the bread during the Prayer of Consecration. 5. Kneeling during the Prayer of Consecration—a practice, however, which he says he has since discontinued. 6. Causing the hymn or prayer commonly known as the *Agnus Dei* to be sung during the Communion service, immediately after the Prayer of Consecration. 7. Forming and accompanying a procession, consisting of the choir and two acolytes in short surplices and red cassocks, four banners, a brass instrument, and a processional cross being carried in it, the choir singing a hymn, and the respondent walking in it, with a cap called a biretta on his head; such procession taking place after the service of morning prayer and immediately before the Communion. 8. Forming and accompanying a like procession on another occasion, when, at one period of it, all those who took part in it fell on their knees and remained kneeling for some time. The fact of these eight charges having been admitted by or on behalf of the respondent, and the unlawfulness of his conduct on these occasions being unquestioned before me, and, in my opinion, unquestionable, my duty on the present occasion will be confined to admonishing him not to offend again in the same way. There is one other charge, upon which in like manner no defence has been offered, which requires, I think, some further notice. I allude to the charge of celebrating the Holy Communion in the vestments known by the names of "chasuble" and "alb." The question of vestments is one which stands in a peculiar position, in respect of the judicial decisions of which it has been the subject. Dr. Lushington, Sir John Dodson, and Sir Robert Phillimore have all held what are called the Edwardian vestments to be lawful. By the Court of Appeal in *Liddell v. Westerton* (Moore's Sp. Rep.), consisting of some of the ablest judges of our time, Lord Cranworth, Lord Wensleydale, Lord Kingsdown, Sir John Patteson, and Mr. Justice Maule, with the late and present Archbishops of Canterbury, it was affirmed in the following words: That "the same dresses and the same utensils or articles which were used under the first Prayer Book of Edward VI. may still be used." In the case of *Martin v. Mackonochie* (L. Rep. 2 P. C. 365; 24 L. T. Rep. N.S. 204) it was declared generally that the court "entirely concurred" in the construction of the ornaments rubric in the previous case, and particularly that "the term ornaments in the rubric means those articles the use of which in the services and ministrations of the church

is prescribed by the first Prayer Book of Edward VI." In *Liddell v. Westerton* (Moore's Sp. Rep.), it is right to observe that the court, in the remarks above quoted, was commenting upon this rubric for the particular purpose, and the particular purpose only, of showing that it applied to articles and things which were "used" in the service as distinguished from ornaments which were not "used," but "set up in churches as ornaments in the sense of decorations." The terms, therefore, in which their construction of the ornaments rubric was declared, constituted a judicial dictum (very valuable, no doubt, considering the high authority of the judges from whom it emanated), but still a judicial dictum only. But in the later case of *Martin v. Mackonochie* (*ubi sup.*), the question arose directly whether the lighting of a candle could be justified as the "use" of an ornament permitted by this same "ornaments rubric," upon which the question of vestments turns. It thus became necessary to construe the language of that rubric, and the court having, as above stated, declared their adherence to the construction given to the rubric in the former case, went on to say that this construction went far to decide the case in hand, and concluded thus: "But the rubric, speaking in 1661, more than 100 years subsequently, has, for reasons which it is not the province of a judicial tribunal to criticise, defined the class of ornaments to be retained by a reference, not to what was in use *de facto*, or to what was lawful in 1549, but to what was in the church, by authority of Parliament, in that year; and in the parliamentary authority which this committee has held, and which their Lordships hold, to be indicated by these words, the ornaments in question are not found to be included." The argument of the court, therefore, ran thus: The ornaments which may be lawfully used are defined by the rubric of the present Prayer Book; the meaning of that rubric is, that such "ornaments" may be used as are prescribed by the first Prayer Book of Edward VI.; the use of a lighted candle is not found to be prescribed by the first book of Edward VI.; therefore it is not lawful. I can only regard this case, then, as a decision directly based upon the proposition that the rubric of the present Prayer Book defined the "ornaments" which should be lawful in future as those which had been prescribed by the first Prayer Book of Edward VI. No doubt the category of lawful ornaments to be found in the first book of Edward VI. was appealed to in that case to prohibit a lighted candle as not being within it; it must be invoked by those who uphold the Edwardian vestments as a justification for the use of all vestments which are within it; but it is difficult to conceive that this distinction warrants a different conclusion as to the rubric's meaning. If the directions of the book of Edward VI. are to be taken as the test of what may be lawfully used under the present Prayer Book, for the purpose of excluding matters and things which are not within them, it may be well urged that they are also the test of legality for the purpose of justifying the use of the things which are within them, and expressly enjoined by them. When fully considered, therefore, this case affords not a mere judicial dictum, but a direct authority, as to the true meaning of the rubric, judicially announced as the *ratio decidendi* of the court,

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and acted upon as the basis of its ultimate decision. With this decision the subsequent one of *Hebbert v. Purchas* (L. Rep. 3 P. C. 605) condemning the vestments which are among the "ornaments" prescribed by the first book of Edward VI., appears to be directly in conflict; but then it must be borne in mind that the case of *Martin v. Mackonochie* (L. Rep. 2 P. C. 365; 24 L. T. Rep. N. S. 204) dealt with things used in the church service, such as a candle, while the case of *Hebbert v. Purchas* (*ubi sup.*) dealt with the dresses of the ministers, as to which dresses the canons of A. D. 1603 had given certain directions, and it was to these canons, as I understand the latter case, that the court ascribed the authority to qualify the subsequent statute and rubric in respect of dresses or vestments. The only passage which throws any light on the aspect in which the previous decision was regarded by the court is the following: "In *Martin v. Mackonochie* (*ubi sup.*) the committee stated anew the substance of the judgment in *Westerton v. Liddell* (Moore's Sp. Rep.) upon this point, but did not take up any new ground." Save in these words no reference whatever to the case of *Martin v. Mackonochie* (*ubi sup.*) is made in the judgment in *Hebbert v. Purchas* (*ubi sup.*). So brief a notice and summary a dismissal seem rather to favour the conclusion that the case was considered unimportant to the matter in hand than that it was meant to be overruled. It may be, therefore, that this conflict of authorities is rather apparent than real, but whether it be the one or the other, my course in this court is clear. I cannot doubt that of two judgments delivered in the Appellate Court, which are in any degree inconsistent, I am bound in pronouncing the decision of the inferior court to obey and carry out that which was addressed directly to the matter in issue here, and which also was the last pronounced. As this result was inevitable the learned counsel have done well, I think, not to argue the question, and as the question has not been argued, I forbear to express my own opinion on the subject. I must, therefore, hold that Mr. Ridsdale has offended against the law in celebrating the Communion in a chasuble and in an alb, and admonish him to refrain from doing so in future. If this decision is wrong it must be corrected by the Appellate Court. I proceed now to deal with the remaining charges, and I will take, first, the charge which relates to the celebration on the 4th July 1875, at the service of the Holy Communion, commencing at 10.30 a.m., when only one person beside the respondent received it. The fact is not denied. The only answer given is that the great bulk of the congregation remained in the church, that there were 200 to 250 people present, and that the respondent had reason to believe, and did believe, that a sufficient number of them would communicate with him. I will examine the correctness of this last assertion presently, but, in the first place, it is desirable to turn to the rubric itself, which is said to have been contravened. It is in these words: "And there shall be no celebration of the Lord's Supper, except there be a convenient number to communicate with the priest, according to his discretion. And if there be not above twenty persons in the parish of discretion to receive the Communion, yet there shall be no Communion except four (or three at the least) communicate with the priest." It cannot, I think, be said that the words of this rubric admit of any but one interpretation.

There is to be no communion unless as many as three persons are present and communicate with the priest. It was not even in argument contended that the rubric meant anything else. It does not say there shall be no communion "unless the priest believes," or "unless he has reasonable ground to believe" that there will be as many as three communicants, but expressly that there shall be no communion "except three at the least" do in fact "communicate with the priest." But it was urged on Mr. Ridsdale's behalf, that his infraction of this rubric was not a wilful or voluntary one, and that on a principle which pervades the administration of all laws he ought not to be held responsible for what he could not prevent. I must observe that this defence was rather that of his counsel in argument than that which he had urged himself in his "answers." All that he there says is, that a convenient number of persons were present who might have communicated, and that every opportunity was given to them to do so, studiously omitting to say either that he honestly thought the requisite number would communicate, or that he had no means of knowing whether they would or not. I cannot regard this as otherwise than a very significant and possibly intentional omission. Still the question remains whether there was on this occasion, or would be on other occasions, any real impossibility of conforming to the rubric, a proposition which it devolves upon the respondent to establish. This impossibility is said to reside in the fact that the priest must, according to the several rubrics regulating the administration of the sacrament, consecrate the elements, and receive them himself before he has any means of knowing whether there will be as many as three persons coming forward to receive them after him. But is this the fact? Neither by any evidence that he has given, nor by any conclusions to be extracted from the rubrics of the Communion Service, does it seem to me to be established that a priest, really desirous of conforming to the rubric, is practically unable to discover whether the celebration he is about to enter upon will be a lawful one or not. On a perusal of the several rubrics as they occur in the Communion Service, it certainly seems to be assumed throughout that the number of those who are about to communicate will be known (or, at least, approximately so) to the priest, and if others are present (the propriety of which is, I believe, a controverted point, but one with which this court has nothing now to do), discriminated in some manner from them. Thus at the very beginning of the Order for the Administration of the Communion, it is said, "So many as intend to be partakers of the Holy Communion, shall signify their names to the curate at least some time the day before." Then at a later period of the service, "The priest shall then place on the table so much bread and wine as he shall think sufficient;" and again, "At the time of the celebration of the Communion, the communicants being conveniently placed for the receiving of the Holy Sacrament;" and again, "Then the priest shall say to them that come to receive the Holy Communion;" and again, "Then shall this general confession be made in the name of all them that are minded to receive the Holy Communion." Those, therefore, who intend to receive the Holy Sacrament, are invited to give notice of their intention, a quantity of bread and wine is to be placed on the Communion

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Table, which is to be estimated in reference to the probable number of them; they are to be conveniently placed "for the receiving of the Holy Sacrament;" and they are to be addressed in the character of communicants by the minister, all of which provisions seem to imply that the minister has some means of distinguishing them. But no precise direction appears to be given as to the details of the manner in which any separation, discrimination, or distinction between those who do and those who do not communicate, is to be brought about. A reference to the rubrics of the previous Prayer Books may throw some light on the general intention of the Legislature on this head. In the first Prayer Book of Edward VI., at the end of the offertory, stands the rubric, following: Then so many as shall be partakers of the Holy Communion, shall tarry still in the quire, or in some convenient place nigh the quire, the men on the one side, and the women on the other side. All other (that mind not to receive the said Holy Communion) shall depart out of the quire, except the ministers and clerks: (The Liturgies of Edward VI., Parker Society edit., 1844, p. 35.) In the second Book of Edward VI., this rubric desiring the communicants to remain in the quire was omitted, perhaps because the congregation was no longer invited to come into the quire, and deposit their alms in the box which used to stand near the altar, or perhaps because a rubric was then for the first time introduced, directing that the table at the time of the Communion should stand in the body of the church, except in those churches where morning and evening prayer were read in the chancel. But at this same time a further alteration was made by adding the following very strong expressions to the form of exhortation which was to be said "at certain times:" "And whereas ye offend God so sore in refusing this holy banquet, I admonish, exhort, and beseech you, that unto this unkindness, ye will not add any more. Which thing ye shall do, if ye stand by as gazers and lookers on them that do communicate, and be no partakers of the same yourselves. For what thing can this be accounted else, than a further contempt and unkindness unto God. . . . Wherefore, rather than ye should so, depart you hence, and give place to them that be godly disposed. . . .—(Ib. pp. 272, 273).—This exhortation is looked upon by some, I believe, as addressed only to those who were not in the habit of communicating at all. By others, on the contrary, it is regarded as an invitation to all who are not about to communicate on the particular occasion, to leave the church, and thus separate themselves from the communicants. But, whatever may have been the intention of it, it is not unlikely that it gave rise to a custom, more or less general, for the non-communicants to withdraw. On this matter I will quote a passage from a judgment delivered in the Metropolitan Court of Armagh in the year 1852. The case was cited by Dr. Stephens, and I am indebted to him for a copy of the judgment. Speaking of this exhortation, the rev. judge of that court said: "This striking address, repeated in all the churches of the kingdom during a period of nearly 100 years, very effectually brought about and established the custom of the non-communicants withdrawing—a custom that continues to this day, although this part of the exhortation was omitted in the Prayer Book of

1662." He then adverts to the fact that the rubric above quoted, as to the communicants "being conveniently placed," was for the first time inserted in the present Prayer Book, and goes on thus: "When, therefore, the non-communicants have withdrawn, and the communicants have placed themselves conveniently for receiving the sacrament, that is in a part of the church near the Lord's table, it would seem to be easy for the officiating minister to make a tolerably accurate estimate of the numbers for whom he is to provide a sufficient quantity of bread and wine, even though they have not signified their names previously." The only other matter which sheds any light on this subject is the language of the 25th article of religion, which speaks of the sacrament as not to be carried about or "gazed upon." Upon this review of the history of these rubrical directions, the conclusions at which I arrive are, that the Legislature, in both Prayer Books of Edward VI., as well as the book of 1662, contemplated that there would be some method of discriminating between those who intended to partake of the Holy Communion, and those who did not; that under the first book of Edward VI., the means of doing so were specifically prescribed; that under the second book of Edward VI. and the present book, no such specific means are prescribed (except they be found in the direction that the communicants should be "conveniently placed"), and that the custom, however general, of the non-communicants retiring from the church is not specifically enjoined by any positive direction of the existing rubrics. Nor am I aware that the minister has any means at his command to enforce compliance with this custom, supposing it to be desirable to do so, upon which matter it is not my duty here to express an opinion. But admitting this to be so, it was still urged by the complainants that the minister has, practically, other means within his reach of ascertaining whether a sufficient number are about to communicate, did he choose to avail himself of them. It was not asserted, nor can it be assumed, that the members of the respondent's congregation would do otherwise than assist him in avoiding the celebration of the sacrament in a manner contrary to the express letter of the law; and it was therefore contended that the respondent had only to make known to his congregation the difficulty in which they placed him by the practice of non-communicants remaining in the church when the celebration of the holy sacrament was about to begin, without any separation being effected between them and the communicants, for the difficulty to pass away. To this it was replied, that a clergyman has no means of doing so without violating the rubrical directions, and the judgment in *Westerton v. Liddell* (Moore's Sp. Rep.), was relied upon to show that the details of the Communion Service could not be added to or varied by any announcement on the part of the minister without infringing the law. Various means were suggested, however, by which it might be done, and either through the churchwardens or through the pulpit or otherwise, it was said that the minister might make known his desire that if noncommunicants chose to remain in the church, the communicants should conveniently place themselves apart from the rest, so as to enable him to recognise them. The most formal method of proceeding in this direction, perhaps, would be for the clergyman to apply to

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his ordinary, and with his leave to read out during the service a notice describing what those who intended to communicate should do to declare themselves, and thus comply with the rubric, immediately preceding the offertory, on the subject of notices to be given in church. I do not dwell further on this, or pause to decide what the respondent might best have done, because he has in fact done nothing and attempted nothing, and, further, because I am not even satisfied that he had any reasonable cause to expect that the celebration of the 4th July would be other than what it actually was. It appears, on the respondent's own evidence, that what happened on the 4th July had happened on several previous occasions; that he had taken no steps to prevent the recurrence of it, and that on leaving his cure in the hands of two other clergymen when he went abroad in August, he gave them no warning or directions, so that the same thing happened again in his absence. The possible difficulties of a position can hardly, therefore, be listened to in exculpation of one who had not been at the pains of ascertaining whether they are real difficulties or not. But now I turn to the question whether the respondent had reasonable ground to believe, or did even in fact believe, that there would be a sufficient number of communicants on the 4th July. It is impossible, I think, to read his own evidence on this head, and not perceive that he entered upon the celebration of the holy sacrament on that day without, as he states it himself on re-examination, "any positive expectation one way or the other." It is true that there were many present as to whom he did not know that they might not communicate, and as to some, he says he thought they might, but he had no belief that they would. Whatever may be said, as to whether reasonable grounds for believing that the proper number would communicate existed or not, it is clear, I think, that the respondent must establish that he did in fact believe that they would do so, before he could possibly be in a position to set up any exculpation based on the imperfect state of his own knowledge. This he failed to do. The rubric has, in my opinion, been violated, and without excuse. It will, therefore, be my duty to admonish the respondent to obey the rubric in future. The next question for the decision of the court concerns the lawfulness of the crucifix, and of the paintings called the stations of the cross, which have been set up in St. Peter's Church. The solution of these questions depends not on any single contested passage of a statute or a rubric to be construed by the court, but on the general result of the various acts of the Sovereign and the Legislature, which go to make up that momentous change in the state religion, and the ecclesiastical laws of the realm, which is known as the Reformation. The field, therefore, over which such an enquiry is capable of being pursued, is an almost unbounded one, but it does not, I think, devolve upon this court so to pursue it. For the ground has been already travelled by the appellate tribunals, in the two cases of *Westerton v. Liddell* (Moore's Sp. Rep.), and *Phillpotts v. Boyd* (L. Rep. 6 P. C. 435; 32 L. T. Rep. N. S. 73), in which all that historical research and able argument could do to elucidate the legal propositions deducible from any inquiry of the kind, was fully and effectually done. I will state, in a few sen-

tences, the points decided in these cases so far as they affect the present inquiry. In the case of *Westerton v. Liddell*, the court had to pronounce upon the legality of a cross set up in Mr. Liddell's church. And it was decided that although before the Reformation the symbol of the cross had no doubt been put to superstitious uses, "yet that crosses when used as mere emblems of the Christian faith, and not as objects of superstitious reverence, may still lawfully be erected as architectural decorations," and that the wooden cross erected in that particular case, "was to be considered a mere architectural ornament." The court determined nothing directly as to the legality of a crucifix, but was at great pains throughout the judgment to point out that crosses were to be distinguished from crucifixes, saying that "there was a wide difference between the cross and images of saints, and even, though in a less degree, between a cross and a crucifix," the former of which they said, had been "used as a symbol of Christianity two or three centuries before either crucifixes or images were introduced." I must infer, therefore, that in the opinion of the court, as declared in this case of *Westerton v. Liddell*, the use of the cross was only to be justified when it played the part of a mere architectural ornament, and that the views and arguments upon which that justification was based did not afford the same justification to crucifixes. In *Phillpotts v. Boyd*, the court, in justifying the erection of the Exeter reredos, adhered entirely and very distinctly to the position taken up in the previous case, and pronounced that erection lawful, though it included many sculptured images, on the express ground "that it had been set up for the purpose of decoration only," declaring that it was "not in danger of being abused," and that "it was not suggested that any superstitious reverence has been or is likely to be paid to any of the figures upon it." These two cases, considered together, afford to this court a sufficient guide for the principles which it is now bound to apply. All that remains is to apply them. In doing so it is necessary first to have a clear idea of what is meant by "superstitious reverence being paid," and then to ascertain whether such "reverence" is likely to be, or in danger of being, "paid" to the particular objects here complained of, or whether, on the contrary, it is established that those objects are for architectural ornament only. It will be observed that the contrast set up by the court in these cases, is between superstitious reverence on the one hand, and architectural decorations on the other; and, I cannot but think that the court considered that all figures in sculpture or painting must needs fall within one category or the other, so that if the objects and figures here in question were intended to be, or were likely to become anything more, or other than mere architectural decorations, they would be illegal as objects of "superstitious reverence." This view would at once simplify the definition of "superstitious reverence," and reduce the inquiry to the question whether the limits of mere architectural decorations have been exceeded or not. But, passing this by, and considering the matter in a more general light, I conceive that the words "superstitious reverence" or "idolrous practices," together with the more general term "abuse," all which expressions are used indifferently by the court in *Phillpotts v. Boyd* are intended by the court to mean the

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same thing as "worship" and "adoration," which are found in the 22nd Article of Religion. This appears from the following passage in the judgment in that case: "As the Reformation proceeded, and the Articles of Religion came to receive statutory authority, the doctrine of the Church on this subject was plainly set forth. The 22nd Article of Religion declares that 'the Romish doctrine concerning purgatory, pardons, worshipping and adoration, as well of images as of reliques, and also invocation of saints, is a fond thing vainly invented, and grounded upon no warranty of Scripture, but rather repugnant to the Word of God.' In other words, it condemns only the abuse of images." What, then, was this Romish doctrine? The actual worship of the graven image in place of the Deity it represents, has never, so far as I am aware, been inculcated by the Romish church. It certainly forms no part of the teachings of that church, if I may rely on the testimony produced in this case from the lips of the witness Dominic Criscitelli. The "Romish doctrine" "concerning worshipping and adoration of images," spoken of in the 22nd Article of Religion, as "a fond thing, vainly invented," must therefore be intended in that article to mean the devotion and prayer which the Roman church to this day enjoins its adherents to offer, not to images themselves, but to God, before crucifixes, images, or paintings, and the like. And it was this doctrine, together with the practices which had been found to result from it, which it was a main object of the Reformation to denounce and put away utterly from the reformed church. That I may in no wise mistake or misapprehend the doctrine of the Romish church on this matter, I will refer to the following passage from the decrees of the Council of Trent: "... Imagines porro Christi, deiparæ Virginis, et aliorum sanctorum, in templis præsertim habendas et retinendas, eisque debitum honorem, et venerationem impertiendam; non quod credatur inesse aliqua in iis divinitas, vel virtus, propter quam sint colendæ; vel quod ab eis sit aliquid petendum; vel quod fiducia in imaginibus sit figenda, veluti olim fiebat a gentibus, quæ in idolis spem suam collocabant; sed quoniam am honores, qui eis exhibitur, refertur ad prototypa quæ illas representant; ita ut per imagines quas osculamur, et coram quibus caput aperimus, et procumbimus, Christum adoremus; et sanctos quorum illos similitudinem gerunt, veneremur.—Sess. 25.—De Invocatione, veneratione et reliquiis sanctorum et sacris imaginibus. (Canonæ et decreta sacrosancti . . . Concilii Tridentini . . . Opera et Studio Judaci Le Plat Sessio xxv, p. 280, Antwerp, 1779.) It was not, therefore, intended in the above decision of the Court of Appeal by the use of the words "superstitious reverence," "adoration," or "worship," to convey only the limited idea of a figure or object itself worshipped like a Pagan idol. On the contrary, I understand these expressions as intended to embrace the far more extended conception of adoration, worship, or reverence paid to the Deity in presence of or before those objects or figures. It may not be easy to push definition further than this, and define what it is that in any, or every case, constitutes adoration or worship in presence of an image or figure; nor is it necessary to do so; it is enough for the purpose in hand to say that it must be taken to include all and every form or degree in which the object in question

is made to take a place or play a part, in the devotions which are paid to the Deity before it. It is in this sense then that I propose now to inquire whether it can fairly and reasonably be said that the figures complained of are likely to be or are in danger of being objects of "worship" or "superstitious reverence." There is no dispute as to what these figures are or where they are placed. There is a screen of open ironwork, some nine feet high, stretching across the church at the entrance to the chancel; the middle portion of this screen rises to a peak, and is surmounted by a crucifix or figure of our Saviour on the cross, in full relief, and about eighteen inches long—this is the crucifix complained of. The screen, of course, from its position directly faces the congregation, and the sculpture or moulded figure of our Lord is turned towards them. There is, further, a row of candles at distances of nearly a foot apart all along the top of the screen, which is continued up the central and rising portion of it, the last candles coming close up to the crucifix on either side, so that when the candles are lighted for the evening service, I should presume that the crucifix would stand in a full light. These candles were proved to have been lighted for the evening service on the 4th July 1875; it hardly seems that they were necessary for the purpose of lighting the church at the beginning of the service on that occasion: but, on the other hand, it appears that the gas was necessarily turned on before the service concluded, and I cannot say that it is made out to my satisfaction that the candles were not then wanted for lighting purposes. I may at once then dispose of the charge, which, though not distinctly made in the representation, was urged in argument that the position of the candles in relation to the crucifix and the manner in which they were used together constituted a ceremonial observance, and as such were not warranted by law. I hold that this charge is not made out, and I pass to the more serious consideration whether a crucifix so placed and lighted is in danger of being an object of "superstitious reverence." The best forecast of the future in most cases, but especially in those wherein the failings of mankind are concerned, is to be obtained from the experience of the past. And it was to the past that the court in *Phillpotts v. Boyd* emphatically appealed in justification of the Exeter reredos. In speaking of "painted representations of portions of sacred history, to be found in many of our churches," the court relied upon the circumstances that these paintings "had been proved by long experience to be capable of remaining there without giving occasion to any idolatrous or superstitious practices." Would an appeal to the experience of the past, in the case of crucifixes, bring out the same result?—or rather, it should perhaps be asked, would not the result be the very opposite? It is precisely here that, to my mind, the great difficulty presents itself in the proposal now made to sanction the restoration of so well-known an object as the crucifix to that place in our churches to which for 300 years it has been a stranger. The crucifix, as set up in our churches, has a special history of its own. Before the Reformation the "rood" was ordinarily to be found in parish churches in this country. It presented the carved, sculptured, moulded, or painted figure of Jesus Christ on the cross, and was, in fact, a "crucifix, with

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images at the base." (Perry's *Lawful Church Ornaments*, p. 247.) This figure was erected on a structure called the rood loft, which appears to have traversed the church at the entrance to the chancel; in fact, it occupied as nearly as may be the position which the iron screen in the present case does. There is in existence the most precise and unquestionable evidence on this matter, and it is to be found in the records of the Lincolnshire parishes, printed in Mr. Peacock's book on *Church Furniture*, and dated A.D. 1565-6. So universal does the existence of the rood in some form, either sculptured or painted, seem to have been, that in these returns of the churchwardens of upwards of 150 parishes, there is mention of the rood as having been defaced or pulled down in at least 140. It will also be found that in Bonner's Articles, put forth during the reign of Queen Mary, in the year A.D. 1554, inquiry is made "whether there be a crucifix, a rood loft, as in times past has been accustomed; and if not, where the crucifix or rood loft is become, and by whose negligence the thing want." Again, in Cardinal Pole's Articles, A.D. 1557, "... whether they have a rood in their church of decent stature, with Mary and John..." After this period, the historical evidence abounds that in the reign of Elizabeth these roods and rood lofts were destroyed far and wide as monuments of idolatry and superstition, but I am not at present concerned with that circumstance, save so far as it serves to show that they had existed, and were of general if not universal occurrence. Not only so, but in the year 1560, a discussion appears to have arisen as to the propriety of setting the roods or crucifixes up again in parish churches. In the Zurich Letters, first series, p. 67, is a letter by Bishop Jewel, dated the 4th Feb. 1560, in which he says: "This controversy about the crucifix is now at its height. ... A disputation upon the subject will take place to-morrow. ... For matters are come to that pass, that either the crosses of silver and tin, which we have everywhere broken in pieces, must be restored, or our bishoprics relinquished." In the same series, at pages 73-74, dated the 1st April, in the same year, is a letter of Bishop Sandys, in which is the following passage: "We had not long since a controversy respecting images. The Queen's Majesty considered it not contrary to the Word of God, nay, rather for the advantage of the church, that the image of Christ crucified, together with Mary and John, should be placed, as heretofore, in some conspicuous part of the church, where they might more readily be seen by all the people. Some of us thought far otherwise, and more especially as all images of every kind were, at our last visitation, not only taken down, but also burnt, and that too by public authority; and because the ignorant and superstitious multitude are in the habit of paying adoration to this idol above all others. ... God ... delivered the Church of England from stumbling-blocks of this kind." From all this it is plain that the crucifix formed an ordinary feature in the parish church before the Reformation; and it cannot be doubted that it did so, not as a mere architectural adornment, but as an object of reverence and adoration. If any proof was required of this proposition, it may be found in the fact that the worship of it was enjoined in the Sarum Use, the missal most largely accepted and used in England before the Reformation. This was especially the case on

Palm Sunday. In the order of service for that day, given in the Sarum Missal, a very elaborate service ended with the adoration of the "rood" by the celebrant and choir, before passing into the chancel. Such is, most briefly, the part played by the "rood" or crucifix in English churches in the past. If set up again in them now, what part is it likely to play in the future? It is no doubt easy to say, What proof is there of danger of idolatry now? What facts are there to point to a probability of abuse? But when the court is dealing with a well-known sacred object—an object enjoined and put up by authority in all the churches of England before the Reformation, in a particular part of the church, and for the particular purpose of "adoration"—when the court finds that the same object, both in the church and out of it, is still worshipped by those who adhere to the unreformed Romish faith, and when it is told that, now, after a lapse of 300 years, it is suddenly proposed to set up again this same object in the same part of the church as an architectural ornament only, it is hard not to distrust the uses to which it may come to be put, or escape the apprehension that what begins in "decoration" may end in "idolatry." If this apprehension is a just and reasonable one, then there exists that likelihood and danger of "superstitious reverence" which the Privy Council, in *Phillipotts v. Boyd*, pronounced to be fatal to the lawfulness of all images and figures set up in a church. Before concluding that it is so, let me pass in review the arguments urged in favour of the opposite side of the question. I will place, first among them the consideration, forcibly pressed on the court, that the times we live in are not as the times before or at the period of the Reformation; that images and figures which gave occasion then for "unhealthy minds" to abuse, "we, in our more extended knowledge, may be permitted to use with safety." That there is a wide difference in the state of knowledge, and still more in the degree of its general diffusion, between the 19th and the 16th centuries will not be denied; but is it equally certain that superstition has waned in proportion as the light of intellectual culture has advanced, and that the ground gained by the one has been lost by the other? Is it really so absurd, as it was argued to be, to imagine that in the present day the worship of lifeless images and figures, not as idols, perhaps, but as aids to devotion, should again prevail as in old times? The fear that it should be so may be unfounded, but I question whether intellectual culture can be relied upon as a safeguard against it; for, if so, what is to be said of the Romish church and of those able and distinguished men who, in our own day, have not hesitated to join it and accept its doctrines. What I am here discussing, I must again repeat, is not the belief in an idol of wood or stone, but the practice of involving in devotional exercises outward and visible forms, as inculcated in the devotional books of the Roman Catholic creed. This is the "fond thing vainly invented" of the 22nd Article of Religion; and the mere fact of the existence of such a doctrine in that church, among whose members high intellectual power and acquirement is rife, is, to my mind, a conclusive answer to the suggestion that the intellect or knowledge of the present day may be relied upon to take the place of those safeguards which it was the work of the Reformation

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to establish. But another consideration must not be lost sight of. If the intelligent and the cultivated no longer need the protection of old days, can the same be said of the weak and ignorant? The parish church is for all—not for a class—and if the crucifix, placed as it is in this instance, is lawful for St. Peter's Church, it is lawful for every parish church in the country, and may be provided for every congregation—strong-minded or weak—instructed or ignorant. Let it be considered to what such a state of things as that would be likely to lead. If devotion to our Lord comes to be habitually paid immediately before a sculptured figure of his body on the cross, which arrests the eye and occupies the imagination while the mind is in attitude of prayer, it may be easy to some, and possible to many, but hardly possible to all, to wholly dissociate the outward object from the inward prayer, and exclude it from playing any part in that devotion. The immediate presence before the eye of an outward form or object proffers an assistance, though of a spurious kind, towards fixing wavering thoughts and exciting religious fervour, which can hardly be rejected by those who most feel the want of it, and to whom all abstract thought is a difficult exercise. When there cease to be any such, the peril may cease also; but, until then, it is impossible, I think, to accept the alleged robust temper of the present times as a safeguard against so obvious a temptation. Another argument urged for the respondent was this, that crosses had been as much abused and worshipped before the Reformation as crucifixes, and are therefore as much in danger of abuse now, and yet crosses were by the court, in *Westerton v. Liddell* (Moore's Sp. Rep.), held not to be unlawful as ornaments. I will only say on this head of argument that the court in that case were of a different opinion; that for reasons which they considered sufficient, they distinguished crucifixes from crosses in this respect, and that if they had been unable to do so, there is nothing to show that, in their judgment, either crosses or crucifixes would have been lawful ornaments. A further objection was then taken that if the delineation of the crucifixion in sculpture may not be lawfully set up in a church, the same thing must be equally true of a picture in a painted window, exhibiting a similar figure. It is not to be doubted that, in many churches (and in the notable instance of St. Margaret's Church, at Westminster, where the window is of great age), representations of the crucifixion in painted glass or paintings are to be found, and I am not prepared to offer any definition which should draw a sharp line of distinction between such decorations and a crucifix. Indeed, I doubt whether any narrower or more exact definition of what is lawful and what unlawful, can, for practical purposes, be framed, than that which is set forth in the case of *Phillipotts v. Boyd*. But, adhering to that decision, and each case standing on its own circumstances, it is, I think, to be presumed that the Court of Appeal would not hesitate to adjudge even painted windows, or paintings portraying the same subject, to be unlawful if it was satisfied from the mode in which the subject was treated, the place which they occupied, or other incidents in the surrounding circumstances, that they were in real danger of adoration, worship, or superstitious reverence. So long as they are free from this

charge, and fulfil no other function but that of fitly decorating the church, they are free from objection—the moment that, from any cause, whether residing in the objects themselves, or arising among those who worship in the church, the danger of their adoration is made manifest, I conceive that they cease to be innocent, and fall under the charge of illegality. Up to this point I have considered only the reasons which lead to a conclusion that this crucifix is likely to invite "superstitious reverence." I will now say a few words on the alternative proposition that it is intended only, and is likely to serve only, as an architectural decoration. Viewing the matter in this light, the remark naturally arises that this particular figure of the crucifix, while it may be justly said to stand highest among the representatives of gospel history in its fitness for the purposes of adoration or worship, must surely be admitted to occupy a very inferior place among the subjects adapted for the display of mere architectural beauty. In association with other figures, and as embodying the scene of the crucifixion, it has no doubt been the subject of artistic treatment; but by itself, as it appears here in this church, standing alone without incidents or adjuncts, it is a subject which, however, artistically treated, might be so well spared in the mere decoration of churches, that it is not easy to conceive that it should be selected solely for that purpose. Upon the whole, then, I must declare that the crucifix surmounting the screen, in this case, has not been shown, to my satisfaction, to have been set up as an architectural decoration only, and that there does exist a danger and a likelihood that it may be the object of "adoration" and "superstitious reverence." This conclusion makes it unnecessary to consider whether its erection was originally covered by the faculty which was obtained for the iron screen; and the court must now order it to be removed; but a removal of the figure, leaving the cross standing, will be a compliance with this order. It remains to deal with the "stations of the cross." They are described in the representation as "figures in coloured relief of a plastic material, attached to the walls of the church, purporting to represent scenes of our Lord's Passion, and such as are commonly used in Roman Catholic churches." It was not denied that this general description of them is a correct one. More particularly they are a set of fourteen separate groups, affecting to delineate the sufferings of our Lord, commencing with His judgment and condemnation, and ending with His crucifixion and burial. The first objection taken to them I must hold to be a fatal one, namely, that they constitute "an addition to the fabric ornaments or furniture of the church" within the meaning of the statute, and have been set up in the church by the respondent "without lawful authority," no faculty having been either granted or applied for to justify their erection. The law which requires that those who wish to fix or set up any new decoration in a church must apply to the proper authorities for a faculty before they do so, is very salutary and ought to be upheld. It serves as a safeguard against the introduction of many objectionable things into the church, which apathy or want of vigilance on the part of the parishioners might, in many instances, facilitate, and it maintains the principle, which is a wholesome one, that the structure and ornament of the church is

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not to be meddled with except upon due consideration and lawful authority. It is upon this ground, therefore, that I shall order their removal. But the representation further alleges that they are "decorations forbidden by law," and as they now stand I think they are. It is needless to enter into the history of this set of pictures. Whatever origin they or some of them had, it is clear that the three falls of Christ under the cross, and the legend of S. Véronique, have no warrant in gospel history. It is also clearly established by the two devotional books put in evidence; *The Crown of Jesus*, published under the authority of Cardinal Wiseman and four Roman Catholic archbishops in Ireland; and the *Key of Heaven*, by S. Alphonsus Liguari; that these fourteen representatives are to the present day authorized objects of adoration in that church. In the *Crown of Jesus*, p. 421, the following instruction appears: "Devotion to the passion of our Lord is a singular special means of grace. The great means of impressing the devotion profoundly on the soul is the holy mass, the holy rosary, and the stations of the cross. You should endeavour to make the stations of the cross every week. The church encourages this practice by the greatest indulgences. Every time that in a state of grace you go round the stations of the cross, kneeling before each (or if the crowd be great simply turning and kneeling towards each), and with a truly contrite heart meditate on each stage of our Lord's Passion, as represented in the *Via Crucis*, you have it in your power, even without Communion, and without any additional special prayers, to obtain several plenary indulgences for yourself, as also for the poor souls in purgatory. . . . In making the following stations, the same indulgences are gained as if they were made at Jerusalem on the very spot where our Saviour suffered." Then there follow a set of prayers for each station, with direction at what part of them the worshipper is to kneel. These extracts sufficiently show the character and objects of the pictures in question, as used among Roman Catholics; the respondent puts them up in a church of the Church of England, and asks the court to say that they are architectural decorations only, and of a lawful character. I think they are neither. Some of them, if they stood alone dissociated from the rest, such, for instance, as the Judgment of Pilate, may be unobjectionable in themselves, whilst others, such as the three falls of Christ under the cross, and the fable of S. Véronique, whether they stand alone or not, may be held objectionable in themselves; but the entire set, viewed as a whole and in their relation to their well-known history, must be regarded, I think, as likely (if not intended) to be used for the purposes for which they always have been used, and not for the mere purpose of decorating the church. I shall, therefore, as I have above said, order their removal, leaving it open to the respondent, if he shall desire it, to apply for a faculty to authorise the introduction into his church of such of them as may turn out to be free from objection. It will be observed that in dealing with the question of lawfulness, both as regards these stations of the cross and crucifix, I have hitherto excluded from view all conclusions to be drawn from the manner in which the respondent has been in the habit of conducting the services of his church. At the same time it is

obvious enough that the probability of both the crucifix and the stations of the cross being turned to superstitious uses, is largely augmented by the fact that they have been set up by a clergyman who celebrates the Holy Communion with a mixed chalice and wafer bread, and with a "biretta" on his head, accompanies a procession round his church with banners, crosses, and acolytes in red cassocks, in apparent imitation of the Church of Rome. But the structure or ornament of a church is more or less a thing of permanence, while the ministrations of a particular clergyman are more or less temporary, and if sound objections exist, as I think they do in this case, to the objects complained of, in themselves, those objections constitute the best, because the most permanent basis for their condemnation and removal. I will only add that I have endeavoured in the above conclusions rightly to interpret and apply the decisions of the Appellate Court on this grave subject, in their spirit as well as their letter. I say grave subject, for no one can doubt that the slightest return to the use of graven images or pictures as an aid to prayer or a spur to devotion, would be justly regarded as a surrender of principles, vindicated at high cost in the Reformation, and dear to the people of this country. On the other hand it would be a matter of no small concern if any needless restriction or prudery of apprehension should serve to check the generous piety of those who have laboured to restore what the hand of time had defaced; to undo the work of Puritan excess, to repair the ravages of neglect, and enhance the outward beauty of the house of God. It is between these alternative evils that the decisions of the Appellate Court appear to me to be designed to occupy a safe position. It may be that, in some cases, the line of severance between the "mere decoration" which is free from harm and the "superstitious reverence" which is full of peril, may be difficult to draw or uncertain to maintain. I do not think it is so in this case, but if I deceive myself in that belief there remains the obvious reflection that a false step in one direction is likely to be fraught with evils far greater than any that can ensue from an error committed in the other. If sculptured figures or pictures are once set up in our churches, and sustained by the law, to which (whether from the natural tendencies and weaknesses of the human mind on this subject, or from the teachings of books, or the promptings of individuals), adoration or superstitious reverence should, contrary to expectation, come to be paid, an irreparable step towards idolatry may prove to have been taken; for the outward object once sanctioned, the inward devotion is beyond the reach of laws. In the opposite direction I can discern no evil comparable to this. The range of decoration and artistic design is practically without a limit, and, in the profusion of choice, the loss by prohibition of any special figures or objects can at no time be more than faintly felt, and can at all times be easily repaired. As the judgment of the court is on all the charges in favour of the complainants, the respondent must pay the costs of these proceedings.

From so much of the decree as related to the eastward position of the celebrant at the Holy Communion, the distinctive vestments worn by the respondent at the said service, bread to be used thereat, and the illegality of the crucifix, the respondent appealed to the Queen in Council.

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Feb. 26.—*W. G. F. Phillimore* moved the Dean of Arches to suspend the execution of the monition in respect of the above four points, pending the appeal, and referred to sect. 9 of the Public Worship Regulation Act 1874, and r. 24 of the Order in Council relating to that Act.

Shaw opposed the motion on behalf of the complainants, and referred to *Walford v. Walford* (L. Rep. 3 Ch. 812; 19 L. T. Rep. N. S., 233).

LORD PENZANCE.—I must say I think it would be a great misfortune if I were bound by any view of the justice of this case to accede to this application. One of the evils that existed before the late Act was the grievance that, when the Court of Arches had decided the thing to be lawful or unlawful, appeal was had to the Queen in Council, and the immediate effect of that appeal was to stay the hand of the inferior court, so that the decisions of the court never could have any effect until a great length of time had elapsed, and until very great expense had been incurred. Reference has been had to what happens in other courts. It is now, as Mr. Shaw has very properly said, under the Judicature Act, the universal practice in all the courts, that the court appealed from should be able to hold its hand over the circumstances under which the appeal should go on, and that it should have the discretion to suspend the operation of its own judgment or decree in proper cases, but that where such circumstances do not exist as to render it a proper case for that suspension, the rule should be that the decree of the inferior court should go forward. That was the practice in the Probate Court under the Probate Act, it was the practice of the courts of equity, and in some cases it was the practice of the courts of law, but now, by the Judicature Acts, it is the practice of all the courts in Westminster Hall. To that extent the analogy of other courts is a thing to look to. But the circumstances under which other courts think it right to stay the execution of the decree of the inferior court will be of very little assistance to this court, owing to the very different nature of the matters involved. Therefore I do not hold with the proposition that because courts of equity lay down the rule—if they do lay it down—that irreparable injury must be done before they will stay the decree, that this court should take the same principle as its guide. I think that the principle, and the only principle, if it can be called a principle, which is to be adopted is that the court in each case should consider the whole of the circumstances, the amount of actual injury, the amount of grievance to people's feelings, the circumstances under which the alleged offence has been committed, the state of the law in previous cases, and a variety of other circumstances, in fact every circumstance that could bear upon the matter—that the court should take all that into its consideration, and then, if special grounds are shown to exist, that it should hold its hand until the Superior Court has had cognisance of the case. That I believe, is the only principle which can be laid down for the exercise of the power confided to this court by the late Act of Parliament. Then the question is, whether in this case any special grounds have been shown. The respondent in the present case has been in the habit of conducting the services of his church in direct contravention of the law as settled by the Supreme Tribunal in the last case that came before it. I

do not know whether I may assume, from his appealing only in respect to certain points, that he is prepared to yield obedience to the law upon those points as to which he has not appealed; I hope I may; but in the cases in which he has appealed he now asks upon no special grounds—except that he still maintains that these matters are not illegal, which is a proposition that everybody maintains in such cases—that he should be allowed to continue the services in a way which the Supreme Court of Appeal has declared to be illegal, until he can have the opportunity, if the court permits him that opportunity, of questioning again in that court its own decision and inducing it to revoke the conclusion at which it previously arrived. Now, that seems to me a very unreasonable thing to ask. I think he should obey the law as it stands. I think he should perform the services of the church as the Supreme Court of Appeal has declared they ought to be performed, and then he will come with clean hands at least to the Superior Court, saying, I have been obedient to the law up to the present time, and I ask you to allow me to open the question again which you have previously decided, and to endeavour to persuade you if I can that you on a former occasion came to a wrong decision. That applies to three of the four points in respect of which alone there is an appeal. The fourth point is as to a decision of this court of a novel character relating to a point which has not been decided before. Now, upon that matter, I will say this, that I think this court, like all inferior courts, ought not by any means to assume that its own judgment will ultimately be affirmed, and, therefore, if any decision is given in this court upon which an order issues which may be very painful to the consciences of those against whom it is directed, I can conceive cases in which it would be very proper indeed that that order should be withheld, or its operation suspended until the Superior Court has had an opportunity of declaring whether it was justified or not; but in this case I can conceive no difficulty of that kind, because the order here is to take off from the crucifix the figure which, as has been very properly pointed out by counsel, was proved in the case not to be a part of the same structure as the cross, but to have been distinct from it, and screwed upon the cross; it therefore can be detached without the slightest difficulty, it also can be detached and removed without doing injury to the religious feelings, scruples, or consciences of anybody, because we must always recollect that the respondent maintains that this figure is a mere architectural decoration, and if it is only a decoration of the church, the loss of that decoration for the period during which this case is under appeal, is not a matter that really could wound the most sensitive conscience. Viewing this figure, therefore, in the light in which the respondent views it, it seems to me that there is no pretence for applying to the court on any special ground as to the injury that would be done to people's feelings, or to the structure of the Church, by the removal of the figure, until the Court of Appeal shall have determined, if it does determine, that it may lawfully be put up again. Therefore, going through the items of the respondent's appeal, looking at the circumstances in which they stand, looking particularly to the state

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of the law as it now is settled by the supreme tribunal in these matters, and not throwing aside or being unaware of the strong feeling that exists upon many of these subjects, I still think it plain that the respondent ought to obey the law as he now finds it, and that, until he can succeed in reversing it he ought to be content to conduct the services of the church in accordance with the judgment that the Privy Council have already delivered. The power confided to this court under the section of the Act to which allusion has been made (37 & 38 Vict. c. 85, s. 9), is one that ought to be sparingly applied—it is one that ought to be applied only where very special circumstances exist, and as, in my opinion, no such circumstances exist in this case, I must reject the application. The application is rejected with costs.

Proctors for the complainants, *Moore* and *Currey*.

Proctor for the respondent, *Brooks*.

HOUSE OF LORDS.

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

June 22 and 23, 1876.

(Before the LORD CHANCELLOR (Cairns) LORDS CHELMSFORD, HATHERLEY, PENZANCE, and O'HAGAN.)

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ERROR FROM THE COURT OF EXCHEQUER CHAMBER IN ENGLAND.

Private Act of Parliament—Existing rights abrogated by general words—Election of churchwardens—New parishes for ecclesiastical purposes—Stat. 10 Vict. c. iii., sect. 5.

As a general rule existing customs or rights cannot be taken away by general affirmative words in an Act of Parliament, but if the affirmative words of the Act are clear and precise, and the right in question cannot co-exist or stand with them, it may be abrogated without express words.

The parish of D. consisted of four townships, D., W., B., and M. The parish church was in D., and churchwardens were appointed at D. in the usual manner, who acted for the whole parish except M., where there was a chapel, and a special custom that the parishioners should elect two churchwardens to act for the hamlet of M. A private Act of Parliament was passed to divide the parish into three, D. and W. to be one parish, B. another, and M. a third. The Act contained a provision that after the contemplated division had taken effect, two persons should be chosen churchwardens for each of the new parishes, "in the same manner as churchwardens are now chosen and appointed for the said parish of D."

Held (reversing the decision of the court below), that the object of the Act being to create three entirely new parishes for ecclesiastical purposes, formed upon the model of the mother parish of D., the previous right of the parishioners of M. to elect both churchwardens was taken away.

This was a proceeding in error from a judgment of the Court of Exchequer Chamber, which had reversed a decision of the Court of Queen's Bench, upon a return to a writ of *mandamus*. The facts of the case were shortly as follows: The parish of Doddington, in Cambridgeshire, comprised the four townships of Doddington, Wimblington, Benwick, and March. The parish was of very large extent, comprising nearly 37,000 acres, with a

population of more than 9000 people. In 1847 a private Act of Parliament (10 Vict. c. iii) was passed, at the instance of the then patrons of the living, to sub-divide the parish into three, Doddington and Wimblington to be one, Benwick another, and March the third. The division was to take effect upon the death of the then incumbent, which took place in 1868. The four townships were quite distinct from one another for all civil purposes, and the Act only constituted them separate parishes "for all ecclesiastical purposes," and contained a clause, sect. 44, preserving all civil rights. By sect. 5, it was provided, that when the division should have taken effect "two fit and proper persons shall be chosen churchwardens for each such parish, at the same time, and in the same manner, as churchwardens are now chosen and appointed for the said parish of Doddington;" and that the new rectors should have "the same powers, privileges, rights, and immunities as the present rector of Doddington." At the date of the Act vestries were held at Doddington, where the parish church was, at which two churchwardens were appointed, one by the rector and the other by the parishioners, in the usual common law manner, under the name of the churchwardens of Doddington, who acted for the whole parish except the hamlet of March. At March there was a chapel, and vestries were held there, in which the inhabitants of the rest of the parish never interfered, in which two churchwardens for the hamlet of March were elected by the parishioners. This right had been the subject of previous litigation, and had been established by a verdict at the Cambridgeshire Assizes in 1782. In 1868 the plaintiff in error, Mr. Green, was appointed to the new rectory of March, and claimed the right of appointing one churchwarden. The parishioners resisted the claim, and writ of *mandamus* was issued commanding him to convene a meeting for the election of two churchwardens by the parishioners. To this writ a return was made, and by consent it was turned into a special case, which is fully set out in the report in the court below.

Upon argument, the Court of Queen's Bench (Blackburn and Archibald, JJ.) gave judgment for the defendant, and against the claim of the parishioners, Quain, J. dissenting, as reported in 30 L. T. Rep. N. S. 255. The case was carried to the Exchequer Chamber, and the decision of the Queen's Bench was reversed by Bramwell, Cleasby, Pollock, and Amphlett, BB., Lord Coleridge, C.J., Brett, and Denman, JJ. dissenting: (31 L. T. Rep. N. S. 543.)

Error was then brought to the House of Lords.

Prideaux, Q.C. and *McIntyre*, Q.C., for the appellant, argued that the intention of the statute was to put the three parishes on one footing, making Doddington the model, and that the customs existing in March, while it was a mere hamlet, were put an end to. The Rector of March was to be just in the position that the Rector of Doddington had been in. They referred to

Craven v. Sanderson, 7 A. & E. 880;

Stead v. Heaton, 4 T. E. 669;

Res v. Justices of the North Riding, 6 A. & E. 968;

Res v. Nantwich, 16 East. 228;

Res v. Marsh, 5 A. & E. 468.

and to an indulgence granted by Cardinal Wolsey to the chapel at March, in 1526, which made no mention of separate churchwardens.

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Bulwer, Q.C. and *F. M. White*, for the respondent, contended that the parishioners could not be deprived of an express right by general words in a private Act of Parliament in which they had no part: (Co. Litt. 115a.) They also cited

Bacon's Abridgement, Tit "Churchwardens," A.; Com. Dig. "Parliament," B. 23.

Prideaux, Q.C. in reply.

At the conclusion of the argument, their Lordships gave judgment as follows:

THE LORD CHANCELLOR (Cairns).—My Lords, the appeal in this case arises out of a proceeding by way of *mandamus*, in which the appellant, the rector of a parish in the diocese of Ely called March, contends that he has the right, in the ordinary way, of appointing one of the churchwardens of the parish. Those who have applied for the *mandamus*, on the other hand, claim that the parishioners have the right of appointing both the churchwardens. That question must be solved by reference to a private Act of Parliament, which was passed in the year 1847, and in point of fact to one clause of that Act. The circumstances under which that Act of Parliament was obtained were these [his Lordship then went through the clauses of the Act, and the facts, as set out in the special case, and continued]. Now these being the facts, as to which there appears to be really no dispute, let me ask your Lordships to consider whether they make any alteration in the construction of the Act of Parliament, which, after all, must be the guiding rule by which we have to determine the present case. The learned judges in the court below, who have decided in opposition to the appellant, apply these facts, as it appears to me, in two ways. In the first place they apply them in the positive construction, if I may use the expression, of the 5th section, and that I will consider in a moment. They also apply them in another way. They say: You have here a custom established in the hamlet of March for the parishioners of that part of the parish to choose officers, who are called their churchwardens. That custom they set a value upon to such an extent, that in the middle of the last century they had it established by proceedings at law. You cannot suppose, say the learned judges, that a custom of this kind is to be taken away by an Act of Parliament without express words, and if there be no express words taking away the custom, it must be held to remain. I will say a word upon the second of these arguments first. I have to remark upon it that there is no doubt that, as a general rule, customs, or rights of a similar description are not to be taken away by inference, or without distinct words. But the error, as it appears to me, which the learned judges have fallen into upon this point is this: This custom was a custom connected with and attaching to the hamlet or chapelry of March, *quod* hamlet or chapelry. The Act of Parliament does not continue the hamlet or chapelry of March. If it did, it might well be said that incidents of this kind were continued along with it. The Act of Parliament makes, ecclesiastically speaking, a *tabula rasa* of the whole of the ecclesiastical arrangements within the area of the old parish of Doddington, and having made that *tabula rasa* it proceeds to erect and to create three new well-known and clear ecclesiastical divisions, namely, parishes or rectories, within the old area; and, creating these three new ecclesiastical divisions, it

enacts that each of them is to be created after the pattern of the old and entire rectory, and that each new rectory is to have the incidents of the old one. It therefore ceases to be a question as to whether a custom attaching to the old chapelry or hamlet of March is or is not taken away by express words. The hamlet itself, as an ecclesiastical division, disappears; the thing is gone, that to which the custom attached is no longer in existence, and therefore that has been done by the Act of Parliament which is much stronger than the abolition of a custom by express words: that is abolished upon which alone the custom could exist, and to which alone it could apply. It only remains to apply the facts thus derived from the special case to the 5th section in the way in which the majority of the learned judges of the court below propose to apply them. This is the mode in which the judges of the court below apply them. I will read again the words of the 5th section. [His Lordship read the section.] Now, say the learned judges who have decided against the appellant, the meaning of that is this: Your new churchwardens, in a new parish, for example, of March, are to be chosen in the same way as churchwardens were appointed in any part of the old parish. In the old parish there were churchwardens appointed at Doddington, and in the old parish there were churchwardens appointed at March, and this is a cumulative expression that new churchwardens are to be appointed throughout the whole area, as former churchwardens were appointed throughout the whole area. If you find that in one part of the old area churchwardens were appointed in one way, and in another part of the old area in another way, when you make your new divisions you are in each new division to appoint your new churchwardens as nearly as possible in the way in which churchwardens were appointed in that particular area. That is the argument of the learned judges. But your Lordships will perceive that the argument proceeds altogether on a fallacy, or rather, I should say, on an interpolation into the Act of Parliament of a word which does not occur there, and the excision from the Act of Parliament of a word which is there. The learned judges substitute for the plain expression, "in the same manner as churchwardens are now chosen and appointed for the said parish of Doddington," the words "in the same manner as churchwardens are now chosen and appointed in the said parish of Doddington." But what says the case? The case, which binds both parties, says, "Separate churchwardens were appointed at the Doddington vestries by the names of the churchwardens for the parish of Doddington." Is it to be said that you ought to alter the wording of the Act of Parliament in this important way, and that having words describing an office in apposite and proper terms, "churchwardens for the parish," you are to alter that expression, and say that it points to any person who in the parish is appointed a churchwarden, although he be not one of the churchwardens for the parish, but a churchwarden for March? Nothing could be more violent than that construction. But what say the learned judges to the second part of that section? "The rector of each of the said new rectories exercising the same rights and powers in the appointment of such churchwardens or one of them as the rector of the said rectory of Doddington now exercises." Say

the learned judges: That means that if the rector has no power he is not to exercise any power. But if that had been the intention of the Act of Parliament, the expression ought to have been, "The rector of the new rectory of Doddington retaining the same right and power in the appointment of churchwardens for that rectory as he now exercises." That would have been a clear and distinct way of expressing what would, according to the supposition, have been meant. The learned judges absolutely reduce to silence, *quoad* March, the second part of this section, and make it altogether inapplicable. Looking at the Act of Parliament, apart from the statements in the special case, I feel no doubt that the construction does not give to the parishioners the right of appointing both the churchwardens; and, looking at the statements in the special case, and applying them to the Act of Parliament, I cannot find anything in those statements which should alter the plain and natural construction of the Act. I therefore submit to your Lordships that the decision of the Court of Queen's Bench is correct, and the decision of the Court of Exchequer Chamber erroneous, and that this appeal ought to be allowed.

Lord CHELMSFORD.—My Lords, the case depends entirely upon the meaning of the words of the 5th section of the Act for dividing the parish and rectory of Doddington into three separate and distinct parishes and rectories. In construing the Act, the object of it must constantly be kept in mind. It was to put an end to the existing parish of Doddington, and to create out of different parts of it three entirely new parishes. It was, of course, absolutely necessary to make provision for the performance of parochial functions, and the appointment of new parochial offices in the new parishes. The Act evidently intended that the three new parishes should be similar in all respects, unless otherwise provided, and that they should be formed upon the model of the parish of Doddington, out of which they were taken. There is nothing throughout the Act to show that the new parish of March was intended to be distinguished in any respect from the other newly-constituted parishes. But it was argued for the respondents, that as before the Act there was a custom in March to choose persons who were called, though improperly, "churchwardens," the rector of Doddington never interfering in such appointment, the words in the 5th section "in the same manner as churchwardens are now chosen and appointed for the parish of Doddington," must be read as not comprehending March, which ought to be regarded as having been intended to be left in this matter *in statu quo*. But the separate appointment of wardens for March, and the non-interference of the churchwardens of Doddington with their functions, have nothing whatever to do with the manner of choosing and appointing churchwardens for Doddington, which are the words of reference to the appointment of churchwardens in the new parishes; they amount, at the utmost, to evidence of the extent of the powers and duties of the churchwardens of Doddington after their appointment. Under the Act the old chapelry and township of March is put an end to, and it appears to me that everything connected with it in this character, its incidents, privileges, and customs, is abolished. And I cannot imagine, if their appointment of churchwardens was intended to be preserved, that this should not have been expressly

provided for. A new parish is created instead of the old chapelry, and this must necessarily have the effect of changing its character, in respect at least to parochial officers. A rector, too, is placed over the new parish, who is clothed by the Act with the same powers, privileges, rights, and immunities as belong to, and are exercised by, the rector of Doddington. Now there can be no doubt that the rector of Doddington had a right to intervene in the choice of churchwardens; and the 5th section of the Act provides for the choice of churchwardens in the manner in which they are chosen in the parish of Doddington, the rector of each of the new rectories exercising the same rights and powers in the appointment of churchwardens as the rector of Doddington now exercises. It is said that this provision is obscure, but I confess it is, to my mind, perfectly clear. We are referred by the Act to the manner in which churchwardens are chosen in the parish of Doddington, and the rights exercised by the rector of Doddington in the appointment of them. When these are ascertained, and there is no doubt about them, they are applicable to the new rectories and the new rectors. As I have already observed no separate notice is taken of March throughout the Act, which seems to lead fairly to the conclusion that it was intended to be placed as to the appointment of churchwardens, and in all other respects, on the same footing as the other new parishes, all of them being established upon the model of the parish of Doddington. The argument for the exception of March from the provision as to the appointment of churchwardens is founded merely on implication, which cannot, in my opinion, prevail against the rights expressly and clearly conferred upon the rector in the choice of churchwardens in the same manner as upon the other newly-created rectors by the 5th section of the Act. I agree with my noble and learned friend, that the judgment of the Court of Exchequer Chamber ought to be reversed.

Lord HATHERLEY.—My Lords, I have come to the same conclusion after hearing the very able arguments of counsel at the Bar, and after very seriously considering the opinions of the learned judges who have so remarkably differed in their construction of this clause; for the case depends almost entirely upon one clause, namely, the 5th clause of the Act of 1847. From a very early period of the argument it appeared to me that, looking at the Act alone, and especially at the wording of the 5th clause, without regarding any of what may be called the accompanying circumstances under which the Act was passed, there could scarcely be any doubt as to what the construction of the Act must be, namely, that it intended for the future, after the new parishes were constituted, the election and appointment of churchwardens should be such as took place, and had always taken place, in the parish of Doddington. But I was struck, I confess, during the argument also by the observations of the learned judges to the effect that it was necessary to consider whether any other construction was open, and, if so, whether under the circumstances that attended the passing of the Act of Parliament that other construction ought to take effect. It was urged with considerable force by some of those learned judges who expressed an opinion contrary to that which I now hold, that this being a private Act of Parliament, passed without the

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usual summoning of the persons who might be supposed to take an interest in the passing of the Act, and there having been a litigation some sixty years before with reference to the election of churchwardens at this very place, March, in relation to the controversy which now exists, it could not be supposed that it was the intention of the Act to alter by indirect means the rights which had been ascertained and declared as between the rector and the inhabitants as to the appointment of churchwardens; and that if another construction, therefore, could possibly be put upon the clause, that construction was the one which we should be justified in placing upon it, in preference to anything which would appear to work an injustice on the part of the Legislature towards persons whose rights had within a comparatively recent period been ascertained after dispute. Now I find in the Act we are construing the usual saving clause which one would expect to find there with regard to all persons interested in the advowson, and in the proprietary right which the patron would have in the advowson. Their interests are all saved. But there is another clause which is important as a saving clause, and which shows the scope and frame of the Act in its entirety. That clause is the 44th, by which it is provided, "that nothing in this Act contained shall make any alteration in the division of the said parish of Doddington into townships or divisions for the maintenance of the poor, or in any civil purpose whatsoever relating to the present parish of Doddington." The Legislature, therefore, tells you what is intended to be done by this Act, namely, that the Act was passed for what we may call a purely ecclesiastical purpose, and that all civil rights are intended to be in this manner saved, unless, indeed, as might possibly occur, and, as it has been argued before us, it may be said in a sense to occur, with regard to the appointment of churchwardens, it should be found that any civil right was affected by the construction which one felt oneself bound to put upon the Act. And I find in the preamble that which corresponds entirely with the view which I attribute to the Legislature in inserting in the 44th clause a protection of the civil rights of all persons within the parish. Therefore, one sees that being passed for ecclesiastical purposes the object of the Act could not affect prejudicially the civil rights of the inhabitants. It was an Act passed very largely for the benefit of the inhabitants of this unwieldy district, and large benefits are, in fact, conferred. You find that a provision is made in the Act, with the concurrence of the patron and of the bishop, for establishing in this large district of March, which up to that time had had only a licensed curate residing within the boundary of the township, and had been separated by a distance of about four miles from the parish church, for establishing in that district, and in a third district, which is also created, a permanent and resident rector instead of a licensed curate. Now, when your lordships look to another clause in the Act, you form some idea of the means which were considered to be required for effectuating these purposes, because although power is given to borrow on the advowson considerable sums of money for the purpose of erecting a church at Benwick, and parsonage houses both at Benwick and in March, you find that the Legislature thought fit, by the

29th section, to set a limit upon the expenditure for these purposes, and that limit is mentioned at 1150*l*. What, therefore, was the object of the Act? I think some of the learned judges scarcely had that sufficiently before their minds. The main object of the Act was the better instruction and better pastoral care of the inhabitants of the whole of this large district, comprising four townships, and to provide for that by means of a rector residing in each of the new districts, instead of one rector superintending, as he had done up to that time, the whole of the larger parish, to provide for his residence there by means of a house which was to be built for him. Finding that, you are not surprised when you come to the other clauses of the Act to find that in constituting these parishes the Legislature provides that the parishes should be constituted with a system, and with a staff, if I may so express it, which should place them in the position of wholly independent new parishes. These three districts are accordingly, by means of the Act, constituted into three separate and distinct parishes for all ecclesiastical purposes, without the invasion of any civil rights. That being done, coming to the 5th clause with that view, we must consider in the first place its natural meaning, and see if it should by any means be diverted or explained into a somewhat unnatural construction by having regard to the state of circumstances which existed at the time of the passing of the Act. The enactment itself relates to the time when the division into separate parishes shall have taken effect. The first part of clause 5 does not speak of churchwardens being "chosen and appointed," but says "chosen." But in a subsequent passage the same clause says "in the same manner as churchwardens are now chosen and appointed." I do not think that that difference of expression can be construed as giving any different effect to the first part of the clause as distinguished from the second part. With regard to Doddington township proper there never could be any doubt, and there has been none raised in the course of the inquiry as to the mode of constituting churchwardens, yet that township is included in the phrase "shall be chosen churchwardens." The mode of constituting churchwardens pointed at in the latter part of the sentence was by means of election and appointment, that is to say, that if the rector and the parishioners agreed they would be appointed, but if they differed the rector would have to appoint one of them, and the parishioners to elect the other. The two churchwardens are to be appointed for the new parish "at the same time and in the same manner as churchwardens are now chosen and appointed for the said parish of Doddington." Now I think upon all the documents it is quite clear that the churchwardens for Doddington were the churchwardens whom the parishioners elected in concurrence with the rector, if they did concur, or of whom the parishioners elected one, and the rector appointed one, if there was a difference of opinion between him and the parishioners. No other set of people can be taken to have been churchwardens for Doddington. Indeed, I asked the question during the argument, although I felt pretty sure it could be only answered in one way. The natural and original course would be that the mother church would have its own churchwardens as churchwardens for the whole of the rectory, that is to say, the whole of this huge parish of Doddington. By degrees, no

doubt, it might well be that it came to pass that they confined their operations to the township of Doddington, because there existed a chapelry in another remote part of this large parish in which certain persons were elected to be churchwardens, who appear only to have repaired that chapel, and never to have acted by way of making a rate in the general parish of Doddington. I have no doubt whatever that when you find the words "churchwardens for the parish of Doddington" in the Act, there being nothing to compete with that interpretation, you must take it to mean the churchwardens for the whole parish of Doddington, as far as their name was concerned, and as far as their original functions were concerned, however much those original functions may have been altered subsequently. At all events it is clear that whether you take them to have been churchwardens for the whole parish of Doddington, or churchwardens for the township, they were not churchwardens for March, as separate and distinct from the township of Doddington proper. Nor certainly were the churchwardens of March at any time whatever, either popularly or legally, the churchwardens for Doddington. Therefore, the plain interpretation of the clause is only one, that the churchwardens shall be elected as the churchwardens for Doddington were. That is the plain and only interpretation; and the words which follow appear to me to make it still plainer, because the end of the clause says that the rector of each of the new rectories is to exercise "the same rights and powers in the appointment of such churchwardens, or one of them, as the rector of the said rectory of Doddington now exercises." It appears to me to be plain that that can only point to this, that when the parish is divided into three parts, the rights of the rectors of those new districts shall be the rights now enjoyed by the rector of the mother church in respect of the appointment of churchwardens. It seems to me that any other interpretation would be most strained and forced. It is said, however, that as you can interpret this clause in a different way, you ought, in the circumstances of the case, to do so. Bramwell, B., undoubtedly puts it very ingeniously. He says (31 L. T. Rep. N. S. 546): You are to take all Doddington, when it is divided into its several parts, and say that churchwardens shall be appointed as they have been appointed for the parish of Doddington, and in the parish of Doddington you find two modes of appointment; the way, therefore, to arrive at a construction which will at once reconcile the existing state of the law, as it had been in comparatively recent times determined, with the provisions of the Act, is this: You must construe the Act *reddendo singula singulis*; when you are in this part of Doddington, it is to be as the churchwardens are appointed in this part; when you are in another part, it is to be as the churchwardens have been accustomed to be appointed in that other part. It appears to me a very violent construction which requires you to apply the principle of *reddendo singula singulis* in this way, when you find that what you call interpreting on that principle simply strikes out all the last words of the section, which says that the rector is to have all such powers as the rector of Doddington had, and in the case of this large part of the parish you tell the rector that he is to have no right or power in the matter at all. I think it is evident that you are stretch-

ing the construction to an extent to which the clause itself is incapable of being extended, and it appears to me that if we were so to read it we should in fact be making a new Act of Parliament instead of construing the enactment which we find before us in the plain language of the clause. But I feel the less scruple in coming to this conclusion because I see no necessity for our endeavouring to strain the construction with reference to the external circumstances to meet this view. A well-known passage from Lord Coke (Co. Litt. 115 a) has been cited by Quain, J. (30 L. T. Rep. N. S. 259)—namely, that you are not to do away with existing special rights by general affirmative words. But if the affirmative words are clear, plain, and precise, and the two things will not co-exist or stand together, then I apprehend you are compelled to come to a construction which is sensible in itself, and also a natural and ordinary construction. Finding that the two things will not stand together, you are compelled to adopt that construction which the plain sense of the words requires, although it may in some degree interfere with what had been done on previous occasions within the same district; the real point of the case being this, that this Act does, for purposes beneficial to all the inhabitants ecclesiastically, sub-divide this great parish into three parishes; it constructs each of these three parishes on the model of the old parish, and, giving them that construction, it gives them a frame of church government, as far as this question of churchwardens is involved, similar to that which existed in the original parish, which was the mother parish of the whole. Coming to the 6th clause, it does not appear to me that any difficulty arises there. That clause not only offers no difficulty in this construction, but in one point of view it seems to me materially to assist us in construing the Act as I propose to construe it. It seems to me to be a saving clause with regard to anything done by the churchwardens anterior to the alteration and the creation of the new parishes. That tends very strongly to show that the Legislature was aware that it was constructing something altogether new, because if the construction of clause 6 was such as is contended for by the learned judges whose view I am now differing from, there would have been no necessity to make any saving about the churchwardens of March at all. The new rector would have had nothing to do with them with reference to their election, and the Act would simply continue the churchwardens of March in their existing position, without any new offices or any new ecclesiastical constitution being framed. But it appears to me to be plain that it was intended to have a full ecclesiastical constitution in each of the new parishes, and that that ecclesiastical constitution should be according to the common law of the land. That being the case, the churchwardens of March would no longer be in the same position as to election as before; there would be a new form of constituting them, and that being so, it was necessary under the new code to save all such rights as they had until the new system could be arrived at. As regards the statement in the case that the churchwardens of March had acted *ex officio* as overseers of the poor, I apprehend that no difficulty could arise in that respect. The Act saves all civil rights, and if it be necessary to have an election of overseers of the poor, I apprehend that that elec-

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tion will take place in the ordinary way, as it has done hitherto, and no inconvenience will occur. The parishioners may elect the same persons if they like, or they may elect others if they prefer. The question of the election of churchwardens remains untouched by that. I apprehend that the whole scope of the Act remains untouched, the whole scope being to place each of these parishes in a similar position with regard to the election of those officers. For these reasons I concur in the resolution which has been proposed by my noble and learned friend the Lord Chancellor.

LORD PENZANCE.—My Lords, after the full discussion which this case has received, I should not have thought it necessary to say a word upon the subject, if there had not been so exact a division as there was between the learned judges who have considered this matter in the courts below. And I shall confine myself in the observations which I address to your Lordships to one very short and simple point. I may say that I entirely agree with the arguments and statements which fell from my noble and learned friend, the Lord Chancellor, and therefore I shall forbear from dilating on the points on which he has dwelt. The first thing which I wish your Lordships to bear in mind in considering this question is that the scope and intention of this Act was expressly, on the face of it, limited to the creation of three fresh parishes for ecclesiastical purposes. The words in the statute by which that is made apparent are found in the first clause. It describes the division that is to take place, and it says "that the township of Doddington and the hamlet of Wimblington shall form and be one separate and distinct parish and rectory for all ecclesiastical purposes." And then follow similar provisions for the other two divisions into which the original parish is cut up. Then, in two other clauses which have been referred to by your Lordships, clause 42, and especially clause 44, it is distinctly provided in the negative "that nothing in the Act contained shall make any alteration in the division of the parish of Doddington into townships or divisions for the maintenance of the poor, or in any civil purpose whatsoever relating to the present parish of Doddington." It is therefore plain, both by way of affirmative and negative words, that the scope of the Act is limited to the creation of three parishes for ecclesiastical purposes; and whatever rights the inhabitants of the four townships which existed within the parish had at the time of the passing of the Act in relation to the maintenance of the poor, in relation to choosing officers who should regulate that maintenance, or take an active part in that regulation, whatsoever rights the inhabitants had in any civil purpose or office whatever, as attaching to the separate townships, the Act carefully preserved to them. Bearing that in mind, the short question is, what did the Legislature mean when it said that the churchwardens should be chosen in each of the new parishes "at the same time and in the same manner as churchwardens are now chosen and appointed for the parish of Doddington"? On the face of them, these words would not appear to carry with them any ambiguity whatever, because a parish is an old ecclesiastical division of land, and one understands what the meaning of appointing churchwardens for a parish is. One would have thought, therefore, upon the face of the statute, that there would be no dif-

ficulty, because one would only have to inquire what was the method which had prevailed in appointing churchwardens for the parish, and at once the description in the Act of Parliament would be satisfied. But in this particular case a controversy arises upon that question, and the difference which has taken place in the court below amongst the learned judges is a difference in the view which they take of the meaning of the words "appointed for the parish of Doddington." Now what are the facts? for it is upon the conclusion to be drawn from the facts as they existed in the parish at the time the statute passed that any difference arises. The case states that there was a mode, which is said to be the common law mode, of electing churchwardens for the parish, and it states that churchwardens were appointed at certain vestries by the name of churchwardens for the parish of Doddington. This, upon the face of it, would seem to satisfy the description we are in search of, in order to give effect to the Act of Parliament. But then it is said these people were appointed by the name of churchwardens for the parish; but in point of fact they were not churchwardens for the parish, they were churchwardens for a limited portion of the parish only. As I understand the argument, it comes to that. Now, this brings me to the point upon which I wish your Lordships' particular attention, because I think sufficient attention has hardly been directed to it. In my judgment, they were not merely in name, but they were in substance and in fact, churchwardens for the whole parish. The church was in the township of Doddington. The inhabitants of that portion of the parish which was called March, being at some little distance from the parish church, had a chapel at which they used to attend, but it is found upon the face of the case that practically the inhabitants of March did occasionally use the church and churchyard at Doddington as parishioners. And whether they did or whether they did not, I am quite unable, from anything which is to be found upon the face of the case, to come to the conclusion that they had lost their legal right to do so. March was within the legal parish of Doddington; the inhabitants of March were parishioners of Doddington; it seems to me that they were entitled to all the services of the church, and to every right of the parishioners of Doddington. If that be so, the persons who were appointed churchwardens for the parish of Doddington, at a vestry held at Doddington, appear to me to have been in fact and in substance, as well as in name, churchwardens for the parish. If so, as I said before, that entirely satisfies the words of the section we have to deal with. Now let me examine whether there was anyone else who could satisfy that description. The only other mode of election which the case discloses was a mode of electing certain persons as churchwardens for the hamlet of March, and by no stretch of language, as it seems to me, could they be held to be in any sense churchwardens for the parish. There was, therefore, at the time this Act passed, a mode of electing churchwardens who were churchwardens for the parish in substance as well as in name; and there was another mode of electing churchwardens, who were not churchwardens for the parish, but only for the hamlet of March. I say that it is impossible to put these together, and to say that those four persons together are the persons who

are meant when the 5th section says that the manner of electing and appointing churchwardens for the parish of Doddington is to become the manner of electing and appointing them in future for the new parishes. The other construction, the one already placed upon the clause, seems to me, upon the face of the Act of Parliament, perfectly to satisfy the provisions of the Act, and I should say to leave it without anything that may be called reasonable ambiguity. Now, why is that to be departed from? The proposition upon which my judgment is founded in respect to construction is this: If you have a thing described in a statute, and you find, upon applying that description to the existing facts, that there is one set of facts or circumstances, one person, or one thing, as the case may be, which amply, fully, and entirely satisfies the description which the statute gives, then you have no right, upon any surmise as to what the Legislature intended, to depart from that simple description, to go away from the words of the description itself, and to amplify them or vary them until you have included some set of circumstances, some other set of persons, or bodies, or things, which, under that amplified form, will come in under the description. I say that it is a principle of construction that no such thing should be done, subject to this, that if, upon the face of the Act of Parliament, you find that giving the ordinary sense and meaning to the words you are involved in some inconsistency in any of the other clauses, it may then be necessary to search about and see whether the palpable and obvious construction which the words point at may not be varied, in order that the inconsistency may be avoided. But there is no such inconsistency here. It is not suggested that this creates any difficulty whatever except this; it is said, if you give this meaning to these words, which is their plain and natural meaning, you will then be depriving the inhabitants of March of some legal right which they had at the time when the statute passed, and that you ought not to do that without express words. It is obvious that that argument does not go far enough, if I am right in the canon of construction to which I have just alluded. But, in point of fact, there is no such right taken away. My noble and learned friend the Lord Chancellor has already pointed out that the right of election was one which attached before to the hamlet of March, for the civil purposes of the township, and that this Act, which is confined to ecclesiastical purposes, really has not, upon the face of it, either expressly or impliedly, taken away that right. Under those circumstances, the plain words of the statute are amply satisfied, in my opinion, by the state of facts which existed at the time of the passing of the Act; and the mode of choosing the churchwardens for the parish of Doddington must be intended to mean, and must mean only, that mode which was in existence, of choosing the only persons who satisfied the description of being churchwardens of the parish.

Lord O'HAGAN concurred.

Judgment of the Exchequer Chamber reversed, and judgment entered for the defendant (plaintiff in error), with costs.

Solicitors, Garrard, James, and Wolfe; Meredith and Co.

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT WESTMINSTER.

Reported by R. H. AMPLETT, and W. APPLETON, Esqrs.,
Barriers-at-Law.

May 2 and 3, 1876.

(Before JESSEL, M.R., KELLY, C.B., MELLISH, L.J.,
and DENMAN, J.)

VESTRY OF THE HAMLET OF MILE END OLD
TOWN v. GUARDIANS OF THE WHITECHAPEL
UNION.

Metropolis Management Acts—Apportionment of expenses—One side of a street—18 & 19 Vict. c. 120, s. 105—25 & 26 Vict. c. 102, s. 77.

The plaintiffs, acting under the Metropolis Management Acts, resolved that a portion (to wit, the eastern side) of a new street should be paved throughout the whole length for a uniform breadth of 12ft., measured from the eastern boundary; and that the owners of the houses forming the eastern side should pay the estimated expenses. In an action against the defendants for contribution to these expenses, their workhouse being part of the eastern side of the street, it was stated in defence that there were houses and land on the western side liable to contribute; and it was replied that these houses and land did not bound or abut on any part of the street to be paved.

Held, upon demurrer to the reply (affirming the decision of the Queen's Bench Division), that the plaintiffs had no power to charge the owners of one side of the street only, and that the action could not be maintained.

APPEAL from a judgment of the Queen's Bench Division in favour of the defendants on a demurrer to reply. The case is reported in 34 L. T. Rep. N. S. 178, ante, p. 126, where the pleadings are set out at length.

The vestry of Mile End New Town resolved to pave the whole length of a new street on one side only. The estimated expenses of the work were apportioned amongst the owners of the houses and land bounding or abutting on the side of the street so paved, and not among the owners on both sides of the street. The real question raised by the demurrer was whether the vestry had power by law to throw the entire expense on owners of houses and land adjoining the particular side which has been paved, or whether the cost of paving must be apportioned among the owners of land and houses adjoining the street on both sides?

The Queen's Bench Division (Blackburn, J., Lush, J., and Field, J.) held that the owners on both sides were liable for the cost incurred in the paving. The vestry appealed.

Philbrick, Q.C. and Bazalgette for the appellants (the plaintiffs in the court below).—The appellants are empowered under 18 & 19 Vict. c. 120, s. 105(a)

(a) By 18 & 19 Vict. c. 120, s. 105, in case the owners of the houses forming part of any new street laid out or made, or hereafter to be laid out or made, which is not paved to the satisfaction of the vestry, or district board of the parish, or district in which such street is situate, be desirous of having the same paved, as hereinafter mentioned, or if such vestry or board deem it necessary or expedient that the same should be so paved, then and in either of such cases such vestry or board shall well

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to pave part of the breadth of a street, and the question to be decided is, whether the owners of land and houses abutting on the part so paved can be charged with the estimated expenses. We submit they can under the Metropolis Local Management Acts Amendment Act (25 & 26 Vict. c. 102), s. 77. *Whitchurch v. The Fulham Board of Works* (L. Rep. 233, Q. B.; 35 L. J. 145, M. C.; 13 L. T. Rep. N. S. 631) is distinguishable. There the expenses of paving were apportioned among separate sections of a street, varying in character and value throughout its entire length, instead of the whole of it.

Finlay (Day, Q.C. with him), for the respondents, were not called upon.

JESSEL, M.R.—I think the decision arrived at by the Court of Queen's Bench in this case is clearly right. There is no doubt that the term "street," according to the interpretation clause, includes "part of a street." And the 105th section (18 & 19 Vict. c. 120) says that "if a vestry deem it expedient or necessary to pave a street, such vestry shall well and sufficiently pave the same, either throughout the whole breadth of the carriage way and footpaths thereof, or any part of such breadth;" and that the owners of the houses "forming such street" shall on demand, pay to such vestry the amount of the estimated expenses of providing and laying such pavement, each amount to be determined by the surveyor of the time being for the vestry. And by a later statute (25 & 26 Vict. c. 102) the owners of land are also made liable to contribute. Now the question raised before us is a very simple one, and it is this: if a vestry decide on paving the whole or part of a street, that is to say, cutting the street transversely, and do not choose to pave it throughout the whole breadth, is such vestry not bound to divide the expense between the owners of land and houses on both sides? I think they are. Houses "forming such street" must mean the houses on both sides. The intention of the Legislature was that whether the whole or part of a street is paved, the owners of land or houses on both sides should be liable to pay for the costs incurred in such paving.

KELLY, C.B., MELLISH, L.J., and DENMAN, J., concurred. *Judgment affirmed.*

Solicitor for plaintiff, *Milner Juteam.*

Solicitors for defendants, *Turner and Sons.*

and sufficiently pave the same, either throughout the whole breadth and carriage way and footpaths thereof, or any part of such breadth, and from time to time keep such pavement in good and sufficient repair; and the owners of the houses forming such street shall, on demand, pay to such vestry or board the amount of the estimated expenses of providing and laying such pavement, such amount to be determined by the surveyor for the time being of the vestry or board.

By 25 & 26 Vict. c. 102 s. 77, where any vestry or district board shall, under the powers given by 18 & 19 Vict. c. 120, s. 105, have paved or be about to pave any new street, the owners of the land bounding and abutting on such street shall be liable to contribute to the expenses, or estimated expenses, of paving the same, as well as the owners of the houses therein.

By 25 & 26 Vict. c. 102, s. 112, the expression "new street" shall apply to and include all streets hereafter to be formed or laid out, and a part of any such street.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Reported by M. W. McKELLAR, J. M. LELY, and R. H. AMPLETT, Esqrs., Barristers-at-Law.

Friday, Nov. 17, 1876.

DUKE OF DEVONSHIRE v. HEMATITE STEEL COMPANY, LIMITED.

Rating of iron mines—Deduction from royalties—Reservation in lease—Liability of lessor—The Rating Act 1874 (37 & 38 Vict. c. 54), s. 8.

By sect. 8 of the Rating Act 1874, where the lessee of a mine is exempt from being rated to any poor or other local rate, he may (unless he has specifically contracted to pay such rate in the event of the abolition of the said exemption) deduct from any rent, royalty, or dues payable by him, one half of any such rate paid by him.

The plaintiff and defendants contracted in a lease of iron mines that the rent and royalties payable by the defendants, the lessees, should be free and clear of and from all rates, taxes, tithe rent charges, expenses and deductions whatsoever, parliamentary, parochial, or of any other nature. The defendants deducted from their royalties half of the rates paid by them under this Act, and the plaintiff brought this action to recover the deduction.

Held that this section of the statute overruled the reservation in the lease, and that the defendants were not liable for the half of the rates which they had deducted.

THIS was a special case stated by consent of the parties for the opinion of the court under Order XXXIV., r. 1.

1. By an indenture of lease dated 17th June 1864, and made between the plaintiff of the one part, and Henry William Schneider and Robert Hannay, of Barrow-in-Furness, in the county of Lancaster, iron masters, of the other part, the plaintiff granted to the said Henry William Schneider and Robert Hannay license and authority to get and raise all iron ore that might be found in and under the lands in the parish of Dalton-in-Furness, in the county Palatine of Lancaster, described in the schedule and plan to the said lease, together with power to open limestone quarries, and to work any such quarries then opened in the said lands. The lease to continue for the term of thirty-one years from the 1st Jan. 1864, but to be determinable as therein mentioned.

2. The reservation of rent in the said lease is in the words following: "Yielding, paying, and delivering unto the said Duke, his heirs and assigns, during the said term, the annual rent of 500*l.*, by equal half yearly payments, on 1st July and 1st Jan. in each year, and also at the same periods the royalty of 1*s.* 4½*d.* per ton for every ton of 2240*lbs.* of iron ore which in any half year shall be dug, raised, and taken out of the said premises over and above 3636 tons. And also at the same periods the royalty of 1½*d.* per ton of 2240*lbs.* of limestone, which in any half year shall be dug, raised, and taken out of the said premises, such rent and royalties to be free and clear of and from all rates, taxes, tithe rent-charges, expenses and deductions whatsoever, parliamentary, parochial, or of any other nature."

3. The covenant by the lessees for the payment

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of rent is in the words following: "That they the said Henry William Schneider and Robert Hannay, their executors and administrators, shall and will from time to time, and at all times during the said term, pay the said rent and royalties hereby reserved at the times, and in the manner herein mentioned."

5. The interest in the said lease of the lessees was assigned to, and is now vested in, the defendants.

6. There was due and owing from the defendants to the plaintiff in respect of the rent and royalties on iron ore payable under the said lease on the 13th Sept. 1875, the sum of 9371*l.* 4*s.* 1*d.*, and on 2nd May 1876 the sum of 9453*l.* 10*s.* 4*d.*, making together the sum of 18,824*l.* 14*s.* 5*d.*

7. The defendants, after the passing of the statute 37 & 38 Vict. c. 54, became liable to pay, and have paid, for poor and local rates imposed upon them as such lessees as aforesaid in respect of the iron ore worked by them under the said lease, and on which they were liable to pay to the plaintiff the said sum of 18,824*l.* 14*s.* 5*d.*, the sums following, that is to say, the sum of 1296*l.* in respect of the poor rate, and the sum of 1728*l.* in respect of the local rate, making together the sum of 3024*l.*, the value of the iron ore raised by the defendants, being for the purposes of the assessment of the defendants to the said rates taken at the sum of 2*s.* 3*d.* per ton.

8. The defendants claimed to be entitled to deduct from the plaintiff the sum of 1098*l.*, being the sum at which one half of the said local and poor rates so paid by the defendants amounted to, calculated upon the said sum of 18,824*l.* 14*s.* 5*d.*, so payable by the defendants to the plaintiff for the said royalties.

9. The defendants having claimed to be entitled to deduct from the plaintiff the said sum of 1098*l.*, have paid to the plaintiff the sum of 17,726*l.* 14*s.* 5*d.* in respect of the total of 18,824*l.* 14*s.* 5*d.* mentioned in the sixth paragraph, leaving unpaid the sum of 1098*l.*

10. On 31st May 1876, a writ was issued in this action, in which the plaintiff claimed to recover from the defendants the sum of 1098*l.* as the balance remaining due to him from the defendants in respect of the said royalties.

11. The plaintiff contends that the defendants are not entitled to deduct from the rent and royalties payable by them to him any money in respect of the rates so paid by them.

12. The defendants contend that they are entitled to deduct the full sum of 1098*l.* in respect of such rates.

13. The question for the opinion of the court is whether the defendants are entitled to deduct from the plaintiff the said sum of 1098*l.*

Kay, Q.C. (with him *Bowen*), argued for the plaintiff.—This case turns upon the application of sects. 8, 9 and 10 of the Rating Act 1874 (37 & 38 Vict. c. 54), to the circumstances herein stated. By sect. 8, "Where any poor or other local rate which, at the commencement of this Act, any lessee, licensee, or grantee of a mine is exempt from being rated to in respect of such mine during the continuance of his lease, grant, or licence, or before the arrival of the period at which the amount of the rent, royalty, or dues is liable to revision or readjustment, he may (unless he has specifically contracted to pay such rate in the event of the abolition of the said exemption) deduct from any rent, royalty or dues payable by

him one half of any such rate paid by him. Provided that he shall not deduct any sum exceeding what one half of the rate in the pound of such poor or other local rate would amount to if calculated upon the rent, royalty, or dues so payable by him." By sect. 9: "Where any occupier, lessee, licensee, grantee, or other person is authorised by this Act to deduct any rate or sum in respect of a rate from any rent, royalty, or dues payable by him, then (1) Any payment so authorised to be deducted shall be a good discharge for such amount of rent, royalty, or dues as is equal to the amount of such payment, and shall be allowed accordingly. (2) Any payment so authorised to be deducted may be recovered as an ordinary debt from the person to whom the rent, royalty, or dues may be payable. (3) The person receiving the rent, royalty, or dues shall have the same right of appeal and objection with reference to the rate and to the valuation of the hereditament in respect of which the rate is payable, as he would have if he were the occupier of such hereditament." By sect. 10: "After the commencement of this Act, the hereditaments to which the poor rate Acts are extended by this Act, and which are thus made rateable to the relief of the poor, shall be rateable to all local rates in like manner, as if the poor rate Acts had always extended to such hereditaments." The words of the lease with respect to payment by the defendants of future rates are very extensive, and may well be held to be within the exemption contained in the 8th section. [*LUSH*, J.—You must show that the defendants have specifically contracted to pay poor rates and local rates in the event of the abolition of the exemption existing in the year 1864.] The words of the reservation in the lease are sufficiently specific to include the defendants' liability for the whole of these rates: the rent and royalties are to be free and clear of and from all rates and deductions whatsoever, parliamentary, parochial, or of any other nature.

Edwyn Jones (with *A. Wills*, Q.C.) appeared for the defendants, but was not heard.

COCKBURN, C.J.—This case to my mind is clear enough: it turns upon the construction of a reservation in the plaintiff's lease of some iron mines to the defendants, whereby the defendants, the lessees, undertake to pay certain rents and royalties, which are "to be free and clear of and from all rates, taxes, tithe rentcharges, expenses and deductions whatsoever, parliamentary, parochial, or of any other nature." I quite agree that this clause is sufficient to entitle the plaintiff to the royalties in full, without any deduction for poor or local rates, were it not for the words of the 8th section of the Rating Act 1874. An occupier of a mine previously exempted, but rated under that Act, "may (unless he has specifically contracted to pay such rate in the event of the abolition of the said exemption) deduct from any rent, royalty, or dues payable by him one half of any such rate paid by him." The exception in the parenthesis is very clear and precise, and we cannot expunge from it the word "specifically." It cannot be said there is any such contract as that described in this exception to be found in the lease before us. As I understand the effect of this clause in the lease, when the contract is general to pay rates and taxes, all existing rates, and all newly imposed rates of an ordinary character, are to be paid by the lessees; but with regard to this new rating

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liability imposed upon mines by the Rating Act, there can be no duty upon lessees to pay the whole of the new rates, unless the parties to the lease had previously considered the probable abolition of the existing exemption, and specifically provided for meeting it when it might take place. In other cases, where the parties have made no specific contract for such a contingency, half of the new rates must be paid by the lessor, and half by the lessee. In order to escape this liability on the lessor's part to share these rates, there must be expressed in the contract a reference to this particular extension of the application of poor rates, or to the prospect thereof. In this lease no specific contract was made to pay these rates in the event of the abolition of the then existing exemption, therefore I think the statute has bound our hands, and the plaintiff cannot recover in this action.

LUSH, J.—I am of the same opinion, and I also think that the Act entitles a tenant to deduct half his payments under this new legislation, unless there has been an express and a specific provision for this particular possible rateability in his lease.

Judgment for defendants.

Solicitors for both parties, Currey, Holland and Currey.

COMMON PLEAS DIVISION.

Reported by F. B. HUTCHINS, and CYRIL DODD, Esqrs.,
Barristers-at-Law.

Monday, Nov. 6, 1876.

ELLIS v. THE MANCHESTER CARRIAGE COMPANY
(LIMITED)

Ancient lights—Sale of adjacent land—Right of purchaser to build.

Where the owner of a house has sold a piece of adjacent land without reserving right to lights he cannot maintain an action for obstructing his ancient lights by building on the land.

Proof that the land so built on was a public street would not enable the owner of the house to maintain such an action.

THIS was an action for damage to the plaintiff's reversion by obstruction to lights. The plaintiff had a reversionary interest in certain houses and shops in Rochdale-road, Manchester, which had been built more than twenty years before the plaintiff purchased the property. Afterwards, about the year 1869, the plaintiff bought some other houses and land in Emmet-street, near the property which he had previously purchased. In 1870 the plaintiff sold the Emmet-street property, which, after certain mesne assignments, was subsequently purchased by the defendants. In the conveyance by which the plaintiff sold the Emmet-street property, there was no reservation of rights of light. The defendants knocked down the houses on the Emmet-street property, and built stables on their site. The stables covered more ground than the cottages, and came nearer to the back windows of the plaintiff's houses in Rochdale-road, and darkened the plaintiff's lights. The case was tried at the Manchester Summer Assizes, 1876, before Mr. Ambrose, Q.C., sitting as commissioner, who ruled that the plaintiff had made out no case in point of law, and directed the verdict to be entered for the defendants. Leave was given to the plaintiff to move to have the damages to which he should be entitled assessed

by an arbitrator, if the court should hold that the learned commissioner was wrong in ruling that no case was made out.

Jordan moved accordingly.—The ruling was wrong, and the plaintiff is entitled to maintain this action. The houses in Rochdale-road having been built for more than twenty years, the plaintiff had acquired an indefeasible right to light as against the occupier of the Emmet-street property; and the fact that the two properties had at one time been held by the plaintiff would make no difference: (*Freuen v. Phillips*, 11 C. B., N. S., 449.) The main point relied on for the defendants was that in the conveyance by which the plaintiff sold the Emmet-street property no rights of light were reserved, and therefore according to the case of *White v. Bass* (7 H. & N. 722; 31 L. J. 283, Ex.), the plaintiff had no right to light as against the defendants; but that case is distinguishable from the present, for there the ownership had never been severed before the granting of the lease, and no easement had been acquired. [DENMAN, J., referred to the note to Gale on Easements, p. 104, 5th edit., where the judgment of Channell, B., in *White v. Bass* (*ubi sup.*) and *Curriers' Company v. Corbett* (2 Dr. & Sm. 355) are cited.] Those cases are distinguishable, for here the plaintiff was prepared to prove that part of the land built on by the defendants was part of a public street, and no person would have any right to build on a public street, and therefore it was unnecessary for the plaintiff to insert any stipulation against so building in his conveyance. In *Curriers' Company v. Corbett* (*ubi sup.*) the land built on was not part of a public street.

GROVE, J.—I am of opinion that there ought to be no rule. We are bound by the decision in the *Curriers' Company v. Corbett* (*ubi sup.*), which is absolutely on all fours with the present case, as Mr. Jordan admits, unless the present case could be distinguished if the ground built on was a public street; and there are other cases to much the same effect, which show that where a person sells land without reserve he sells it for all purposes. It is alleged here that the land built on was a public street, but of that fact there is no evidence. If the action had been one for impeding the plaintiff in the use of the street, evidence that it was a public street might have been important; but here the action was for building so as to impede the plaintiff's lights, and therefore it was immaterial whether the land was a street or not. The defendants could not be expected to be prepared to meet such evidence, and it might be that the street had been abolished. Here the person from whom the defendants purchased the land had a perfect right to sell it, and when he sold it to the defendants they bought it with the right to build on it. There will be no rule.

DENMAN, J.—I am of the same opinion. In *Tenant v. Goldwin* (2 Lord Raym. 1093) Lord Holt, C.J., said, "If indeed the builder of the house sells the house with the lights and appurtenances, he cannot build upon the remainder of the ground so near as to stop the lights of the house; and as he cannot do it, so neither can his vendee. But if he had sold the vacant piece of ground and kept the house, without reserving the benefit of the lights, the vendee might build against his house." No doubt this is not a decision, but it is the dictum of a very learned judge; and in *White*

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v. *Bass* (*ubi sup.*), to which case Mr. Jordan very fairly called our attention, Channell, B., adopts the words of Lord Holt to which I have referred, and the case was so decided. *The Curriers' Company v. Corbett* (*ubi sup.*) is to the same effect, and the weight of authority is very strong against the proposition contended for on behalf of the plaintiff. Mr. Jordan says that the cases to which I have referred do not apply here, because he was in a condition to prove that the land on which the defendants built was part of a public road; but there was no issue as to that; it was a simple case of persons building on land which they had bought without any rights being reserved. If it were a public road I do not say how the case might stand as to the defendants' liability to an action for building on the road, but that case is not before us.

Rule refused.

Solicitors for plaintiff, *Chester, Urquhart, and Co.*, for *M'Ewen*, Manchester.

Friday Nov. 17, 1876.

HARRISON (app.) v. CARTER (resp.).

Parliamentary franchise—Receipt of alms—Disqualification—2 Will. 4, c. 45, s. 36.

By 2 Will. 4, c. 45, s. 36, no person can be registered as a voter who within a year before 31st July has "received parochial relief or other alms, which by the law of parliament now disqualify from voting."

Property was devised to trustees for charitable purposes, the overplus of the rents to be "distributed to the poorest inhabitants . . . as my said trustees . . . shall think fit."

The overplus was distributed yearly in small sums according to the discretion of the trustees.

Held, on a case stated by a revising barrister, that persons who had received a grant from this charity were disqualified.

APPEAL from the decision of a revising barrister. The following case was stated for the opinion of the court:

The Borough of Petersfield in the County of Hants.

1. At the court for the revision of the parliamentary list of voters for the above borough, held by me, the revising barrister, this 22nd Sept. 1876, one John Cook, of Weston, in the parish of Buriton, in the said borough, who was on the list of voters as an inhabitant householder in the said parish of Buriton, was duly objected to as not being qualified, inasmuch as it was alleged he had within twelve months next previous to the last day of July in the present year, received alms, which, by the law of Parliament, disqualified him from voting in the election of a member to serve in Parliament. The facts upon which this objection was founded and proved before me are the following.

2. In the year 1864, one John Goodger, by his will, left certain funds for charitable purposes.

The only portion of such will necessary for the consideration of this case is as follows:

I give and devise unto my honoured friend Leonard Bilson, Esquire, and my nephew Edmund Yalden, in the county of Surrey, clerk, and to his heirs and assigns for ever, all my messuage dwelling house, together with all the barns, stables, outhouses, and buildings, and all the gardens and orchard thereunto belonging, situate in Weston aforesaid, called Halfpenny Land, now in the possession of Thomas Jacques, together with the free

liberty to water and overflow, the said lands as it is now and heretofore hath been used for the best improvement thereof, to the intent and purpose that they the said Leonard Bilson and Edmund Yalden, and the survivor of them, their heirs and assigns, shall grant and convey all the said messuage lands and premises, with the appurtenances, unto six, able honest, and sufficient persons, their heirs and assigns, as they or the survivor of them shall think fit, upon trust and confidence, and to the intent and purpose that all the yearly rents, issues, and profits of the said messuage land and premises shall be employed and disposed of for ever hereafter for the putting forth and placing abroad of all such poor children of the tything of Weston aforesaid, and the overplus thereof shall be distributed unto the poorest inhabitants of the said tything of Weston aforesaid as my said trustees and their assigns shall think fit.

3. The overplus, after making payments for education, apprenticeship fees, and sundry expenses generally amounts to about 40*l.*, which sum is distributed once in each year (generally in the spring) by the trustees amongst about eighty of the labouring population of the Tything of Weston, in the said parish of Buriton, according to their discretion in sums varying from 2*s.* 6*d.* to 12*s.* 6*d.*, according to the necessities of the recipient and the number of his family.

4. Personal application is not made to the trustees, who make inquiry by themselves or their agent into the circumstances of the inhabitants of the Tything of Weston, and they decide who are fitting persons to receive, and who shall receive a grant from the charity, and of what amount that grant shall be.

5. The money was distributed on the 10th Jan. in the present year, and the said John Cook then received 12*s.* 6*d.*, the largest sum granted.

6. The said John Cook, who is an agricultural labourer, is a married man with five children, and has from time to time applied for and received parochial relief. He was omitted from the list of voters for the year 1874-75 on the ground of the receipt of parochial relief, but he received no such relief in the electoral year which expired on the 31st July last.

7. That previously to the passing of the Reform Act of 1867 the said John Cook was not entitled to exercise the Parliamentary franchise, the house which he then occupied and now occupies being of insufficient value to confer a qualification under the Reform Act of 1832, and he being not otherwise qualified.

8. The said John Cook was a proper recipient of the charity.

9. The court is to be at liberty to draw inferences of fact.

10. Upon objection taken that this was a receipt of alms, which incapacitated the said John Cook, I decided it was not such a receipt, and I refused to expunge the name of the said John Cook from the said list of voters, and his name was accordingly retained thereon.

11. The question for the consideration of the court is whether or not I did right in retaining the name of the said John Cook on the said list of voters.

There was a similar appeal in the case of Edmund Port, the facts were substantially identical with those in Cook's case, with the exception that Port had never actually received parochial relief; he had applied for it on one occasion but his application had been refused. The two cases were argued together.

Arbuthnot, for the appellant.—The decision of

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the revising barrister was wrong, and the names of these two persons ought to be struck off the register, for they are disqualified by 2 Will. 4, c. 45, s. 36, by which no person is entitled to be registered in any year who, within twelve calendar months before 31st July in that year, has "received parochial relief or other alms which by the law of Parliament now disqualify from voting," &c. This question was raised as to this same charity in the case of the Petersfield Election Petition, *Stowe v. Jolliffe* (L. Rep. 9 C. P. 734; 43 L. J. 173, C. P.; 30 L. T. Rep. N. S. 795), but it became unnecessary to decide it. The proper rule as to what are such alms as disqualify is that a distinction is to be made between cases where the recipient has a vested right to the proceeds of the charity, and those where the mode of distribution is dependent on the will of the person distributing. The object of the disqualification is to ensure independence in voters, and a person who receives alms which it is in the discretion of another to give or to withhold is not likely to exercise the franchise independently. [Lord COLERIDGE, C.J.—Some of the cases seem to point to the principle that alms which disqualify are those which can be said to be in aid of the parochial relief.] The cases collected in Rogers on Elections, 12th edit., pp. 213—215, are conflicting. *Smith v. Hall* (33 L. J. 59, C. P.), is distinguishable from the present case, for there the persons whose right to vote was upheld were members of a foundation, and therefore could not be influenced in the exercise of the franchise as the recipients of this charity could. The principle now contended for is supported by the judgments in that case. Here, by the terms of the will, the recipients of the charity were necessarily the most indigent persons in the borough, and therefore the least likely to exercise the right of voting independently.

Anstie, for the respondent.—The true distinction is that alms which form part of or stand in the place of relief from the poor rate disqualify, but alms in the discretion of trustees do not. In *R. v. Mayor of Lichfield* (2 Q. B. 693) where a similar clause disqualified persons who had received "parochial relief or other alms," it was held that the word "parochial" applied to alms as well as to relief. See also *Reg. v. Inhabitants of Halesworth* (3 B. & Ad. 717). The principle contended for on the other side cannot be correct, for parochial relief is given not of grace but as a right to those qualified to receive it, yet the recipients are expressly disqualified. The *Bedford Cases*, *Harpur's Charity* and *Hawes's Charity* (Rogers on Elections 12th edit. 213) are authorities in favour of the respondent, and *Welborn's Charity* (*ibid.*) is distinguishable, because there the alms were distributed by the overseers, and it conflicts with the *Colchester case* (*ibid.*). See also the *Downton case* (*ibid.*). The appellant is attempting to upset the right to vote, and the burden of proof lies on him.

Arbuthnot in reply.—The *Aylesbury case* (Rogers on Elections 213) is in favour of the appellant. *Reg. v. The Mayor of Lichfield* (*ubi sup.*) was decided on a different statute, and is not in point here. [LINDLEY, J. referred to the *Bishop of Hereford v. Adams* (7 Ves. 324)].

Lord COLERIDGE, C.J. (having stated the facts). Now it cannot be disputed that alms have been received; in one of the cases parochial relief had also

been received, but not within a year before the last day of July in the present year, and therefore what we have to try is whether the alms which have been received are alms which by the law of Parliament disqualify from voting in the election of members to serve in Parliament. The law of Parliament means the law with regard to the right to vote, as it was administered by Parliamentary committees until the jurisdiction was transferred to the Court of Common Pleas, and the law as administered by the Court of Common Pleas, and, since the coming into operation of the Judicature Acts, by the Common Pleas Division of the High Court of Justice, on appeals from revising barristers and election petitions. We have to try if we can extract a principle which will govern these cases from the decisions of the Committees of the House of Commons, or from the decisions of the court, but, as has been pointed out in the argument, it is very difficult to extract any satisfactory principle from the decisions of Committees of the House of Commons in these cases. It was suggested from the Bench in the course of the argument that the principle might be that alms would disqualify which were part of the parochial relief or in aid of parochial relief, and that view is to a certain extent supported by some of the cases which have been cited; but after all it does not seem to throw very much light upon the question, for suppose a person were in receipt of a payment, say of ten pounds a year from a charity, without which he would be unable to support himself, in such a case it would be difficult to say that this was not a payment in relief of the rates, for it would enable the recipient to live without receiving parochial relief when otherwise the expense of his maintenance would be on the rates. Very few cases have been decided on this question in the Court of Common Pleas, but we find in *Smith v. Hall* (*ubi sup.*), though the case is not quite in point here, a principle laid down in argument and to a certain extent adopted in the judgment, which throws some light on the present case. That was a case where the persons whose votes were objected to were the brethren of a hospital, and no doubt in one sense they received alms; but the same might also be said in the case of colleges at Oxford and Cambridge, where persons on the foundation receive the benefit of eleemosynary endowments, and it is quite clear that a fellow of a college would not be disqualified from voting at an election for the city or borough, if he possessed a house or in any other way had the necessary property qualification. The principle striven for by Mr. Welsby in arguing that case was that the brethren of the hospital were not disqualified because they were not dependent on the caprice or goodwill of any person for their share of the benefits of the charity, and in giving judgment Erle, C.J., says, "These persons are entitled to vote unless they are disqualified by the 36th section of the Reform Act . . . if we look to the meaning of the enactment in question, I think it will be evident that the reason why the persons there mentioned are disqualified is because it is considered that from being so situated they are likely to be subservient, and not to have that independence which a workman ought and might be expected to have. But I take it that these persons, having a house of their own, and a share in the proceeds of certain lands for

life, would, in all probability, be more independent than many persons who have nothing to subsist on but the profits of their own labour." Williams, J. in his judgment says, "Shepherd, an able and accurate writer, in his work on Elections (2nd edit. p. 5) adopts the very words of Serjeant Heywood. 'A distinction may be made between charities which are of such a nature as to imply that the partaker of them is in a state of indigence and abject dependence, and those which afford no such inference, or from which a contrary one may be drawn.' (Heywood on County Elections, 2nd edit., p. 278). It seems to me impossible to hold that these persons are in a state of indigence or abject dependence, and that we ought not to hold them to be disqualified." Now as far as one can extract the principle of that case it seems that the persons whose right to vote was in question there were held qualified because they were not in a state of indigence and dependence, and it follows that persons who receive alms of such a nature as to show that they are in a state of indigence and dependence ought to be held disqualified. What then is the case here? Both these persons have, on previous occasions, made application for parochial relief, and one of them has received it; in fact, both of them appear to be on the very verge of the necessity of coming to the parish to keep themselves and their children alive; the charity by which they have been relieved is a charity for the benefit of the poorest inhabitants, and the distribution of the relief given is in the discretion of the trustees. It is obvious that this is just such a condition of things as the provisions of the Act were meant to apply to, for such a charity as this is capable of being misapplied in the very mode in which parliament thought that charitable relief might be misapplied unless the disqualification were established. Although there is no ground for suggesting that anything of the sort is the case here, still it is obvious that such a charity as this might be used for purposes which neither Parliament nor this court would sanction. I think, therefore, that these persons do come within the disqualifying provisions, and ought not to have votes. It may be that in Chancery the word "poorest" in this will would be construed as "poor" was in the *Bishop of Hereford v. Adams* (*ubi sup.*), but, however this may be, looking at the words of the statute it seems that these persons have been in the receipt of such alms as in the opinion of Parliament would have disqualified the recipients from voting at the time when the Reform Act was passed. The decision of the revising barrister will, therefore, be reversed.

LINDLEY, J.—I am of the same opinion. It is found in the case that these persons possessed the qualification necessary to entitle them to vote, subject to the question whether they were disqualified from having received a payment of 12s. 6d. under the circumstances stated. It turns on the construction of 2 Will. 4, c. 45, s. 36, and the question is, did they receive parochial relief or other alms which would disqualify them? It is found that they have not received parochial relief within a year, and therefore the question is whether they have received "other alms" within the meaning of the section. Suppose the section had stopped at the word "alms," it would then have been necessary that the alms should have been *ejusdem generis* with parochial relief, which

would be alms given by reason of the poverty of the recipient, and would include these alms which are expressly directed to be given to the "poorest" inhabitants. But the section does not stop there. It goes on, "which by the law of Parliament now disqualify from voting in the election of members to serve in Parliament." We must therefore find out if we can what is meant by such "other alms," and there is the difficulty, for it is not easy to see what the principle was on which the Committees of the House of Commons acted in deciding on this section. We must assume that there was a principle, and try to extract it, but it is not easy to do so, for in the reports of the decisions the reasons are not given, and the decisions themselves are contradictory. But there must be some principle underlying the decisions. First, it is said that the question is whether the alms are distributed by the parochial authorities, but I cannot say that it seems to me to be a sound principle to make the nature of the alms depend on the character of the trustees of the charity. Then the other principle is that the question depends on whether the recipient of the alms is likely to be dependent, and so to be easily influenced as to his vote. The case of *Smith v. Hall* shows that poverty alone will not do, if the person is permanently entitled to the benefits which he receives, and is not dependent for them on the caprice or good will of any other person. In such a case as that the mere receipt of alms ceases to be a disqualification. In this case all the evidence goes to show that it is exactly such a state of facts as was pointed at by the Act and the decisions. There is poverty, there is the receipt of alms, and there is the absence of independence, and where these three elements exist I think that the disqualification is made out. Therefore, although the burden of proof lies on those who question the franchise, I am of opinion that the necessity for proving the case is satisfied, and that the decision of the revising barrister must be reversed.

Judgment for the appellant in both cases.

Solicitor for appellant, *Soames*.

Solicitors for respondent, *Rogerson and Ford*.

EXCHEQUER DIVISION.

Reported by H. LEIGH and H. F. DICKENS, Esqrs., Barristers-at-Law.

Tuesday, Nov. 14, 1876.

HOLDEN AND WIFE v. KING.

Assault—Action for aggravated assault on woman—Conviction before justices of same assault in form of common assault—24 & 25 Vict. c. 100 ss. 42, 43, 45—"Same cause."

Upon an information by the plaintiffs before justices, under 24 & 25 Vict. c. 100, s. 42, for unlawfully assaulting and beating the female plaintiff, the defendant was convicted and sentenced to suffer a term of imprisonment and to pay the costs, or in default a further term of imprisonment. The defendant paid the costs and suffered the imprisonment.

In an action for the same assault, in the form of an aggravated assault, as to which jurisdiction is given to the magistrates under sect. 43, Held that the action was a proceeding for "the same cause" as that adjudicated upon by the justices, and was therefore barred by sect. 45.

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ACTION for assault.

Two actions were originally brought, one by the plaintiff Thomas Holden to recover damages for an assault committed on him by the defendant, the other by Thomas Holden and Mary Rebecca his wife to recover damages for an assault committed by the defendant on the said Mary Rebecca Holden, in which action the husband also claimed damages for the loss of his wife's services. The two actions were, however, consolidated.

To the statement of claim in the first action, the defendant, in his statement of defence, raised the following defence:

First, not guilty. Secondly, that after the committing of the said alleged assault, the plaintiff preferred a complaint and charge of the said alleged assault before John Dixon Dyke, Esq., Frederick Luck, Esq., and William Walton, Esq., justices of the peace of the county of Kent, sitting at Sittingbourne, in Kent, having jurisdiction to try the same, and the said justices caused the said defendant to be summoned to answer the said complaint and charge; and thereupon the parties appeared, and the said justices heard and determined the same, and convicted the defendant of the alleged assault, and adjudged that the defendant should pay a fine of 40s., together with a further sum of 48s. 5d. costs, and the defendant thereupon paid the said sum forthwith, and before action.

And in answer to the statement of claim in the second action the defendant also pleaded not guilty, and a similar plea to the second plea pleaded in the first action, terminating with an averment that the justices convicted the defendant of the alleged assault, and adjudged that the defendant should pay the sum of 2l. 18s. 5d. for costs, and further should suffer a term of imprisonment with hard labour for fourteen days, and the defendant before action thereupon paid the said sum of 2l. 18s. 5d., and suffered the said term of imprisonment with hard labour awarded.

On these pleas the plaintiffs joined issue, and replied that the action was not in respect of the same cause as that which was adjudicated upon as therein alleged, on which issue was joined.

At the trial before Cleasby, B., at the Maidstone Spring Assizes, 1876, the following facts were proved:

On the 10th July, 1875, the male plaintiff who had been on strike, was at the Wheatsheaf public-house, at Eastchurch, with his wife, who had in her hand a basket of vegetables. The defendant, who was under the influence of drink, came in, and, pulling some onions and lettuces from Mary Holden's basket, began to tear them to pieces. Upon the husband's expostulating, the defendant knocked him down, and then struck Mary Holden a blow on the head and knocked her down, repeating the blow with great violence when she got up, fracturing her jaw, and causing her other injuries, and knocking her down a second time.

On the Monday following the assault, the plaintiffs applied for summonses against the defendant for unlawfully assaulting and beating the plaintiffs, which summonses were heard on the 16th Aug., when the magistrates, for the assault on the husband, fined the defendant 40s. and 48s. 5d. costs, and for the assault on the wife they passed a sentence on him of fourteen days' imprisonment with hard labour, and further adjudged that he

should pay 2l. 18s. 5d. for costs, or suffer a further term of one month's imprisonment. The money was paid by the defendant, and he likewise suffered his term of imprisonment.

Upon these facts a verdict was entered for the defendant, with leave to the plaintiffs to move to enter a verdict for them for 10l. 10s. for the injury to the wife, and 5l. 5s. for the loss of the wife's services.

The sections of 24 & 25 Vict. c. 100, bearing on the case, are as follows:

Sect. 42. When any persons shall unlawfully assault or beat any other person, two justices of the peace, upon complaint by or on the behalf of the party aggrieved, may hear and determine such offence, and the offender shall, upon conviction thereof before them, at the discretion of the justices, either be committed to the common gaol or house of correction, there to be imprisoned, with or without hard labour, for any term not exceeding two months, or else shall forfeit and pay such fine as shall appear to them to be meet, not exceeding, together with costs (if ordered), the sum of 5l.

Sect. 43. When any person shall be charged before two justices of the peace with an assault and battery upon any male child who-e age shall not exceed fourteen years, or upon any female, either upon the complaint of the party aggrieved or otherwise, the said justices, if the assault or battery is of such an aggravated nature that it cannot in their opinion be sufficiently presented under the provisions hereinbefore contained as to common assault and batteries, may proceed to hear and determine the same in a summary way, and, if the same be proved, may convict the person accused; and every such offender shall be liable to be imprisoned for any period not exceeding six months, or to pay a fine not exceeding 20l.

Sect. 45. If any person against whom any such complaint as in either of the last three preceding sections mentioned shall have been preferred by or on behalf of the party aggrieved, shall have obtained such certificate, or, having been convicted, shall have paid the whole amount adjudged to be paid, or shall have suffered the imprisonment awarded, in every such case he shall be released from all further or other proceedings, civil or criminal, for the same cause.

CLEASBY, B., was the only member of the court present, but by the consent of both the parties the case was argued before him.

Gates, Q.C. and Glyn, now moved accordingly. —It is not disputed that the assault on the husband was adjudicated upon by the magistrates, but that on the wife was not adjudicated upon by them, the plaintiffs are therefore entitled to recover in this action, in respect of the aggravated assault on the wife. In order to avail himself of sect. 45 of 24 & 25 Vict. c. 100, upon which he relies as a defence, the defendant must show that this action is a proceeding "for the same cause" as that adjudicated upon by the magistrates. But he cannot show that; the magistrates merely adjudicated upon the common assault upon the female plaintiff under sect. 42 of that Act, and did not take into consideration the aggravated assault upon her under sect. 43, for which aggravated assault this action is brought. That being so, the case of *Reg. v. Morris* (L. Rep. 1. C. C. R. 90), is directly in point, where it was held that a conviction for assault by justices in petty sessions, at the instance of the person assaulted, and imprisonment consequent thereon, are not either at common law or under the 24 & 25 Vict. c. 100, s. 45, a bar to an indictment for manslaughter of the person assaulted, should he subsequently die from the effects of the assault.

Henry F. Dickens, for the defendant.—The argument of the plaintiff simply amounts to this, that if A. gives B. three blows on the head, B. is

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entitled to get A. convicted before the magistrates of two, and to bring an action for the third. The clear intention of sect. 45 of 24 & 25 Vict. c. 100 is to release the defendant from all further proceedings civil or criminal for the same assault for which he has been fined and imprisoned. In the case of *Masper and Wife v. Brown* (L. Rep. 1 C. P. Div. 97) which is absolutely on all fours with the present, it was held that the words "for the same cause" must be taken to mean "for the same assault." The point here then is, Is the assault on this female plaintiff, for which this action is brought, the same assault on her as that adjudicated upon by the magistrates? It undoubtedly is. The information before the magistrates was for a common assault upon her under sect. 42; but by sect. 43 the magistrates have power upon the summons for a common assault, if they find that the assault is of an aggravated nature upon a woman, to levy a heavier fine or impose a longer term of imprisonment. A special summons for an aggravated assault is not necessary. The true construction of sects. 42 and 43 is that upon a summons under sect. 42 they can adjudicate upon one under sect. 43. And they have done so here, for in the summons for the assault on the husband the defendant was only fined, in the summons for the assault upon the wife he was not fined but imprisoned. The case of *Reg. v. Morris* is altogether distinguishable. He also cited:

Wemyss v. Hopkins, 33 L. T. Rep. N. S. 9; L. Rep. 10 Q. B. 378; 44 L. J. 130, Q. B.;

Bradshaw v. Voughton, 3 L. T. Rep. N. S. 373; 30 L. J. 93, C. P.

CLEASBY, B.—If I had entertained any doubt in this case, I should have preferred to have had the case argued again before two judges, but as I feel no doubt whatever, and as the parties consented that the motion should be heard before me, I have no hesitation in giving my decision. There were originally two actions which were consolidated, but with respect to the assault on the husband the plaintiffs' counsel does not deny that that assault was adjudicated upon by the magistrates, and that with respect to that the plaintiffs cannot recover. The whole question is whether the assault on the wife has been adjudicated upon. The action by the husband and wife is for an assault committed by the defendant upon the wife, and the defence set up by him is, that the case was brought before the magistrates under 24 & 25 Vict. c. 100, s. 42, that he was imprisoned for this very assault, and that sect. 45 of that Act releases him from all further proceedings, civil or criminal. But in order that he can avail himself of that defence, he must show that this action is "for the same cause" for which he has been adjudged to be imprisoned. Has he then been adjudged to be imprisoned "for the same cause?" Now if there were one proceeding for a common assault, and another for an aggravated assault, I should have thought that the magistrates in this case could not be said to have adjudicated upon the aggravated assault, and that though to some extent the defendant suffered for the same cause, he would not have been said to have been convicted "for the same cause," but only for the common assaults and battery. But I cannot come to that conclusion. Sect. 42 gives power to the magistrates to impose a fine not exceeding 5*l.*, or a term of imprisonment not exceeding two months, on any

person who shall unlawfully assault and beat any other person. Then sect. 43 provides that "when any person shall be charged before two justices of the peace with an assault and battery upon any male child whose age shall not exceed fourteen years, or upon any female, either upon the complaint of the party aggrieved or otherwise, the said justices, if the assault and battery is of such an aggravated nature that it cannot in their opinion be sufficiently punished under the provisions hereinbefore contained as to common assault and batteries, may proceed to hear and determine the same in a summary way, and if the same be proved, may convict the person accused, and every such offender shall be liable to be imprisoned for any period not exceeding six months, or to pay a fine not exceeding 20*l.*" The language of that section satisfies me that the information laid is for an assault and battery, and then if it appears that it is an assault and battery on a female of an aggravated nature, the magistrates may deal with it by inflicting a heavier punishment than they could inflict under sect. 42. It seems to me, therefore, to follow that the proper way of proceeding is to lay the information for an assault and battery, and then it is for the magistrates to deal with the case under sect. 42, or if they think fit under sect. 43. That is a matter for their consideration. It does not follow in the slightest degree that because they have not gone to the full extent of the powers given them by sect. 43, that they never took the aggravated assault into consideration at all. Indeed, the fact is that they adjudged the defendant to pay a fine for the assault on the husband, and for the assault on the wife they adjudged him to pay the costs and to be imprisoned. Quite independently of authority, therefore, I think upon the proper construction of sects. 42 and 43, that the magistrates have dealt with the assault upon the female plaintiff, and that there can therefore be no further proceeding. With regard to the authorities, I think the case of *Masper v. Brown*, referred to by the learned counsel for the defendant, is in point, and I can see no distinction between that case and the present. The other cases cited in the course of the argument have, I think, no reference to the case before me.

Motion refused.

Solicitors for plaintiff, *Henry Pook and Son.*

Solicitor for defendant, *Thomas Sisney*, for *John Copland*, Sheerness.

DIVISIONAL COURT FOR APPEALS FROM INFERIOR COURTS.

Reported by M. W. McKELLAR, J. M. LELY, B. H. ANPLETT,
and A. H. FOSBER, Esqrs., Barristers-at-Law.

May 18 and 19, 1876.

(Before CLEASBY, B., GROVE and FIELD, JJ.)

THE WAKEFIELD LOCAL BOARD OF HEALTH (apps.)
v. LEE AND ANOTHER (resps.).

Public Health Act 1848 (11 & 12 Vict. c. 63), s. 69
—Premises "fronting, adjoining, or abutting
upon" street.

By 11 & 12 Vict. c. 63, s. 69, local boards of health may, by notice in writing, require owners or occupiers of premises fronting, adjoining, or abutting a street (not being a highway) to sewer, level, &c. such street within a time to be specified in such notice, and in case of default may themselves execute the works, and recover the expenses in-

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curred in ten days in a summary manner from the owners according to the frontage of the premises, and in such proportion as shall be settled by the surveyor, or, in case of dispute, by arbitration.

The respondents were owners of premises divided by a narrow stream from a street which had been sewered, &c., under the provisions of the above-mentioned section. The respondents' premises communicated with the street by means of two bridges, one of which belonged to them. The respondents had gates on their own premises, by which they were enabled effectually to close all communication between their premises and the street.

Held, on the above facts, that the respondents' premises fell within the provisions of 11 & 12 Vict. c. 63, s. 69; per Field and Grove, JJ., because they fronted and abutted upon the street; per Cleasby, B. (with considerable doubt), because they adjoined the street.

CASE stated by justices of the peace for the borough of Wakefield, under 20 & 21 Vict. c. 63.

At a petty session holden on the 10th March 1875, a complaint was preferred by the appellants under the Public Health Act 1848, s. 69 (a), charging that prior to and on the 3rd April 1872, and thenceforward until after the service of the notice next mentioned, a street called Dyehouse-lane, situate within the district of the appellants' parish (not being a highway within the meaning of the statutes in that behalf), was not sewered, levelled, paved, flagged, and channelled to the satisfaction of the said board, whereupon the said board did, on the 15th Nov. 1872, by written notice in the form or to the effect provided by the statutes in that behalf, and dated the 3rd April 1872, to the respective owners and occupiers of the premises fronting, adjoining, and abutting upon such part of the same street as required to be sewered, levelled, paved, flagged, and channelled, require the said owners to sewer, level, pave, flag, and channel the said street within six weeks from the service of the said notice in manner in the said notice described; that the said notice was not complied with as by law required; and therefore the said board thought fit to execute, and did thereafter execute the works mentioned and referred to therein; that the proportion of the expenses incurred by the said board in so executing the said works to be paid by the respective owners of premises so fronting, adjoining, and abutting as

(a) By 11 & 12 Vict. c. 63, s. 69, it is provided as follows: "In case any present or future street, or any part thereof (not being a highway), be not sewered, levelled, paved, flagged, and channelled, to the satisfaction of the local board of health, such board may, by notice in writing to the respective owners or occupiers of the premises fronting, adjoining, or abutting upon such parts thereof as may require to be sewered, levelled, paved, flagged, or channelled, require them to sewer, level, pave, flag, or channel the same within a time to be specified in such notice; and if such notice be not complied with, the said local board may, if they shall think fit, execute the works mentioned or referred to therein, and the expenses incurred by them in so doing shall be paid by the owners in default, according to the frontage of their respective premises, and in such proportion as shall be settled by the surveyor, or, in case of dispute, as shall be settled by arbitration (having regard to all the circumstances of the case), in the manner provided by this Act; and such expenses may be recovered from the last mentioned owners in a summary manner, or the same may be declared by order of the said local board to be private improvement expenses, and be recoverable as such in the manner hereinafter provided."

aforsaid, according to the frontage of their respective premises, were afterwards, to wit, on the 27th April 1874, duly settled by the surveyor of the said board, having regard to all the circumstances of the case, and pursuant to the statutes on that behalf; that notice of the amount of the said proportion so settled by the said surveyor was, in accordance with the statutes in that behalf, given more than three calendar months before the 3rd Feb. 1875, being the day of complaint, namely, on or about the 9th June 1874, duly given to all the said owners, and the respective proportions of the said expenses to be paid by the said owners respectively, had theretofore and more than three calendar months before the date of the complaint been duly demanded of all the said owners; but that the respondents, two of the said owners within the meaning of the statute in that behalf made, had not paid, but had refused to pay, that proportion of the expenses so due from them as aforsaid, amounting to the sum of 145*l.* 13*s.* 5*d.*, nor had paid, but had refused to pay, the interest in respect of the said sum by law payable by them to the said board, and had not within the time limited by the statute in that behalf, and in manner thereby described, disputed the same; and that there was, therefore, then due from them to the said board, in respect of the premises, the said sum of 145*l.* 13*s.* 5*d.*, and the further sum of 4*l.* 14*s.* 4*d.* for interest on the said first-mentioned sum, pursuant to the statute in that behalf, making together the sum of 150*l.* 7*s.* 9*d.*, for the recovery of which last-mentioned sum these proceedings were taken.

At the hearing the respondents' solicitor admitted the regularity of the preliminary proceedings taken by the board, and that Dyehouse-lane was a street repairable by the owners adjoining or abutting thereupon.

The street called Dyehouse-lane was situate within the appellants' district, and on the east side of the stream called the River Chald or Ings Beck, which divided the townships of Wakefield and Alverthorpe-with-Thornes, and also divided the premises of which the respondents were owners from Dyehouse-lane. There were two communications with the respondents' premises out of Dyehouse-lane and over the beck by means of two bridges. One of these bridges was made of brick arched over the beck, and might be used by horses, carts, and other carriages, and by foot passengers. The other bridge was a wooden foot bridge, and could only be used by foot passengers. The respondents had gates on their own premises, by means of which they could at their own will and pleasure effectually close all communication between their premises and Dyehouse-lane, and these gates were the only obstructions to the free ingress and egress over the bridges to and from the respondents' premises; but it was stated by one of the respondents that he had known only one cart go over the brick bridge within the last ten years. These bridges had directly communicated between the respondents' premises and Dyehouse-lane for a great number of years, but there was no evidence adduced showing by whom they were erected. It was proved that they had been in existence for fifty years or upwards, and it was also proved that the wooden foot bridge was removed by the respondents at their own cost from its original position some seven or eight

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years ago, and that it still communicated between their premises and Dyehouse-lane. It was not proved by whom either of the said bridges had been repaired, or that they had ever been repaired by the respondents, except so far as the wooden foot bridge was altered and repaired by them on its removal as aforesaid.

The appellants admitted that they had cleansed or paid for the cleansing of the stream called Chald or Ings Beck up to the middle thereof co-extensive with their premises. The respondents proved that the principal entrance used to their premises was from the street called Westgate, in Wakefield, and not from either of the bridges.

The appellants contended, through their counsel, that the Chalk or Ings Beck was a fence bounding the respondent's property, and that as the respondents had two communications from Dyehouse-lane over the beck by means of an arched bridge for carts as well as foot passengers, and a wooden bridge for foot passengers, their premises fronted, adjoined, or abutted upon Dyehouse-lane in respect of the whole of the frontage of their premises co-extensive with the stream called Chald or Ings Beck.

The respondents contended, through their solicitor, that no part of their property fronted, adjoined, or abutted upon Dyehouse-lane, and produced a conveyance, dated 11th July 1845, of the land and premises in respect of which the present claim was made, upon which conveyance was indorsed a plan of the premises purporting to be thereby granted. According to this plan, the land of the respondents extended only as far as the bank of the stream next their property. They further contended that no part of the stream called Chald or Ings Beck, or the two bridges crossing over it, formed part of the premises in the said conveyance mentioned; that as the principal entrance to their premises was from the street called Westgate, they could not be owners of premises fronting, adjoining, or abutting upon Dyehouse-lane within the meaning of the Act; that the centre of the stream formed the boundary between the township of Wakefield and the township of Alverthorpe-with-Thornes; and that, supposing the respondents had any right to the stream, it would only be as an easement to the centre thereof in the township of Wakefield, and that the other half of the said stream would therefore front, adjoin, and abut upon Dyehouse-lane in the township of Alverthorpe-with-Thornes; that the respondents could not maintain an action for damages done to the bridge crossing the stream, and that under the circumstances they could not be held liable to pay any proportion of the cost of repairing Dyehouse-lane, it being divided from their premises by the stream as before mentioned. The appellants' counsel argued in reply that, if the respondents were owners up to the middle of the stream, it was quite clear they were owners up to the street, for the other half of the stream, from the centre thereof, was portion of the street, and therefore the respondents' premises fronted, adjoined, and abutted upon Dyehouse-lane. We were of opinion that the respondents under the circumstances, were not liable, and accordingly dismissed the complaint, but consented to state a case. The question of law is whether the respondents were liable to pay to the appellants a portion of the cost of sewerage, levelling, paving, flagging, and channelling Dyehouse-lane.

John Forbes, for the appellants.

Tennant, for the respondents.

The following cases were cited and referred to:

School Board of London v. Vestry of St. Mary, Islington, L. Rep. 1 Q. B. Div. 65; 45 L. J. 1, M. C.; 33 L. T. Rep. N. S. 504;
Baddely v. Gingell, 1 Ex. 319; 17 L. J. 63, Ex.;
Reg. v. Newport Local Board of Health, 3 B. & S. 341; 32 L. J. 97, M. C.;
Mayor, &c., of Manchester v. Chapman, 37 L. J. 173, M. C.; 18 L. T. Rep. N. S. 640;
Oldaker v. Hunt, 6 D. M. & G. 376; 1 Jur. N. S. 785;
Plumstead Board of Works v. British Land Company, L. Rep. 10, Q. B. 203; 44 L. J. 38, Q. B.; 32 L. T. Rep. N. S. 91.

Cur. adv. vult.

May 19.—**CLEASBY, B.**—The question here is, whether the premises of the respondent have been brought within the provisions of the 69th section of the Public Health Act 1848, and whether they can be said to be "fronting, adjoining, or abutting upon" Dyehouse-lane. The facts are shortly as follows: Between the respondents' premises and the lane there is a narrow stream. It seems clear that the whole of the bed of this stream does not belong to the respondents, and the evidence before us tends to show that their boundary was the edge of the bank next their land. Two bridges form the means of communication between the respondents' premises and the street; one of them is of brick, but it was not clearly proved to whom it belonged; it had been only once crossed by a cart during ten years. Besides that there was a wooden bridge, and it appeared to belong to the respondents, for they had removed it, and had exercised such rights relating to it as they thought proper. The respondents could, for all practical purposes, prevent anyone from using the bridge without their consent. We have now to consider whether, upon these facts, the respondents are liable to pay the amount claimed from them. I do not think the Legislature intended the words used in the 69th section to have the same meaning. One of the words which the statute uses is the word "abutting," and in considering whether the respondents' premises "abut" upon Dyehouse-lane, we ought not to forget that the premises in question are on the opposite side of the bridge. I am of opinion that the respondents' premises do not "abut" upon the street, because there is this stream between them, which is not part of the premises, and does not belong to the respondents. I may remark that if the respondents' premises do either front, adjoin, or abut upon a street, the fact that for practical purposes they gain no benefit from their proximity to the lane is unimportant. Owners and occupiers falling within the provisions of the statute are to be assessed according to their frontages, and the argument that those who derive no advantage are not bound to pay is not warranted by the words of the statute: (See *R. v. Newport Local Board of Health* (*ubi sup.*)). There are two other points to be determined, namely, whether the premises "front" or "adjoin" the street. I confess it does not appear to me that upon the facts stated the premises front the street. Then do they "adjoin"? Now, it occurs to me that as the stream between the street and premises is of very small width, it is not using the word in an unreasonable sense to say they adjoin. The question is substantially one of fact, and the answer might be different if the stream could only be crossed by a ferry. On the

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whole I should have felt inclined to abide by the decision of the justices: but as both my learned brothers are of opinion that their judgment was wrong, I do not feel inclined to differ from them. The authorities, with the exception of *R. v. Newport* (*ubi sup.*), throw no light upon the construction of this section; and the decision in *Baddeley v. Gingell* (*ubi sup.*) was upon a different statute, and the question raised was whether certain houses in a yard could be said to be "within a street;" there the property had a frontage in the street, and its side communication was with the street. In the *School Board for London v. Vestry of St. Mary Islington* (*ubi sup.*), the question was whether certain land situated behind a row of houses fronting the street "formed part of a street," and great stress was placed by the learned judges on the fact that the only passage out was by passing to the street. The facts in both these cases are very different to the one now before us, and do not, in my judgment, at all aid us in arriving at a conclusion.

GROVE, J.—I think the appellants are entitled to our judgment. If the questions here were of fact I should be inclined to agree with my brother Cleasby, that we ought not to interfere with the decision of the magistrates; what, however, we have to determine is whether upon the facts as stated the defendants' premises are really "fronting, adjoining, or abutting upon" Dyehouse-lane. I feel considerable doubt whether, save in mathematics, there can be exact definitions of words; they must be construed with reference to the subject matter to which they are applied. The question is whether the respondents' premises can be said to "front, adjoin, or abut" the street known as Dyehouse-lane. Now, it is a fact beyond dispute that between the premises and street was a stream of which the breadth was about fifteen feet. Now, I am inclined to think that if a natural division of this kind existed, without any means of access from the one side to the other, that would have been a sufficient interruption to prevent the premises from being brought within the words of the section. But the case does not stop here. We find that there are two bridges over this stream, one of which apparently was the property of the respondents, and under their control. As regards the other bridge no act of ownership was adduced, though that was also under the respondents' control; and carriages coming over it could only gain access to the premises when the respondents opened their gates. I think the premises may be fairly said to "abut" and "front" the street, even if they cannot be said to "adjoin" it. The authorities cited throw some light on this question. In *Baddeley v. Gingell* (*ubi sup.*) the occupiers of houses situated in a yard were held liable to be rated as being within a street, though they were separated from the street by other buildings. In the *School Board case* (*ubi sup.*) the question was whether certain houses "formed a street," and Cockburn, C.J., in the course of his judgment, said: "It matters not in point of justice of the case that the house, instead of actually fronting the street, stands in the rear of the street if it has its access from the street. It is the benefit of access to the premises which must be supposed to be the foundation of the liability which the Legislature thinks fit to impose." This is an *à fortiori* case in favour of the appellant, since the words "abutting and adjoining" are not

so strong as "forming part of." These premises are in no way fenced off from the street, and I think they clearly front and abut upon Dyehouse-lane, and that the respondents are accordingly liable to pay their proportion of the expenses. I will only add that my brother Field agrees with me in the conclusion I have arrived at.

Judgment for the appellants. Case to be re-mitted to justices.

Solicitors for appellants, *Pitman and Lane*, for *Brown, Wilkin, and Scott*, Wakefield.

Solicitor for respondents, *Badham*, for *J. and J. M. Marsden*, Wakefield.

Thursday, Nov. 16, 1876.

(Before CLEASBY B. and GROVE, J.)

MUSSETT v. BURCH.

Justices' jurisdiction—Bonâ fide claim of right—Navigable non-tidal river—Public right of fishing—24 & 25 Vict. c. 96, s. 24.

The right of the public to fish in a non-tidal river which is made navigable by locks cannot exist in law.

The appellant was convicted under 24 & 25 Vict. c. 96, s. 24 of fishing in water which was private property. The water was part of a navigable river, which was not tidal, and which was navigated by means of locks. At the hearing the appellant set up a public right of fishing, and argued that the jurisdiction of the justices was ousted by such bonâ fide claim of right.

Held, upon a case stated by justices under 20 & 21 Vict. c. 43, that no such right could exist in law, and therefore the jurisdiction of the justices was not ousted.

THIS was a case stated by the justices of Essex, before whom the appellant had been tried on the 15th Jan. 1876, upon an information which charged that he, Thomas Mussett, of Bures St. Mary, in the county of Suffolk, did unlawfully and wilfully, by angling in the day time, take fish in certain water then and there running through certain land belonging to Zachariah Pettitt, the owner of such water, and having a right of fishery therein, contrary to the form, &c.

The above information was laid by George Burch, water bailiff to the Stour Angling Preservation Society.

It further appeared from the case stated that the river referred to, the Stour, is navigable and that it is now used by the Stour Navigation Company by means of locks.

Two or three witnesses deposed that they had fished in the said river for upwards of forty years without interruption.

At the hearing Mussett set up his right to fish in the river as one of the public, and objected that the jurisdiction of the justices was ousted thereby. They nevertheless convicted him, and ordered him to pay a fine of 5s. and costs.

Against this order Mussett now appealed.

Graham, for the appellant.—The information in this case was laid under the 24th section of the Larceny Act, so that a mere *bonâ fide* claim of right is sufficient to oust the jurisdiction of the justices, for there is no proviso in this Act as in 24 & 25 Vict. c. 97, s. 52, as to a fair and reasonable claim: (*White v. Feast*, L. Rep. 7 Q. B. 353.) The question is, then, did the appellant make a *bonâ fide* claim of right? if so, the justices were

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bound to hold their hands: (*Reg. v. Stimpson*, 8 L. T. Rep. N. S. 536; 4 B. & S. 301; *Cornwell v. Sanders*, 7 L. T. Rep. N. S. 356; 3 B. & S. 206; 32 L. J. 6, M. C.) Still, it is impossible to contend that every *bonâ fide* claim of right is sufficient; it must be such a claim as can exist in law: (*Hudson v. McCrea*, 4 B. & S. 585; 9 L. T. Rep. N. S. 678; 33 L. J. 65, M. C.) And that case also decides that no right to fish in a non-navigable river can exist in the public. It is admitted that the public have a right to fish in a tidal river. The third case, of a river which is navigable but not tidal is the one before us, and on that there has been no distinct decision in the English courts. *Reg. v. Burrow* (34 Just. of Peace 53) shows that such a claim may be *bonâ fide* raised in the case of a navigable lake, and that case is subsequent to *Murphy v. Ryan* (Ir. Rep. 2 C. L. 143). The case is one of doubt, and therefore the justices should have stayed their hands. The case states that this is a navigable river. If there is any Act of Parliament with regard to the fishing, it is for the other side to produce it, otherwise this case will not be within *Hargreaves v. Diddams* (32 L. T. Rep. N. S. 600; L. Rep. 10 Q. B. 582).

Croome (Jones with him).—*Reg. v. Stimpson* is not applicable to the present case, for there the right could exist in the public, because the river was tidal, but *Hudson v. McCrea* is in point. In that case the fishing had been uninterrupted for sixty years, but as the river was not navigable it was held that a right to fish could not exist in the public. The decision in *Reg. v. Burrow* does not touch this case at all, as the fishing there was in a lake and not in a river; even if it were in point, it would be distinctly overruled by *Hargreaves v. Diddams* (*ubi sup.*). The river in question in that case was originally not navigable, but it was made so by Act of Parliament and various tolls granted, and there it was held that no right of fishing could exist in the public. Not a single case can be found in which it has been held that the public have such a right in a river which is not tidal.

Graham, in reply.—It is enough for me to show that the justices have decided what is in reality a doubtful case; that being so, *Reg. v. Burrow* is in point, and the jurisdiction of the justices is ousted.

CLEASBY, B.—It appears to me that the question which arises in this case is governed by the decision in *Hargreaves v. Diddams*. The real question is, did a matter of title come before the justices? If it did, they were not entitled to decide it. It is not necessary to ask, was the title established, but did it come in question? Nor is it sufficient that a *bonâ fide* claim should be raised, but it must be of some right which the law allows. We must not ask whether the appellant had the right in question, but whether such a condition of things exists as would enable him reasonably and fairly to claim such a right. Now, it appears to me that the case in the Irish reports (*Murphy v. Ryan*) is decisive on the point before us. It expressly decides that "the public cannot acquire by immemorial usage any right of fishing in a river in which, though it be navigable, the tide does not ebb and flow," and the following passage is there cited from Hale (*De Jure Maris*, p. 12): "That is called an arm of the sea where the sea flows and reflows, and so far only as the sea flows and reflows," and, it proceeds, that "only in such water is there *primâ facie* a right of fishing common to all." If the river in question were not

navigable, *Hudson v. McCrea* would be directly in point to decide that no such right could be raised. Some doubts, however, seem to have been raised with regard to that case by observations made in the case of *Reg. v. Burrow*. But subsequently to that decision we have the judgment in *Hargreaves v. Diddams*, upon which I think we ought to act in this case. Lush, J. there says: "It is true that this part of the river was made navigable to the public on payment of tolls under the Act of Parliament, but that did not affect the ownership of the soil, and none of the incidents attaching to a navigable river up to the flow and reflow of the tide can properly attach here." We must deal in the present case with the facts that appear before us, it already having been decided that where a river is made navigable the right of fishing is private. Now, here the facts are precisely the same, for we have it as a fact that the river is navigated and used by the Stour Navigation Company by means of locks. It appears as a fact that the locks exist, and therefore *primâ facie* the river would not be navigable without such locks, and that the making of such locks does not interfere with private rights of ownership of soil is distinctly decided in *Hargreaves v. Diddams*. The conviction must therefore stand.

GROVE, J.—I am of the same opinion. Mr. Graham has not shown us any case in which the public have been held to have a right of fishing in a river merely because it is navigable or navigated by boats. Can the right to navigate give the right to fish? No case has been made out to satisfy the court that such is the law. My brother Lush's judgment in *Hargreaves v. Diddams* already referred to, seems clearly in point here, and shows that no such right can exist. Again, we have the case *Murphy v. Ryan*, which expressly decides that the public can have no right of fishing in a river which is not tidal. The only case causing any doubt is that of *Reg. v. Burrow*, but that was the case of a lake, not a river, and Mellor, J. appears to base his judgment on the fact that the claim was raised by the occupier of a certain cottage who claimed on the ground of such occupation, and not as one of the general public. Be that as it may, the other cases referred to are too strong to leave any doubt on the question. The claim now set up is one that cannot exist in law, but if that were not so as the claim is so unusual an one that the onus would rest upon the respondent to show that such a right might exist. The locks were probably made within the memory of man, and the defendant ought to have proved that before those locks existed the river was navigable. He has not done so. On these grounds my judgment must be for the respondent.

Conviction affirmed.

Solicitors for appellant: *Walter Moojen and Son*, for *Salmon and Son*, Bury St. Edmunds.

Solicitors for respondent, *Goody and Stock*, for *Smythies, Goody and Sons*, Colchester.

Nov. 11 and 16, 1876.

SNAILBEACH MINE COMPANY (LIMITED) (apps.) v. FORDEN GUARDIANS (resps.).

Rateability of lead mine—Smelting works—Premises out of union—The Rating Act 1874 (37 & 38 Vict. c. 54), s. 7.

The appellants occupy a lead mine held under a lease, which comprises land and works in a

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neighbouring union, the mine and most of the works being in that of the respondents. After the ore is crushed and washed, it is taken by a tramway about half a mile to a smelting house, occupied under the same lease, in the neighbouring union, where the ore is converted into lead for sale. The appellants were rated under the Rating Act 1874, sect. 7, for their mine in the respondents' union at the amount of the whole of the dues payable in respect of the mine under the lease during the previous years. They were separately rated for part of the tramway to, and a chimney from, the smelting house, which were situated in the respondents' union; and were also rated by the neighbouring union for the land, works, and smelting house there situated.

Held, that all these crushing, washing and smelting works were included under the definition in sect. 7, as in connection with and for the purposes of the mine; and that a deduction should be made from the gross dues in respect of the rateable premises out of the union, in order to obtain the rateable value of the mine in the respondents' union.

This was a special case stated for the opinion of the court on an appeal against an assessment and supplemental assessment, and a rate in conformity with such assessments made for relief of the poor in the parish of Worthen, in the county of Salop, and in the Forden Union, on the appellants, as occupiers of a lead mine called the Snailbeach Mine, and of certain lands, buildings, machinery, and tramways connected therewith or adjacent thereto.

The said rate was made in conformity with the valuation lists as hereinafter mentioned, which were duly objected to before the assessment committee, who declined to interfere. All notices necessary for appeal to the quarter sessions were duly given by the appellants, the appeal was duly entered and respited, and by the consent of the parties and an order of Master Unthank, dated 20th Jan. 1876, the following case was stated under 12 & 13 Vict. c. 45, s. 11, for the opinion of the court:

1. The Forden union comprises, with others, the parish of Worthen, which adjoins the township of Minsterley, in the parish of Westbury, in the same county, but which township of Minsterley is comprised in the Atcham union.

The appellants occupy the Snailbeach mine as lessees under two several leases, one from the Earl of Tankerville, dated the 25th March 1858, and the other from the Marquis of Bath, dated 1st Nov. 1874. The whole of the lands comprised in the said lease from the Earl of Tankerville are situate in the parish of Worthen aforesaid, but the said lease from the Marquis of Bath comprises lands and works part of which are in the parish of Worthen aforesaid, and part in Minsterley township aforesaid.

3. The particular parts of the underground workings from which ores are at this moment actually obtained are wholly situate in the parish of Worthen, some of them being comprised in the lease from the Earl of Tankerville, and the residue in the lease from the Marquis of Bath.

4. The underground works are connected with the surface by two vertical shafts, worked by means of two steam engines, one of which is used for lifting the ore and spar in which it is found embedded, and the other for pumping the water from the underground workings.

5. The mixed spar and ore when so raised from the underground workings is conveyed to a landing stage situate about 20 yards from the top of the shaft (which is on the hill side), and thence conveyed to the surface in waggons through a horizontal level or tunnel about 154 yards in length to an outlet, also in the parish of Worthen. The spar and ore is then dealt with by the appellants in manner hereinafter described.

6. The steam engines, shafts, tunnel, and outlets therefrom respectively, are situated in the parish of Worthen, and within the land comprised in the lease from the Marquis of Bath.

7. The spar and ore, when brought to the outlet, is conveyed a distance of about 30 yards, by a tramway, to a tip, where the blocks of spar are deposited on a floor. By the operation of tipping a certain amount of breakage results, and some small ore is separated from the mass.

8. The unbroken masses are then conveyed a few yards, by wheelbarrows, across the parish boundary, to a crushing house, situated in the township of Minsterley, and where, by the operation of crushing, the ore is made separable from the spar in which it had been embedded. This crushing is effected by passing the material between iron rollers or wheels worked by steam. It is then taken, together with the small ore, to washing floors, which are situate entirely within the township of Minsterley, in the Atcham union, and by the process of washing the ore is separated from the spar, and so rendered fit for smelting. The ore in point of fact sinks to the bottom, as being the heavier, and the lighter spar is washed away.

9. The great bulk of the ore, when washed, is shot into a receptacle beneath the washing floor by means of a tunnel about 50 yards long; it is conveyed to the "ore bin," also in Minsterley parish, where it is weighed; the water from the washing floors, which still contains minute particles of crushed ore is passed through two pits, by which process the dust ore is precipitated and collected, and is afterwards conveyed to the ore bin.

10. After the ore is weighed it is taken by tramway to a smelting house, which is situated in the township of Minsterley, at a distance of about five-eighths of a mile from the bin. The ore is then smelted, whereby it is converted into lead for sale.

11. The whole of the tramway, from the outlet of the mine to the tip, is in Worthen parish, in land comprised in the lease from the Marquis of Bath; part of the floor on which the ore is deposited by the tip is in Worthen parish, in land comprised in the lease from the Marquis of Bath, and part in Minsterley township.

12. The crushing house, the washing floors (three in number), and all the works necessary for the subsequent operations, except portions of the tramway to the smelting house and of the flue of the chimney hereinafter described) are in Minsterley township.

13. The tramway, in its course to the smelting house, enters Worthen parish and traverses it for about a distance of 220 yards through lands comprised in the lease of the Marquis of Bath, when it recrosses the parish boundary into Minsterley township, and during the remainder of its course to the smelting house is situate in Minsterley township.

14. A straight underground flue passes from

the smelting house, in the first place, about 748 yards through land in Minsterley township, and then about 484 yards through land in Worthen parish, and comprised in the said lease from the Marquis of Bath, and terminates by a chimney, which is also situate in that parish and in land comprised in that lease.

The flue and chimney are used for the purpose of collecting the small particles of lead which are carried away out of the smelting furnace by the heated air and smoke, and gradually deposited on the sides of the flue, from whence they are removed periodically; and such small particles of lead, when so collected, form what is commercially known as "flue dust."

15. All the works, buildings, and tramways described as in Minsterley township, in Atcham Union, are comprised in the lease from the Marquis of Bath.

16. All the surface works are situated on land comprised in the lease from the Marquis of Bath.

17. The leases under which the mine is occupied are each of them granted without fine on a reservation wholly of dues within the meaning of the Rating Act 1874; the leases were made part of the case.

18. The persons respectively receiving the dues under the leases are not liable for repairs, insurance, or other expenses necessary to maintain the mine in a state to command the annual amount of dues within the meaning of the Rating Act 1874.

19. The amount of the whole of the dues payable in respect of the mine, under the said leases, during the year 1874, was, under the lease from the Marquis of Bath, 3143*l.*, and under that from the Earl of Tankerville, 659*l.*

20. In July 1875, on behalf of the Forden Union, a substantial valuation list was duly deposited, in which the said mine was assessed as follows:—

No. 609. Occupier, Snailbeach Mining Company (Limited); owner, the Marquis of Bath; description, lead mine; situation, Snailbeach; gross estimated rental, 3143*l.*; Rateable value, 3143*l.*; former amounts—gross 587*l.*, rateable value 440*l.*

No. 610. Occupier, Snailbeach Mining Company (Limited); owner, the Earl of Tankerville; description, lead mine; situation, Snailbeach and Lordeshill; gross estimated rental, 659*l.*; rateable value, 659*l.*; former amounts—gross 15*l.*, rateable value 12*l.* 10*s.*

The former amounts are those at which the surface works in connection with the said mine were assessed prior to the Rating Act 1874.

21. A supplemental valuation list was afterwards duly deposited on behalf of the said Forden Union, of which the following is a copy:—

Occupier, the Snailbeach Mining Company; owner, the Marquis of Bath; description, tramway from ore bin to smelting house, tunnel or flue from smelting house to chimney; chimney; situation, Snailbeach; gross estimated rental, 120*l.*; rateable value, 96*l.*

The amount of the gross and rateable value therein stated is correct, if the property described is separately rateable.

22. The "tramway" described in the last mentioned valuation list is part of the tramway from the ore bin to the smelting house described in the 13th paragraph hereof.

23. The "tunnel or flue from smelting house to chimney" is so much of the tunnel or flue described in the 14th paragraph hereof as is situate within Worthen parish. The chimney is that described in the said 14th paragraph hereof.

24. The said valuation lists were duly approved and confirmed and delivered to the overseers of Worthen aforesaid, and a poor's rate of 1*s.* in the pound was made by them on the 30th Sept. 1875, and duly allowed and published. The following is an extract from the said rate so far as it affects the said mine, tramway, tunnel or flue, and chimney:

No. 643. Occupier, Snailbeach Mining Company (Limited); owner, Marquis of Bath; description, tramway from ore bin to smelting house, tunnel or flue from smelting house to chimney, and chimney; situation, Snailbeach; gross estimated rental, 120*l.*; rateable value, 96*l.*; rate at 1*s.* in pound, 4*l.* 16*s.*

No. 644. Occupier, Snailbeach Mining Company (Limited); owner, Marquis of Bath; description, lead mine; situation, Snailbeach; gross estimated rental, 3143*l.*; rateable value, 3143*l.*; rate at 1*s.* in pound, 157*l.* 3*s.*

No. 645. Occupier, Snailbeach Mining Company (Limited); owner, Earl of Tankerville; description, lead mine; situation, Snailbeach and Lordeshill; gross estimated rental, 659*l.*; rateable value, 659*l.*; rate at 1*s.* in pound, 32*l.* 19*s.*

25. A valuation list was in 1875 duly deposited on behalf of the said Atcham Union in respect of lands and works connected with or adjacent to the said mine, situate within the said Atcham Union, of which the following is a copy:

Occupier, Snailbeach Mining Company (Limited); owner, Marquis of Bath; description, crushing and dressing machinery, tramways, outhouses, washing floors, offices, timber yard, workshops, part of tunnel, engine, and spoilbanks; situation, Snailbeach mine; gross estimated rental, 600*l.*; rateable value, 450*l.*

Occupier, Snailbeach Mining Company (Limited); owner, Marquis of Bath; description, smelting houses; situation, Snailbeach mine; gross estimated rental, 350*l.*; rateable value, 262*l.* 10*s.*

26. The crushing and dressing machinery, tramways, washing floors, part of tunnel, and smelting houses are those already described herein in paragraphs 8, 9, 10, 11, and 13, so far as the same are situate within Minsterley township in the Atcham Union.

27. The valuation list deposited by the Atcham Union has been appealed against by the appellants, but the decision of the assessment committee of such Atcham Union has not yet been made known to the appellants.

The questions for the opinion of the court are:

—First, whether the whole of the land, surface works, smelting houses, and other matters and things hereinbefore described and included in the said supplemental valuation list of the respondents' union, and the said valuation list of the said Atcham Union are to be regarded as part of the mine, and so treated for rating purposes within the meaning of the Rating Act 1874, and as covered by the rate payable in respect of dues payable during the preceding year, or whether they are liable to be separately assessed and rated, as distinct and separate from the mine; secondly, if the answer to question one be that such lands, surface works, matters and things are not to be regarded as wholly included for rating purposes in the Snailbeach mine, then whether any portion thereof, and what portion, ought not to be so included, the court being respectfully requested to state the principle upon which the dividing line between those which ought not to be so included is to be drawn; thirdly, if the answer to question one be that such lands, surface works, matters and things are to be regarded as included for rating purposes within the Snailbeach mine, then are the appellants to be

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rated to the respondents' union and parish for the whole amount of the rateable value (i.e., the annual amount of the whole of the dues payable during the preceding year) of such mine, or are they entitled to any deduction in the assessment for the respondents' union by reason of part of the works being locally situated as hereinbefore described within the said Atcham Union, and liable to be assessed there also; the court being respectfully requested to state the principle upon which such deduction, if any, is to be made.

It has been and it is agreed that a judgment in conformity with the decision of the court, and for costs as this court shall adjudge, may be entered on motion by either party at the quarter sessions next, or next but one, after such decision shall have been given.

Nov. 11.—*Webster* (with him *Venables*) argued for the appellants.—The mining company are rated in the parish of Worthen at the amount of the whole of the dues payable in respect of the whole mine, although they are also rated in the parish of Ministerley for the proportion of dues in respect of the surface premises in that parish. There is also a separate assessment of the smelting house and premises which must now be taken to be part of the mine. The section of the Rating Act 1874 (37 & 38 Vict. c. 54) which is important for the decision of these questions is the 7th. "Where a tin, lead, or copper mine is occupied under a lease or leases granted without fine on a reservation wholly or partly of dues or rent, the gross value of the mine shall be taken to be the annual amount of the whole of the dues payable in respect thereof during the year ending on the 31st Dec. preceding the date at which the valuation list is made in addition to the annual amount of any fixed rent reserved for the same which may not be paid or satisfied by such dues. The rateable annual value of such mine shall be the same as the gross value thereof, except that where the person receiving the dues or rent is liable for repairs, insurance, or other expenses necessary to maintain the mine in a state to command the annual amount of dues or rent, the average annual cost of the repairs, insurance, and other expenses for which he is so liable, shall be deducted from the gross value for the purpose of calculating the rateable value. In the following cases, namely: First, where any such mine is occupied under a lease granted wholly or partly on a fine; secondly, where any such mine is occupied and worked by the owner; and, thirdly, in the case of any other such mine which is not excepted from the provisions of this Act, and to which the foregoing provisions of this section do not apply, the gross and rateable annual value of the mine shall be taken to be the annual amount of the dues or dues and rent at which the mine might be reasonably expected to let without fine on a lease of the ordinary duration according to the usage of the country if the tenant undertook to pay all tenant's rates and taxes, and tithe rentcharge, and also the repairs, insurance, and other expenses necessary to maintain the mine in a state to command such annual amount of dues or dues and rent. The purser, secretary, and chief managing agent for the time being, of any tin, lead, or copper mine, or any of them, may, if the overseers or other rating authority think fit, be rated as the occupier thereof. In this section the term 'mine,' when

a mine is occupied under a lease, includes the underground workings and the engines, machinery, workshops, tramways, and other plant, buildings (not being dwelling houses), and works and surface of land occupied in connection with and for the purposes of the mine, and situate within the boundaries of the land comprised in the lease or leases under which the dues or dues and rent are payable or reserved. The term 'dues' means dues, royalty, or toll, either in money, or partly in money and partly in kind; and the amount of dues which are reserved in kind means the value of such dues. The term 'lease' means lease or sett or licence to work or agreement for a lease or sett or licence to work. The term 'fine' means fine, premium, or foregift, or other payment or consideration in the nature thereof." The only case in which this Act has been discussed with respect to a lead mine is *The Van Mining Company (Limited) v. Llanidloes* (L. Rep. 1 Ex. Div. 310), but no interpretation was there put upon what was to be included under the words "in connection with the mine."

McIntyre, Q.C. (with him *Arbuthnot*) for the respondents.—Nothing can be said to be in connection with and for the purposes of the mine, which is for the purpose of dealing with the material after it has been brought to the surface. If the premises for smelting are to be included in the mine itself, the words of the definition must be read as if they were also "and relating to the manufactory of the ore." The effect of the Rating Act 1874 is to make mines rateable besides the premises connected with them which were rateable before. In *Rees v. Earl of Pomfret* (5 M. & S. 139), a rate was imposed in respect of one-fifth share of the lead to be smelted from the ore raised from some lead mines, of which the appellant was owner of the ore. Lord Ellenborough, in his judgment, said, at p. 143, "But this is not a reservation of any part of the thing demised, it is not a reservation of any part of the ore, or of the mineral, in its natural and primitive state, but of something of a quality, name, and character entirely different; of a metal produced from that mineral by the laborious and expensive process of smelting, in which the native mineral is mixed with another matter, viz., with coal or charcoal; and by the effect of fire upon both a metal is obtained which is to be considered, for this purpose at least, as entirely different from either of the two, and rather as a manufacture of art and labour resulting from the use and application of these materials than the original earth itself." This is a conclusive authority for the respondents with respect to the smelting-houses and the tramway leading to them; and this being so, where should the line be drawn, except at the arrival of the ore on the surface? In the case of *Talargoch Mining Company v. St. Asaph Union* (L. Rep. 3 Q. B. 478), a watercourse for the purpose of working the machinery connected with a lead mine was held to be rateable apart from the mine, although the mine was not rateable. So with respect to the surface lands, buildings, machinery, workshops, and tramways in connection with an iron mine, in *Guest v. East Dean* (L. Rep. 7 Q. B. 334). [CLEASBY, B.—The definition of mine in the Act of 1874 expressly includes some premises of this kind. MELLOR, J.—These cases, therefore, do not touch the questions we are asked.]

Webster in reply.—There is no reason why

under this definition of a mine the whole of the appellants' premises in the parish of Worthen should not be assessed together. But even if there should be a distinction between the dressing and the smelting houses, the whole of the dues payable in respect of the mine under the leases is too high an amount for the assessment of the mine in one parish only. The respondents must abide by the definition in sect. 7, or the whole assessment would under sect. 13 be bad, according to *The Van Mining Company (Limited) v. Llanidloes*.

MELLOR, J.—I think it is not necessary for us formally to answer all these questions reserved for us. The contention in the case depends upon the construction of the definition of a mine contained in sect. 7 of the Rating Act 1874, and we are of opinion that Mr. Webster is right so far that the rateable value of the mine in this parish must be estimated at a reduction from the gross value under the leases by so much of the dues payable in respect of the premises on the surface in the parish of Minsteriey, and also by so much of the dues payable in respect of the buildings in the same parish which are separately rated. Whether the smelting house and the tramway are to be taken as works occupied in connection with and for the purposes of the mine is a matter which we will further consider if necessary. The proportional deductions are all questions of fact, and the amount must be settled elsewhere. We are clearly of opinion that there must be a diminution from the gross receipts of the value of the hereditaments separately rated in order to obtain the rateable value of the mine.

CLEASBY, B.—It seems to me that sect. 7 of the Act is conclusive as to our judgment for the appellants. I think it was intended to be a guide for the rating of mines, and it abolishes all principles to be inferred from previous cases on the subject. I certainly see no intention in the section to enable the rating authorities to assess any part of the mine twice over; and if there be any buildings, or other premises which should be rated separately from the mine itself, either in consequence of their position in another parish, or their not being connected with or for the purpose of the mine, then a deduction must be made in respect of those premises from the gross dues payable under the lease of the mine. And if the gross dues are the right measure of the rateable value, none of the premises for which those dues are payable ought to be rated a second time. This will necessarily involve some reduction of the rateable value, and for myself I may say I see nothing in this case to separate any of the buildings or works mentioned from the mine itself. There must be a deduction from the assessment of the amount of the dues proportional to the buildings in the next parish; in this we both agree. It seems to me that the smelting works are in connection with and for the purpose of the mine, but of this we will consider further.

Nov. 16.—CLEASBY B.—Upon further consideration my brother Mellor and I agree that no distinction can be drawn upon the facts stated in this case between the smelting house and the other parts of the mine. They all, in our opinion, come within the definition of the 7th section of the Rating Act, and are in connection with and for the purposes of the mine. It seems, however, as the case is stated, that it can be no consequence to the appellants whether the smelting works are

rated separately or not. We have already decided that a deduction must be made from the gross dues in respect of works otherwise rated in order to obtain the rateable value of the mine itself, and apparently it cannot affect the total rateability whether the separate assessment of the smelting works be struck out, or whether the mine be assessed at a proportional reduction. At all events, if it be of any importance, we are prepared to hold that upon the statement of this case the term "mine" includes these smelting works.

Judgment for appellants with costs.

Solicitors for appellants, *Dean and Taylor*, for *Longueville, James*, and *Williams*, Oswestry.

Solicitor for respondents, *Charles Francis*, for *W. Wilding*, Montgomery.

Saturday, Nov. 18, 1876.

SCOTT v. LEGG.

Covering in new building without party wall—Addition to old building—Metropolitan Building Act 1855, sects. 9, 27, 28, 46.

By the Metropolitan Building Act, s. 9, any alteration, addition, or other work made upon an old building is to the extent of such alteration subject to the provisions of the Act, which does not otherwise apply to old buildings. By sect. 27, rule 4, every warehouse containing more than 216,000 cubic feet must be divided by party walls in such manner that the contents of each division shall not exceed such number of feet. By sect. 28, rule 2, no buildings "shall be united, if when so united, they will, considered as one building only, be in contravention of any of the provisions of the Act." And by sect. 46 a justice of the peace may make an order on any builder commanding him to comply with the requisitions of a surveyor made in cases of contravention of the Act.

The appellant, by taking down one of the external walls of an old building, containing more than 216,000 cubic feet, made an addition containing less than 216,000 cubic feet.

Held, that such addition was within the statute, and that the order of a stipendiary magistrate commanding him to divide the old building from the new was good.

THIS was a special case stated pursuant to the Metropolitan Building Act 1855, 18 & 19 Vict. c. 122, ss. 106 and 107, for the purpose of obtaining the opinion of the court on questions of law as hereinafter stated.

1. On the 22nd July 1875, a complaint preferred by Henry Simpson Legg (hereinafter called the respondent) against William Scott (hereinafter called the appellant) under sect. 46 of the Metropolitan Building Act 1855, charging that the said appellant did complete the covering in of a new building erected and united to the then present building, viz., the Anchor Brewery, Mile-end-road, without a party wall, the building so united exceeding the cubical contents allowed by the Metropolitan Building Act above-mentioned, and as required by sect. 27, r. 4 and sect. 28, r. 2 thereof, was heard before H. J. Bushby, Esq., the magistrate of the Worship-street Police Court, and upon such hearing the said magistrate made an order that the appellant should erect a proper party wall so as to divide the new building from the old.

2. Upon the hearing of the complaint the fol-

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lowing facts were proved by the respondent and admitted by the appellant.

3. The appellant, the builder, as defined by the 3rd section of the said Metropolitan Building Act 1855, was also the clerk of the works to Messrs. Charrington, Head, and Company, of the Anchor Brewery, Mile-end-road, and the respondent was the district surveyor, under the said Metropolitan Building Act 1855, of the hamlet of Mile End Old Town.

4. The Anchor Brewery, to which the new building is an addition, is an old building erected long before the passing of the above Act, in itself containing a greater number of cubic feet than that specified in sect. 27, r. 4, and is not divided by party walls. The addition, which is roofed in, and which the appellant was making to the front of the old building, taken by itself contains less than the before-mentioned number of cubic feet, but the old and new buildings taken together greatly exceed that amount. [A ground plan and section annexed showed the new building, and the position of the appellants' machinery and plant in the old building.]

5. It was contended by the respondent that a party wall should be made between the old and new buildings, which were so united as to contravene sect. 28, r. 2 of the above Act, and were, therefore, taken together of larger cubical contents than that specified in sect. 27, r. 4. The appellant also relied upon sect. 9 of the Act, which is in the following terms:

Any alteration, addition, or other work made or done for any purpose except that of necessary repairs, not affecting the construction of any external or party wall into or upon any old building or into or upon any new building after the roof has been covered in shall, to the extent of such alteration, addition, or work, be subject to the regulations of this Act, and whenever mention is hereinafter made of any alteration, addition, or work into or upon any building it shall, unless the contrary appears from the context, be deemed to imply an alteration, addition, or work to which this Act applies.

6. It was contended by the appellant; firstly, that by sect. 9 the operation of the said Act as to alterations, additions, or other work made or done for any purpose into or upon any old building was confined to the extent of such alterations, additions, or other work so made or done; secondly, that the enactment of sect. 27 as to party walls was by sect. 7, confined to new buildings which exceed the cubical contents mentioned in sect. 27, r. 4; thirdly, that in the present case a new building having been added to an old building they do not come within sect. 28, which applies to the uniting of new buildings to each other.

7. Upon such hearing the said magistrate reserved his judgment, and on the 29th July 1875, made an order on the appellant commanding him to erect a proper party wall so as to divide the new building from the old, on the ground that the addition of the new building to the old building was an uniting them within sect. 28, r. 2. and that, therefore, the buildings taken together were in contravention of sect. 27, r. 4.

8. The questions of law for the opinion of the court were; firstly, whether sect. 28, r. 2, contemplates the union of a new with an old building, and whether even if it should so contemplate an union, an addition such as appeared by the case was within the said section of the statute; secondly, whether the defendant was rightly convicted under sect. 27, r. 4.

If the court should be of opinion that the said order was legally and properly made and was valid, and the appellant was liable, then the said order was to stand, but if the court should be of opinion otherwise then the said complaint was to be dismissed.

Benjamin, Q.C., for the appellant.

F. M. White, (with him *Biron*) for the respondent. *Cur. adv. vult.*

Nov. 22.—The following written judgment of the court, Cleasby, B., and Grove, J., was delivered by

CLEASBY, B.—The question in this case was whether an addition made to an old building after the passing of the Metropolitan Building Act, 18 & 19 Vict. c. 122, required to be separated by a party wall in order to comply with the Act. By the 27th section any warehouse or building used for the purpose of trade containing more than 216,000 cubic feet must be divided by party walls in such manner that no part contain a greater cubic measurement. This only applies to new buildings; old buildings are not affected by the Act. By the 9th section any addition to an old building is to the extent of such addition to be subject to the regulations of the Act. The addition made by the appellant contained by itself less than 216,000 cubic feet. It was made by taking down one of the external walls of an old building, which contained more than the contents mentioned, and was not subject to the Act, and building it up at a certain distance, so that the old building and additions contained of course much more than the measurement named. The plan may be referred to. If the addition had contained more than the prescribed contents it was not disputed that the appellant must comply with the Act, and have one or more party walls; but it was contended that as taken by itself it contained less, the 9th section did not apply, and that there were no words in the Act which fairly read could include such a case. If the case had rested on the 9th section only I should have felt great difficulty in holding that it extended to anything beyond the addition itself. But the main reliance of the respondent was placed on the 28th section, sub-section 2, by which it is provided that no buildings shall be united if when so united they shall be in contravention of the provisions of the Act. It was powerfully urged on behalf of the appellant that this was intended to meet a different state of things from the present, namely, the making into one of the two separate buildings, whether new or old, and that it would be straining the language beyond what could be intended to make it apply to so different a subject as the addition to a former building. The answer to this argument is, that the case comes within the mischief intended to be prevented, and that the following consequences will follow from holding the rule not to be applicable to additions to old buildings. A man might have a building of less than the specified dimensions, and he might add a new building also of less than those dimensions, and the two together containing perhaps 400,000 cubic feet would require no partitions, though no such building existed before the passing of the Act. Also, if one wall of the appellant's warehouse should be taken down and 200,000 feet added, he might afterwards take down the three other walls, and make further additions to the same extent, each under the

specified dimensions, and so add 800,000 cubic feet without any partitions. It is certain that this could not have been intended. It seldom happens that the framer of an Act of Parliament or the Legislature has in contemplation all the cases which are likely to arise, and the language, therefore, seldom fits every possible case. Whenever the case is clearly within the mischief, the words must be read so as to cover the case, if by any reasonable construction they can be read so as to cover it, though the words may point more clearly to another case. This must be done rather than take such a case to be a *casus omissus* under the statute. We think that the words may be read as including not only the existing building already constituted, but the adding a new building to an old one, and so uniting them together. The appeal is therefore dismissed, and of course with costs.(a)

Judgment for the respondent.

C. Scott asked for leave to appeal under sect. 45 of the Supreme Court of Judicature Act 1873.

CLEASBY, B.—We have no doubt upon the point, but considering the importance of it, you may take leave to appeal.

Solicitor for the appellants, *William Wyke Smith*.

Solicitors for the respondent, *Loxley and Morley*.

CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, Nov. 18, 1876.

(Before Lord COLERIDGE, C.J., MELLOR, J., LUSH, J., POLLOCK, B., and LINDLEY, J.)

REG. v. OXENHAM.

Larceny—Bailee—Bill of exchange—Fraudulent conversion—24 & 25 Vict. c. 96, s. 3.

Prosecutor asked prisoner if he could get bills of exchange discounted, and prisoner replied that if prosecutor was a person of credit he could get his discounted. Three bills were then drawn by prisoner payable to his order, which prosecutor accepted, and delivered to the prisoner to get discounted. The proceeds of the discounting were to be handed to the prosecutor, less the prisoner's commission, or the bills to be returned. The prisoner being pressed by a creditor for a debt, less than the amount of the bill indorsed to him, gave one of the bills in payment, representing it as his own bill, and asking the creditor to discount the balance of the bill. The bill was not indorsed upon the condition of the creditor's discounting the balance; and the jury found that it was the prisoner's intention, when he indorsed the bill, to pass the property in it absolutely to the creditor.

Held, that upon these facts the prisoner might properly be convicted of larceny as a bailee of a bill of exchange under 24 & 25 Vict. c. 96, s. 3.

CASE stated by the Assistant Judge of the Middlesex Sessions.

Herbert Oxenham was tried before me at the Middlesex Sessions, on the 28th July, 1876, on an indictment which charged him with having stolen "a certain valuable security to wit, a bill of exchange for the payment of 200l., the property of

Charles Garrett, the said sum of 200l. so secured and payable by and upon the said bill of exchange, being then due and unsatisfied to the said Charles Garrett." (See the 24 & 25 Vict. c. 96, s. 3.)

It appeared that on the 3rd Dec. 1875, the prosecutor, Charles Garrett, called upon the prisoner, who is a licensed victualler, at the house of the latter, and asked him if it was true as he had been informed, that he the prisoner could get bills of exchange discounted. The prisoner answered that he had occasionally done so, and if the prosecutor were a person of credit, he had no doubt he could get his acceptances discounted. Three bills of exchange respectively dated the 3rd Dec. 1875, one of which for 200l., became the subject of the present indictment, were then drawn by the prisoner, payable to his order three months after date, and were accepted by the prosecutor, and were by him delivered to the prisoner for the purpose of getting them discounted. Before the prosecutor handed these his acceptances to the prisoner, it was agreed between them that the prosecutor should call again upon the prisoner at the expiration of a fortnight, and then, as to each of the bills respectively either the proceeds obtained upon the discount of it were to be handed over to the prosecutor, or the bill itself returned to him by the prisoner. The prisoner was to be allowed 5 per cent. commission on each of the bills he might get discounted, and a further sum in the event of his getting all of them discounted. The prosecutor received no value or consideration whatever for either of these acceptances. The evidence was inconclusive as to whether the prosecutor or the prisoner paid for the stamped paper on which the bills were drawn.

On the 10th Dec. the prisoner being then indebted to Messrs. Cutler and Robson, in the sum of 62l. for goods which they had sold and delivered to him, and being pressed by Mr. Cutler for a settlement of their account, indorsed to them in payment thereof the bill for 200l., which is the subject of the present indictment.

He then told Mr. Cutler that he had received this bill in relation to some property belonging to his wife, and said nothing as to its having been entrusted to him to get it discounted. He asked Mr. Cutler to discount the balance, and Mr. Cutler promised to consult his partner before determining whether they would do so or not, but that was to be optional with them, and the bill was not indorsed upon condition that they would do so.

The prisoner was credited with the current bill in his account with Cutler and Robson, and they afterwards declined to advance money upon the difference between the 62l. due to them and the amount of the bill. After the 17th Dec. the prosecutor called repeatedly upon the prisoner, and made several applications to him for the bills or the cash obtained upon the discount of them, but could on neither occasion obtain any account from him as to what he had done with them. In February the prosecutor summoned the prisoner before a police magistrate, and that proceeding resulted in the prisoner at once returning to him two of the bills, and the summons was withdrawn upon his promising to return forthwith the other bill (the one now in question), which he assured the magistrate was "in the city, but he had not a shilling on it." This, however, he failed to do, and it afterwards came to the knowledge of the

(a) See *Ashby v. Woodthorpe*, 9 L. T. Rep. N. S. 409.

prosecutor that the prisoner had previously indorsed this bill to Messrs. Cutler and Robson. The prosecutor dishonoured the bill, and the said indorsees thereupon brought an action upon it and recovered judgment against him for 62*l.* and costs. Proceedings were then taken against the prisoner, which resulted in his being committed for trial upon the present charge.

At the close of the case for the prosecution,

The prisoner's counsel objected that there was no evidence that the prisoner had fraudulently converted the bill, and cited in support of his argument *Reg. v. Weeks* (10 Cox's C. C. 224), but I overruled the objection, considering that there were facts in the present case which upon this point distinguished it from that one.

The prisoner's counsel then addressed the jury, and called a witness for the purpose of contradicting the evidence of the prosecutor as to the terms of the alleged bailment; but as the jury expressed their entire disbelief of her evidence, it is unnecessary to refer to it. After summing up the facts, I directed the jury that if they believed the prosecutor's statement, as to what had taken place at the meeting on the 3rd Dec., when he accepted the bill and delivered it to the prisoner, the prisoner was to be deemed a bailee of a "valuable security" within the meaning of the Act (24 & 25 Vict. c. 96, s. 3) under which he was indicted; but that it was essential to the maintenance of the indictment that they should be satisfied not merely that he had acted contrary to his agreement with the prosecutor and misappropriated the bill, but that he had done so wilfully and knowingly, and that he had in point of fact and practical effect by indorsing the bill to his creditors, Cutler and Robson, converted it to his own use or to theirs in fraud of the prosecutor. Unless they answered all these questions in the affirmative they should acquit the prisoner. The jury found him guilty, and in answer to a question I then put to them, stated that in their opinion it was the intention of the prisoner, when he indorsed the bill, to pass the property in it absolutely to Cutler and Robson in payment of their account.

I postponed sentence. My attention was afterwards drawn by the prisoner's counsel to *Reg. v. Cosser*, the report of which in Cox's Crim. Cas. Vol. 13, Part 3, had in the meantime been published. In deference to the ruling of the learned Judge in that case I respite the judgment, and state this case for the opinion of the Court of Criminal Appeal. I liberated the prisoner upon recognizances to appear when called upon.

The questions for the opinion of the Court are:

1st. Whether upon the facts stated the defendant was a bailee within the meaning of the above enactment; and

2ndly. (If he was) whether there was evidence to go to the jury of a fraudulent conversion.

Oct. 17, 1876.

P. H. EDLIN.

Sims for the prisoner.—The indictment is framed upon the 24 & 25 Vict. c. 96, s. 3: "Whosoever, being a bailee of any chattel, money, or valuable security, shall fraudulently take or convert the same to his own use, or to the use of any person other than the owner thereof, shall be guilty of larceny, and may be convicted thereof upon an indictment for larceny." By sect. 1 (the interpretation clause), the term "valuable security"

includes (*inter alia*) any bill, note, or order, or other security whatsoever for money, or for payment of money. It is submitted that the document in question was not a security for money at the time it was dealt with by the prisoner within the meaning of sect. 3: (*sup.*) *Reg. v. Cosser* 13 Cox, C.C. 187.) In that case the prisoner drew, and the prosecutor at his request accepted, three bills of exchange on the understanding that the prisoner was to deposit them with a third person as security for the purchase-money for the transfer of a licence of a public house, and not to negotiate them or use them for any other purpose. Instead of depositing them with the third person, the prisoner converted two of the bills to his own use. Upon these facts it was held that there was no bailment within sect. 3. [LUSH, J.—Strike out the words "valuable security to wit," in the indictment, and then the indictment charges the prisoner with having stolen a bill of exchange Is that not sufficient?] It is submitted that it is not, for the bill was then of the value of the paper only, and the prisoner is not charged with stealing a piece of paper. In *King v. Phipoe* (2 Leach's Crown Cases 774), the prisoner, by threats and intimidation, compelled the prosecutor to draw a promissory note on paper, which with pen and ink were supplied by the prisoner, and the prisoner was indicted under the 2 Geo. 2, c. 25, s. 3, which enacts that if any person shall "steal or take by robbery" (*inter alia*) any bills of exchange or promissory notes for the payment of money, notwithstanding any of the said particulars are termed in law a *choses in action*, it shall be deemed and construed to be felony. In that case, Ashurst, J., said the judges were of opinion that, "as the Legislature at the time of passing the 2 Geo. 2, c. 25, s. 3, whereby the stealing a *choses in action* was made felony, could not possibly have had a case like the present in contemplation, it is not within that statute; that it is essential to larceny that the property charged to have been stolen should be of some value; that the note in the present case did not, on the face of it, import either a general or a special property in the prosecutor, and that it was so far from being of the least value to him, that he had not even the property of the paper on which it was written, for it appeared that both the paper and the ink were the property of Mrs. Phipoe, and the delivery of it by her to him could not, under the circumstances, be considered as vesting it in him." Here it is submitted that the document was valuable as a piece of paper only. Secondly, there was no conversion of the bill of exchange by the prisoner. For that proposition, *Reg. v. Weekes* (10 Cox, C.C. 224) is an authority. There the prisoner volunteered to get the prosecutor's acceptance for 30*l.* discounted, and thereupon drew a bill which the prosecutor accepted and indorsed and handed to prisoner to get discounted. The prisoner subsequently delivered the bill to a creditor of his, to whom he owed 10*l.*, that the creditor might take 10*l.* out of the proceeds after discounting it. And it was held that this did not amount to a conversion by the prisoner analogous to larceny. So in *Reg. v. Jackson* (9 Cox, C.C. 505), Martin, B., said: "There are many instances of conversion sufficient to maintain an action of trover, which would not be sufficient to support a conviction under this statute. The determination of the bailment must be something analogous to larceny,

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and some act must be done inconsistent with the purposes of the bailment. As, for instance, in case of bailment of an article of silver for use, melting it would be evidence of a conversion. So when money, or a negotiable security, is bailed to a person for safe keeping, if he spend the money, or convert the security, he is guilty of a conversion within the statute." [LUSH, J.—You have the finding of the jury here that the prisoner intended to pass the property in the bill absolutely to Cutler and Robson.]

No counsel appeared for the prosecution.

COLERIDGE, C. J.—I am of opinion that this conviction should be affirmed. The prisoner was indicted under these circumstances. It appears that he, being the drawer of a bill of exchange for 200*l.*, which the prosecutor had accepted and delivered to him for the purpose of getting discounted, instead of getting the bill discounted, took it to Cutler and Robson, creditors of his, to whom he was indebted in the sum of 62*l.*, and indorsed it to them as his own in payment of the 62*l.*, and the jury have found that in their opinion it was the intention of the prisoner when he indorsed the bill to them to pass the property in it absolutely to Cutler and Robson, in payment of their account. Now upon these facts we are asked to hold that the prisoner was not a bailee of a bill of exchange for payment of money, and that he did not convert it to his own use. I should have thought it impossible to doubt that the statute met this very case, and that it was intended to suppress frauds of this kind. The case of *Reg. v. Cosser* is inapplicable to the present case. In that case the acceptor of the bills delivered them to the prisoner to be used for one purpose, and the prisoner applied them to another. When the purpose for which they had been given failed, and the acceptor applied for the bills, the prisoner said he had destroyed them, and it was not until the acceptor was applied to for payment that he discovered what had become of the bills. Upon those facts I think it was properly held that there was no bailment of the bills within the statute. The present case is entirely different. As to the case of *Reg. v. Weeks*, that case, in my opinion, was rightly decided. In that case the prisoner Weeks received from the prosecutor Batty a bill of exchange for 30*l.* to get discounted. Weeks, not having got it discounted, handed it to a creditor Bailey, to whom he owed 10*l.*, that he, Bailey, might get it discounted, and keep the 10*l.* Weeks owed him, and hand over the remainder of the proceeds of the discounting to him. And that was held not to be a conversion of the bill of exchange within this statute. But the facts there were not the same as here. Here the jury have found that at the time the prisoner delivered the bill to Cutler and Robson he intended to pass the property in it absolutely to them in payment of their debt. I think, therefore, the conviction should be affirmed.

MELLOR and LUSH, JJ., POLLOCK, B., and LINDLEY, J., concurred.

Conviction affirmed.

Saturday, Nov. 18, 1876.

(Before COCKBURN, C.J., KELLY, C.B., BRAMWELL, B., BRETT, J., AMPHLETT, B., ARCHIBALD, J., POLLOCK, B., and FIELD, J.)

REG. v. TATLOCK.

Larceny Act—Broker embezzling proceeds of securities—Marine policies—Chattel—Securities for payment of money—Valuable security—24 & 25 Vict. c. 96, s. 75.

An insurance broker was employed by prosecutor to effect three policies upon a vessel, which he did, advancing the premiums. A total loss having occurred the broker received the necessary documents from the prosecutor to collect the moneys insured, and thereupon collected the amounts due upon two of the policies, by cheques payable to his order, which he paid into his own bank to his own credit. The premiums advanced by the broker and his commission on effecting the policies and receiving the losses were unpaid to him. The broker on being asked for the moneys after they had been received, said they were not due until a future day, and subsequently made excuses, and did not pay over the sums received on account of the losses to the prosecutor. The jury, in answer to a question left to them, found that the policies had been intrusted to the broker for a special purpose, viz., that he should receive the moneys due on them, and forthwith pay them over to the prosecutor. There was no evidence to support such a finding in the case.

Held, that there was a miscarriage, and as the court had no power to direct a new trial, the conviction should be quashed.

Semble, that a marine policy of insurance upon which a loss has occurred in respect of the perils insured against is a security for the payment of money within the first branch of sect. 75 of 24 & 25 Vict. c. 76.

Quære, whether such a policy is a chattel or valuable security within the second branch of that section.

CASE stated for the opinion of this court by Mr. Commissioner Kerr.

At the session of the Central Criminal Court, held on Monday, the 28th Feb. 1876, the prisoner was tried before me upon an indictment, the second count of which was founded on the second branch of the 75th section of the stat. 24 & 25 Vict. c. 96, and was as follows:

Second Count.—And the jurors, &c., that the said William Ananias Cragge, trading under the style and firm of Overall, Son, and Co., heretofore, to wit, on the 27th Nov. 1875, within the jurisdiction of the said Central Criminal Court, did entrust the said William Thomas Augustus Tatlock, as his broker, attorney, and agent, with certain valuable securities to wit, two policies of insurance for 650*l.*, and 500*l.* respectively for a special purpose, that is to say, that he the said W. T. A. Tatlock should receive the said sums of 650*l.* and 500*l.*, which were then due, and payable on the said policies of insurance, and forthwith pay over to the said W. A. Cragge the said sum of 1138*l.* 10*s.*, without any authority to him the said W. T. A. Tatlock, to sell, negotiate, transfer, or pledge the said valuable securities, and the jurors aforesaid, upon their oath afore-

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said, do say that the said W. T. A. Tatlock, being a broker, attorney, and agent, as aforesaid, on the day and year aforesaid, and within the jurisdiction aforesaid, in violation of good faith, and contrary to the said object and purpose for which the said valuable securities were entrusted to the said W. T. A. Tatlock, as aforesaid, unlawfully did convert to his own use and benefit a certain part of the proceeds of the said valuable securities, to wit, the said sum of 1138*l.* 10*s.*, contrary to the form of the statute, &c., and against the peace, &c.

The facts adduced in evidence were these:

The prisoner was an insurance broker in the city of London, trading as Tatlock Brothers, and in November 1875, was employed by W. A. Crage (trading under the style of S. Overall, Sons and Company) to effect for him (Crage) an insurance on the cargo of a ship called the *Agatha* to the extent of 1650*l.* The prisoner was to pay the necessary premium. He delivered to Crage the following memorandum:

London, 17th Nov. 1875.

Tatlock Brothers		To Messrs. Overall, Son and Co.
Dr. to insurance for 1650 <i>l.</i> on <i>Agatha</i>	...	£24 15 0
at 30 <i>s.</i> per cent.	0 4 3
Duty	0 4 3
Less 10 per cent. discount for cash on	...	
23 <i>l.</i> 10 <i>s.</i> 3 <i>d.</i>	2 7 0
		£22 12 3

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On the 27th Nov. prisoner was at Crage's counting house, and Crage's clerk said to him, "By the by, Mr. Tatlock, we have an account due to you" (alluding to the above). Prisoner replied, "Oh, never mind that, I shall have to give you a cheque presently." The loss of the *Agatha* was by this time known. The clerk, in consequence of this statement by the prisoner, did not give him a cheque for the amount of the premium. On the 27th Nov. 1875, Crage having heard of the loss of the *Agatha*, gave the prisoner directions to obtain the money on the policies, and wrote to him as follows:

London, 27th Nov. 1875, 102, Lower Thames-street.
Messrs. Tatlock and Brothers.

Gentlemen,—Herewith we hand you the necessary documents for recovering the amount insured on *Agatha*, Lerwick, and list of same, which please sign and return per bearer.—We are, gentlemen, yours truly, S. OVERALL, SON and COMPANY.

With that letter Crage sent to prisoner, and prisoner received three policies of insurance for the sums of 650*l.* in the Archangel Office, 500*l.* in the Imperial Office, and 500*l.* by underwriters, the captain's protest, and bill of lading, and a letter from Lloyd's agent.

On the 17th Dec. the prisoner received from the Imperial Office the 500*l.* on their policy by a cheque payable to his order, and he paid that cheque into his own bank, the Union, to his own credit, and it was cashed and credited to him.

On the 31st. Dec. the prisoner received from the Archangel Office the 650*l.* on their policy, by a cheque payable to his order, and he paid that cheque into his own bank, to his own credit, and it was cashed and credited to him.

On the 11th Jan. 1876, prisoner wrote and sent to Crage the following memorandum:

London, 10th Jan. 1876.

From Tatlock Brothers.
To Messrs. S. Overall, Son and Co.
Cr.—By total loss per *Agatha* ... £1650 0 0
Less commission receiving ... 16 10 0

£1633 10 0

Due 17th Jan. 1876 subject to payment by underwriters.

TATLOCK BROTHERS.

Crage called on prisoner twice for the money, and the prisoner said it was not due until the 17th Jan. Again on the 18th, Crage called upon him and asked for the money, and prisoner said he could not let him have it at present, but should be able to let him have it on Saturday, or some of it.

On the 19th, prisoner went to Crage and said he could not get the money till Saturday, and would let Crage know on the following Thursday how much he (prisoner) could get by Saturday. On the 20th Jan. prisoner wrote and sent to Crage the following memorandum:

London, 20th Jan. 1876.

From Tatlock Brothers.
To Messrs. S. Overall, Son and Co.
Agatha.

Dear Sirs,—We fear that we shall be unable to exceed 1000*l.* upon the loss for the above-named vessel on Saturday next.—Yours truly, TATLOCK BROTHERS.

Upon the receipt of that memorandum Crage called upon prisoner for the money, who said, "It would be impossible for a broker to carry on his business if he had to pay immediately." Crage replied, "Having had the money, as I presume you have, you should pay it at once. You have no business to withhold it. Let me see the policies." Prisoner thereupon went to a safe and rummaged it and then said, "I have not the policies, the office has kept them." Crage replied, "The office would not have kept them unless they had paid for them." The prisoner said, "Two of the offices have settled with me in account;" and prisoner then handed to Crage one of the three, viz., the underwriter's policy for 500*l.*, and Crage himself obtained the money on that policy.

The prisoner never paid Crage any money, and on the 27th Jan. 1876, he filed his petition for liquidation, with a statement of debts 2500*l.*, and returned Crage as a creditor for 1112*l.* 5*s.* 11*d.* The trustee under the prisoner's liquidation received the balance (about 600*l.*) standing to the credit of the prisoner at the Union Bank; and five creditors only having proved under the liquidation, the prisoner's discharge under the liquidation was granted. Mr. Crage did not prove but repudiated the liquidation altogether.

It was contended by Mr. Straight, on behalf of the prisoner, that the facts as proved did not show the prisoner to have committed the offence mentioned in the statute, and that I ought so tell the jury. I, however, laid the facts before the jury, and asked them the following questions, viz.:

1. Did Crage intrust the prisoner with the two policies of insurance?
2. Did he intrust him with them for a special purpose?
3. Was that special purpose that he should receive the moneys and forthwith pay over the moneys when received to Crage?
4. Had the prisoner any authority to sell, negotiate, transfer, or pledge them?
5. Did he, in violation of good faith, and contrary to the purpose for which they were intrusted

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to him, convert any part of the proceeds to his own use?

The jury answered questions 1, 2, 3, and 5 in the affirmative, and No. 4 in the negative, and under my direction they found the prisoner guilty, and the verdict was so recorded.

The question reserved by me for the consideration of the Court above, is whether the facts as proved were sufficient to constitute the offence mentioned in the statute, or whether I ought to have directed the jury to find a verdict of not guilty.

The prisoner is in custody awaiting judgment.—

R. MALCOLM KERR, Commissioner, &c.

June 24.—*Straight*, for the prisoner.—The prisoner was indicted under the second branch of sect. 75 of the 24 & 25 Vict. c. 96, for unlawfully converting in violation of good faith, and contrary to the purpose for which the same were entrusted to him, the proceeds of certain valuable securities intrusted to him for a special purpose, that is to say, that he should receive the sums payable thereon and forthwith pay over the same to the prosecutor. The 75th section provides for two distinct offences. The first branch provides for the case of an agent "intrusted with money, or a security for the payment of money," with a direction in writing as to the application thereof, who shall in violation of good faith and contrary to the terms of such direction convert the same or any part of the proceeds to his own use or benefit, or the use or benefit of any person other than the person by whom he shall have been so intrusted. The second branch provides for the case of an agent intrusted with "any chattel or valuable security, or any power of attorney for the sale or transfer of stock" for safe custody or any special purpose without any authority to sell, negotiate, transfer or pledge, who shall in violation of good faith and contrary to the purpose for which the same shall have been intrusted, sell, negotiate, transfer, or pledge, or in any manner convert to his own use or benefit, or the use or benefit of any person other than the person by whom he shall have been so intrusted, such chattel or security or the proceeds of the same or any part thereof." Upon this indictment under the second branch the conviction was wrong, for there was no dealing by the prisoner with the policies of insurance contrary to the purpose for which the same were intrusted to him. It will not do to say the offence is divisible into two parts, (1) converting the security, (2) converting the proceeds, for it is contended that to render the agent liable for converting the proceeds he must first convert the security contrary to the terms of the provision. The case of *Reg. v. Cooper* (12 Cox, C. C. 600; L. Rep. 2 C. C. R. 127) is in favour of the prisoner. In the present case the prisoner was intrusted with the policies of insurance to collect what was due upon them. He was entitled to hand them over to the underwriters; and the cheques he received for the losses were payable to his order, and there was nothing wrong in his paying them in to his own bankers. Then at what moment was there any fraudulent conversion within the meaning of the section? According to the course of dealing the prisoner was entitled to deduct what was owing to him by the prosecutor for premiums and commission. There was no evidence in the case of any fraudulent conversion at the time he paid the cheques into his bankers.

He was entitled to hold the cheques according to the usage of business among insurance brokers.

Bestley, for the prosecution.—First, as to the construction of the statute. The second branch of sect. 75 comprehends two cases, (1) where the agent fraudulently converts the valuable security, (2) where he fraudulently converts the proceeds of a valuable security correctly dealt with. That this is the right construction would appear to be so from the course of legislation on this subject. The first statute, 52 Geo. 3, c. 63, s. 1, did not contain the words "or the proceeds of the same." They were introduced into the 7 & 8 Geo. 4, c. 29, s. 49, apparently to meet cases like the present, and the 24 & 25 Vict. c. 76, s. 75, follows the words of that enactment. The case of *Reg. v. Cooper* may be reviewed. Secondly, as to the facts stated in the case. [COCKBURN, C.J.—What evidence was there to show that the prisoner was bound to pay over the proceeds by a certain day? The broker's month had elapsed when he was asked to pay over the proceeds: Besides, after verdict the court will assume that there was evidence to support the finding of the jury: (*Hayman v. The Queen*, L. Rep. 8 Q.B. 102). *Cur. adv. vult.*

Nov. 18.—COCKBURN, C.J.—The defendant was indicted under the 75th section of the 24 & 25 Vict. c. 96. The facts are as follow: Having negotiated as broker certain policies of insurance on a ship belonging to the prosecutor, and the ship having been lost, the defendant was intrusted with the policies for the purpose of collecting the amounts due upon them. These he received in cheques payable to his own order, which he indorsed and paid into his bankers to his own credit; but he failed, either then or at any time afterwards, to pay the amount to the prosecutors, and two months later filed a petition for liquidation. The jury, in answer to questions specifically put to them by the learned commissioner before whom the case was tried, found expressly that the prisoner was intrusted with the policies for a special purpose, namely, that he should receive, and when received, forthwith pay over the moneys to the prosecutors. They further found that the prisoner had no authority to sell, negotiate, transfer, or pledge the policies; and that, in violation of good faith, and contrary to the purpose for which they were intrusted to him, he converted the proceeds to his own use. Upon which they were directed by the learned commissioner to find the prisoner guilty. The question submitted to us is, whether the facts as proved were sufficient to constitute the offence mentioned in the statute, or whether the jury should have been directed to find a verdict of not guilty. It appears to me plain that there has been a miscarriage in this case. But I scarcely know in what position we are placed as to the decision we can pronounce, whether our opinion is asked upon the facts as found by the jury, or on the facts as proved by the evidence; it being to my mind perfectly plain not only that the right questions have not been put to the jury, but also that the answers to the questions as put are directly contrary to the evidence. The proper remedy would be a new trial, but that we have no authority to direct. I think, however, that the form in which the question is put leaves it open to us to say whether the learned commissioner, instead of putting any questions to the jury, should not upon the evidence have directed them to acquit the prisoner; and this, I think, would

have been the proper course, the evidence being, in my opinion, insufficient to warrant a conviction. The case turns on the construction of the second branch of the section referred to, which enacts that "whosoever having been intrusted either solely or jointly with any other person, as a banker, merchant, broker, attorney, or other agent, with any chattel or valuable security, or any power of attorney for the sale or transfer of any share or interest in any public Stock or Funds, whether of the United Kingdom or of any Foreign State, or in any stock or fund of any body corporate, company, or society, for safe custody or for any special purpose without any authority to sell, negotiate, transfer, or pledge, shall in violation of good faith, and contrary to the object or purpose for which such chattel, security, or power of attorney shall have been intrusted to him, sell, negotiate, transfer, pledge, or in any manner convert to his own use or benefit, or the use or benefit of any person other than the person by whom he shall have been so intrusted, such chattel or security, or the proceeds of the same or any part thereof, or the share or interest in the stock or fund to which such power of attorney shall relate, or any part thereof, shall be guilty of a misdemeanour." I entertain very serious doubt whether a policy of insurance comes within this section. The term "chattel" is intended, I think, to apply to objects which can be sold, bartered, or pledged, and a policy of insurance cannot be said to be a "valuable security" any more than a contract of sale or any other contract. It is simply a contract whereby, in consideration of a premium, one party insures another against a given loss. Unless the loss occurs nothing is payable. A valuable security is one on which money is payable irrespective of any contingency. Moreover, a policy of insurance upon which money is received is neither "sold," "negotiated," "transferred," or "pledged," in any sense of the word. The money due on it is paid, and the contract comes to an end, just as when money is paid on a contract of sale. I likewise entertain very serious doubt whether this enactment extends to a case in which a person intrusted with any of the instruments enumerated in the section for the purpose of disposing of it or receiving money on it, having done so embezzles the proceeds. The enactment, if the words are carefully followed, appears to me to apply, and, indeed, to be intended to apply solely to the dealing with securities without authority, and contrary to the purpose for which they were intrusted, and in so doing converting the instrument or the proceeds of it to the use of the party so violating his trust. But here the party uses the instrument for the very purpose for which it was intrusted to him, namely, that of receiving the money due on it. Let us assume, for the purpose of the argument, that he afterwards embezzled the money. He still cannot be said to have dealt with the policy "without authority," which by the express terms of the statute is an essential element of the offence. It may, however, be said, that if an instrument is intrusted to a person for the purpose of his receiving money upon it and handing over the money so received to the principal he receives it for a "special purpose," and that if the agent receives such money with the intention of applying it to his own use instead of handing it over to the person employing him, the authority being violated by the intended fraud, he is acting with-

out authority as well as in violation of good faith. Assuming this to be so, and that a party receiving money on an instrument intrusted to him for the special purpose of his receiving the money due upon it, and forthwith handing such money over in specie, and who at the time he receives the money intends in violation of good faith, to apply it to his own use, commits the offence created by the statute, I doubt exceedingly whether that would be so, where the money having been received with an honest intention, the fraudulent design of misappropriating it afterwards arose. If this doubt be well founded, it would be a question for the jury whether the defendant at the time he received the money intended to appropriate it to his own purposes, a question which was not submitted to the jury in the present case. At all events, it is to my mind perfectly clear that unless there was at the time the money was received the fraudulent intention of keeping the money, in which case the statute may possibly apply, it cannot apply to a case in which, by the understanding of the parties, the person receiving the money is not to hand it over at once to the principal, but is to carry it to an account between them and to pay it only in settlement of such account. That such was the understanding between the prosecutors and the defendant whether as arising from the general custom of trade as between insurance brokers and their principals, or from the course of dealing between these immediate parties appears to me to result from the evidence. No evidence having been given as to any general custom, I do not think we are at liberty to take notice of the statement of such a custom occurring in any work on insurance law; but sufficient evidence of the understanding between the parties is to be found in the fact that when the defendant is applied to for the money received on the policies, he answers, while acknowledging the receipt, that it will not be due to the prosecutor for a month, and this is acquiesced in; affording, as it seems to me, at all events *prima facie* (and no evidence was offered on the part of the prosecution to rebut the presumption) good ground to infer that the defendant either by the custom of business, or the course of dealing between himself and his principals, was entitled, instead of paying over the money at once, to hold it and treat it as his own for a time, settling for it only in account when the time for settlement came. If such were not the terms on which the defendant was employed, it was for the prosecution to rebut the inference which arises from the facts I have referred to. Assuming such a case to be within the statute, it would be a question for the jury whether the defendant at the time the money was received intended to embezzle it. Possibly proof that a party receiving money under such circumstances was and knew himself to be hopelessly insolvent, and being aware that his account at his bankers was heavily overdrawn, paid the money in to the credit of his account, knowing that the effect of his so doing would be that it would be totally lost to the party entitled to it, might be sufficient evidence of an intention to convert the proceeds to his own use, although under other circumstances the payment of the money into his bankers might have been perfectly legitimate. But the only evidence of insolvency in the present case was that two months after the receipt of the money the defendant filed a petition for liquida-

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tion. At the time he received it he may have been solvent. It was for the prosecution to give evidence as to the state of his circumstances, if it could be shown that he was insolvent when the money was received, so as to raise the inference that in paying it into his bankers, he intended to defraud the prosecutor of the amount. No such evidence having been given, I think that even supposing the case to be within the statute, as to which I entertain great doubt, the learned Commissioner should have held that there was no case to go to the jury, and should have directed an acquittal. I am therefore of opinion that the conviction was wrong, and should be quashed.

KELLY, C.B.—I think it is so far doubtful whether a marine policy of insurance upon which a loss has occurred and a sum of money has become payable is a chattel or a valuable security within the meaning of the 75th section of the Act, that I do not feel justified in dissenting from the judgment of acquittal upon which the other members of the Court have agreed. In addition, however, to the judgment of Baron Pollock, in which I entirely concur, I would observe that I cannot accede to the doctrine that because a man whose duty it is to pay over a sum of money to another, pays it into his bankers, and afterwards draws it out by cheques, and then goes into liquidation or becomes bankrupt, he may not have been guilty of a criminal offence within this statute, or of what under other circumstances, would have amounted to embezzlement. It appears to me that if the prisoner after he had received the money and ought to have paid it to the prosecutors, and after paying it into his bankers drew it out again, knowing that he was insolvent, and applied it to his own use, knowing that he could never make it good, he was guilty of fraudulently converting the proceeds of the policy to his own use, and that if the policy had clearly been a chattel within the statute, the conviction would have been right. But for the reasons already stated, I agree that it should be quashed.

BRAMWELL, B.—I am of opinion for the reasons given in my brother Amphlett's judgment, that these policies were not valuable securities entrusted to the prisoner for a special purpose within the meaning of the second part of sect. 75, but were securities for money within the first part of the section, and were entrusted to the prisoner for such purpose as to make the case within the first part had there been a direction in writing, and as there was none, the conviction cannot be sustained.

AMPHLETT, B.—I am of opinion that the conviction must be quashed. The indictment is framed upon the second branch of the 75th section of the 24 & 25 Vict. c. 96, and the case alleged against the defendant is, that being entrusted as a broker with certain ship policies for the special purpose of receiving the moneys due thereon and paying over the same forthwith to the prosecutor, he fraudulently converted the same to his own use. Now looking at both branches of the section which we ought to do for the purpose of arriving at the true meaning of either, it appears to me that the second branch only deals with the case of chattels and securities sold or converted into money without authority, and does not embrace in its provisions policies like these which were entrusted to the defendant for collection. For we must observe that the

section only relates to certain classes of agents whom the Legislature has not thought fit to make amenable to the ordinary law of embezzlement, and it is only therefore under defined conditions and safeguards that such agents can be proceeded against criminally for misappropriating moneys or securities entrusted to them. The general scheme appears to be this. If moneys or securities which they are authorised to convert into money, are entrusted to agents of this character, they are only answerable criminally for a fraudulent misappropriation if a direction in writing as to the disposal of such monies was given. That is provided for by the first branch of the section, which embraces the case we are considering, for I cannot doubt, having regard to the Interpretation Clause that the policies were securities for the payment of money within the meaning of the section. There remained the case (which was supposed also to require the protection of the criminal law) of chattels or securities entrusted to such agents for safe custody, or for some special purpose without authority to sell or convert into money, and that is provided for by the second branch of the section, which makes such agents criminally liable for a fraudulent misappropriation of such last mentioned chattels or securities, or of the proceeds of the same. It has been argued that these last words can have no meaning unless they are held to refer to securities other than those which they had no authority to convert into money. I think this is a mistake; these words are not to be found in the first Act (52 Geo. 3, c. 63) on this subject, but were inserted in the subsequent Acts for the obvious purpose, as it appears to me of meeting the case, which may well happen, of such agent selling or at all events alleging that he had sold honestly though without authority, and afterwards yielding to temptation and fraudulently converted the proceeds to his own use. Without these words the agent in such a case would escape, or it might at all events be more difficult to convict him. The irrational consequences that might occur if securities dealt with by the first were also held to be comprised in the second branch of the section are numerous, and, as it appears to me, afford a strong argument that it was not so intended by the Legislature. For instance, if you gave such an agent money for a particular purpose, but not expressed in writing, he would not be criminally responsible; but, if you had given him a cheque and told him verbally to get it cashed and apply the proceeds in the same way, he would. What is the sense or meaning of such a distinction? Is he not as soon as he cashes the cheque, entrusted with the amount exactly in the same way as if it had been handed over to him directly by his principal? Again it is admitted on all hands that if a debenture or other security be entrusted to a broker with authority to sell, negotiate, transfer, or pledge, the case would not be within the second branch of the section; and that, in the absence of a written direction as to the disposal of the proceeds, he would be civilly, only not criminally, responsible; but according to the argument if the security were intrusted to him for the purpose of collecting the moneys due upon it, he would be criminally responsible for the misapplication of the proceeds. I confess I cannot see any reason why he should be criminally responsible in one case but not in the other. It is certainly difficult to bring a broker so authorised to collect moneys

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due on a security within the description of an agent authorised to sell, negotiate, transfer, or pledge, although, I think, there is little doubt but that the framers of the section by the use of the latter words imagined that they had exhausted every means of converting securities into money. I do not, however, think it necessary to deal with that difficulty, since my judgment is based not upon subtleties of language, but upon the broad ground that according to the true construction of the section, cases which, if there had been a written direction would have fallen within the first branch, do not in the absence of such written direction fall within the second branch of the section. In fact, I think that the cardinal principle of the section is that such an agent is only in the absence of a written direction to be criminally responsible for moneys which may come into his hands by some unauthorised act of his own. This construction of the section was adopted and formed the ground of an unanimous decision of the Court of Appeal consisting of five judges, in *Reg. v. Cooper* (L. Rep. 2 C. C. 127), and I think we are bound by that authority, even if it be the fact, as is alleged, that there was another ground unnoticed by the counsel who argued, or the Judges who decided the case, which might have supported the decision. Upon the other point argued before us as to the sufficiency of the evidence in point of fact to support the conviction, I will only say that I find it very difficult to understand what, if anything, the learned judge has referred to us beyond the legal question on which I have already expressed my opinion. If he meant to ask us whether the facts stated in the case justified the findings of the jury, I should say they did not, for I can find in the facts as stated no evidence at all of the special purpose stated in the indictment, and consequently none of the alleged conversion.

BRETT, J. and FIELD, J. acquiesced in the judgment of AMPHLETT, B., and ARCHIBALD, J. died during the Long Vacation.

POLLOCK, B.—In so far as the decision of this case depends upon the proper construction to be put upon the section of the statute under which the prisoner was indicted, the 24 & 25 Vict. c. 96, s. 75, I entertained during the argument, and still entertain, considerable doubt. I have had, however, the advantage of seeing the judgments which have been prepared by my learned brothers, and thinking as I do that the conviction was unsatisfactory for reasons to which I will presently refer, I am not prepared to differ with the view which has been taken by the majority of the court upon the construction of a statute which is undoubtedly capable of more than one interpretation. If it could be assumed that the construction of the statute which was insisted upon by the prosecution was correct, it appears to me that having reference to the duty of the prisoner to pay over to the prosecutors the sums of money which he had received in payment of the policies, and also to the false statement made by the prisoner to the prosecutor after he had received these sums, there may have been evidence which might and ought to have been submitted to the jury with a view to their finding whether or no the prisoner, who undoubtedly had the money, had converted it to his own use or benefit within the meaning of the statute. But the prisoner was not a mere clerk of the prosecutors, he was an insurance broker carrying on an independent business.

It must be assumed that he had many other principals for whom he acted besides the prosecutors, and it does not appear what had been the previous course of dealing between the prosecutors and the prisoner as to the payment of or accounting by the latter for money received by him on the settlement of losses. These are matters having an essential bearing upon the guilt or innocence of the prisoner, and yet they do not appear to have been explained by the evidence or brought to the attention of the jury, who, by their answer to the third question, appear to have assumed that the duty of the prisoner was to pay over the money forthwith without having their attention called to or having entered on the consideration of the facts from which such a duty could be properly inferred. Under these circumstances, when I have to answer the question which has been submitted to us by the learned Commissioner, I cannot say that I consider the facts as proved were sufficient to constitute the offence mentioned in the statute, and therefore, in my judgment the conviction should be quashed.

Conviction quashed.

Saturday, Nov. 25, 1876.

(Before COCKBURN, C.J., Lord COLERIDGE, C.J.,
CLEASBY and POLLOCK, BB., and FIELD, J.)

REG. v. GALE.

Embezzlement—Proceeds of cheque—For or on account of master—Indictment—24 & 25 Vict. c. 76, s. 68.

The head office of an insurance company was at L., and there were branch offices at M. and G. The local managers at M. and G. having moneys to remit to the head office, paid them into local banks, obtaining cheques thereon for the amount payable to the order of the prisoner (the chief manager, at the head office), and forwarded the cheques by letter to the head office. It was the prisoner's duty to open the letters at the head office, receive the remittances, and hand the same over to the cashier. The local managers at M. and G. remitted by letter two such cheques for 200l. and 400l. respectively to the head office, which the prisoner duly received. He indorsed the bills, got them discounted by friends of his own, instead of handing them to the cashier to pay into the company's bank, and converted the proceeds to his own use:

Held, that the prisoner received the proceeds for and on account of his masters, and that he was properly indicted for embezzling the money.

At the quarter sessions for the borough of Liverpool, James Edward Gale was tried before me upon an indictment consisting of two counts, in the first of which the prisoner was charged with having, on the 19th May 1874, when a clerk and servant to the London and Lancashire Fire Insurance Company (Limited), embezzled 400l., the property of his said masters, and in the second of which he was charged with having, when in the same capacity and on the same day, embezzled 200l., also the property of his said masters.

The evidence in support of the charge, so far as the same is material, was as follows:

The said company's head office is in Liverpool. There are branch offices at Manchester, Glasgow, and elsewhere. The prisoner was the head manager of the company, and was their clerk and

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servant. In ordinary course he opened all letters and received all remittances sent to the head office, and handed the remittances to the cashier, who kept the ordinary books under the superintendence of the prisoner as manager, and those books were from time to time submitted to and checked by Mr. Blenham, the company's accountant at Liverpool.

It frequently happened that the managers of the provincial offices remitted cash or cheques to the prisoner as chief manager, which it was the duty of the prisoner to hand on receipt to the cashier, and in the case of cheques it was the duty of the prisoner to indorse them, if they were payable to his order, and they were then paid into the company's bankers by the cashier, and accounted for in the books.

On the 19th May 1874, the prisoner received on account of the company, by post from Glasgow, a cheque dated the 18th May 1874, for 400*l.*, drawn by the manager of the Glasgow branch upon the Commercial Bank of Scotland, payable to the prisoner's order. On the same day the prisoner also received on account of the company, by post from Manchester, a cheque for 200*l.*, dated the 19th May 1874, drawn by the manager of the Manchester branch upon the Manchester and County Bank (Limited), payable to the prisoner's order.

The prisoner did not hand over either of these cheques to the cashier, or inform him or anyone else of their receipt, except that he acknowledged the receipt of them to the Glasgow and Manchester managers respectively.

On the same day, the 19th May, the prisoner indorsed and cashed both the cheques through private friends of his own, who gave him the cash and paid the cheques into their own banks. Later in the day the prisoner paid 600*l.* in bank notes and gold, which was probably the produce of the cheques, to the cashier of the company, saying that he wished it to go against his salary, which was then overdrawn to that amount. The cashier, supposing the money to be the prisoner's own, received it from him, and handed back to the prisoner I.O.U.s for the amount which he had received from the prisoner in respect of the overdraft.

Shortly after sending the cheques, the Glasgow and Manchester managers, according to their usual practice, sent to the prisoner financial statements, which among other things contained entries of the sending of these cheques. These statements should have been handed to the accountant by the prisoner, who, however, suppressed them both.

The prisoner's salary was 1500*l.* a year.

The fact of the prisoner having received the cheque for 200*l.* was not known to the company or the accountant till about a month later. The prisoner, when questioned, said he would put it all right, and nothing was done in respect of it at that time. The remittance of the cheque for 400*l.* was not known to the company or the accountant till about four months afterwards, when the prisoner was no longer in the company's service. The prisoner became bankrupt, and the company proved upon his estate for the amount of the cheques. The prisoner never accounted for either the cheques or the money.

At the close of the case for the prosecution, counsel for the prisoner submitted that the pri-

soner could not be properly convicted of embezzling either of the sums charged in the indictment, inasmuch as the cheques were sent to the prisoner payable to his order, and required his indorsement, and the prisoner was entitled to cash the cheques and receive the cash which was paid to him in respect of them, and, therefore, there was no embezzlement by him of the said sums or either of them. It was also submitted that there was no embezzlement, because the identical money received for the cheques was paid to the cashier, although it was so paid as the prisoner's own money and in discharge of so much of his own overdraft.

I ruled that there was evidence of embezzlement, but consented to reserve the questions for the consideration of the Court for Crown Cases Reserved.

The jury convicted the prisoner. I did not sentence him, but remanded him until the decision of the Court to the borough gaol at Liverpool.

The question for the Court is, whether there was evidence of embezzlement which I was justified in leaving to the jury.

JOHN B. ASPINALL, Recorder of Liverpool.

14th Nov. 1876.

Torr, Q.C. (Kennedy with him) for the prisoner.
—The prisoner was improperly convicted of embezzlement. There was no embezzlement here, but it was a mere transference of the cheques from the master to the prisoner, and like the case where a master hands money to one servant to give to another for a specific purpose, and that other applies the money to his own use. [COCKBURN, O.J.—No; here the prisoner receives a piece of paper from his master, which he is to convert into money.] The cheque was not payable until the prisoner put his name on it. [LORD COLERIDGE, C.J., referred to *Reg. v. Keena*, 11 Cox C. C., 123; *L. Rep. 1 C. C. R. 113*, to show that where a servant has embezzled a cheque and converted it into money, he may be indicted either for embezzling the cheque or the money.] The contention is that this was not a case of embezzlement, but, if anything, one of larceny, and the prisoner was not indicted or convicted for larceny. In the present case, the prisoner indorsed the cheques, and got cash for them from his own friends, not from the banks on which the cheques were drawn. This cash was not paid to the prisoner for or in the name or on account of his masters within the meaning of the stat. 24 & 25 Vict. c. 76, s. 68. The cheques were sent by the local managers as a means of forwarding money which was constructively in possession of the masters through them. [COCKBURN, O.J.—How does this case differ from that of a servant who gives a receipt before a customer will pay?] The following cases were then referred to:

Reg. v. Wilson, 9 Car. & P. 27;

Reg. v. Beaumont, 6 Cox C. C. 269; 23 L. J. 54, M. C.;

Reg. v. Harris, 6 Cox C. C. 363;

Reg. v. Thorp, 8 Cox C. C. 29; 27 L. J. 264, M. C.;

Reg. v. Cullum, 11 Cox C. C. 469; *L. Rep. 2 C. C. R. 28*.

Again, the money in this case was received on the prisoner's own account, and not, in the language of the statute, "for or on account of masters." The cheques may have been received by him by virtue of his employment, but the money was received on his own account.

Reg. v. Masters, 3 Cox C. C. 178; 2 Car. & Kir. 330.

No counsel appeared for the prosecution.

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COCKBURN, C.J.—I entertain no doubt that this conviction must stand. The principal facts appear to be these: The prisoner was the chief manager at the head office of a Fire Insurance Company, at Liverpool, which had branch offices at Manchester, Glasgow, and elsewhere, and when money was to be remitted from the branch offices to the principal one under the management of the prisoner, the mode of remittance was by paying the money into a local bank and obtaining a cheque upon that bank payable to the prisoner's order, and then forwarding the cheque in a letter to the principal establishment. It was the prisoner's duty to open the letters and receive all remittances sent to the head office, and hand the remittances to the cashier. That being his duty, the prisoner opened the letters containing the two cheques remitted by the managers of the Manchester and Glasgow branches, and he then indorsed them and got them discounted by intermediate parties, and then paid the amount to the cashier to go against his salary, which was then overdrawn to that amount. Upon these facts there can be no doubt that the prisoner was intrusted with the cheques with a knowledge of the purpose for which they had been received, and that he might have been found guilty on an indictment for embezzling the cheques. But instead of that he has been found guilty of embezzling the money, the proceeds of the cheques. The only difficulty in the case, which however is a superficial one, is that the cheques were cashed not by the banks on which they were drawn, but by intermediate persons. It was ingeniously argued that inasmuch as the cheques were discounted for the prisoner's convenience by intermediate persons with a knowledge that they were not his cheques, the money so obtained was not paid on account of his masters. That is not the right way to construe the matter. The question is whether the prisoner received the proceeds on account of his master? The case may be illustrated thus: A man, intrusted with a cheque to cash, meets a friend in the street and says to him, it is not convenient for me to go to the bank, will you cash this cheque for me? and the friend does cash it. That is like the present case. The moment the prisoner got the cash for the cheque it was his duty, both morally and legally, to take and hand it over to his masters. That is the common sense view: and I entertain no doubt that the money was received by the prisoner in this case on account of his masters, and that the conviction for embezzlement was right.

LORD COLERIDGE, C.J.—I am of the same opinion. I will only add that the words of the statute "for or in the name, or on account of his master," seem to refer to cases where it is the known duty of the servant to pay the money received over to the master.

CLEASBY, B.—I am of the same opinion. If the prisoner had received the cash from the banks there could have been no doubt that he received it for and on account of his masters, and I think it can make no difference that instead of receiving it from the banks he got it from another person. In both cases the money was obtained for his employers.

POLLOCK, B.—I am of the same opinion. The words "or by virtue of such employment," which were in the previous statute of embezzlement, the 7 & 8 Geo. 4, c. 29, s. 47, were omitted in the

recent statute, with the view of meeting cases where the money was obtained not by virtue of the employment, but as here, on account of the master.

FIELD, J.—I am of the same opinion.

Conviction affirmed.

Saturday, Dec. 2, 1876.

(Before COCKBURN, C.J., LORD COLERIDGE, C.J.,
CLEASBY and POLLOCK, BB., and FIELD, J.)

REG. v. LANGTON.

Evidence—To refresh memory—Document not written by witness—Limited Joint Stock Company.

It was the prisoner's duty, as a timekeeper, to give to a clerk (not the pay clerk) a list of the number of days on which each workman had worked, and it was the clerk's duty to enter these times in the time book, and the amount of wages due to each workman according to such returns; and from the time book at the time of paying the wages it was the prisoner's duty to read out aloud the number of days each man had worked, and the wages were then paid to the workman by the pay clerk. The prisoner had wilfully falsified the list by overstating the time one of the workmen had worked, and the false statement was entered in the time book by the clerk, and wages calculated accordingly. On the pay day the entries were read out aloud by the prisoner, and the amount of wages so represented paid to the workman. On an indictment against the prisoner for false pretences, the pay clerk was called as a witness, and not remembering the particulars of the entries, he was allowed to refresh his memory by reference to the time book, because he saw the entries at the pay time when they were read out by the prisoner, and knew that the prisoner then read the entries correctly, and that he, witness, had paid the sums mentioned in those entries, although the entries were not made by himself,

Held, that the time book was properly admitted to refresh the witness's memory.

Parol evidence that a Joint Stock Company Limited has acted as an incorporated company is sufficient evidence of its incorporation as a limited company on an indictment for false pretences in which the property obtained is alleged to be the property of the A. B. Company, Limited.

THE prisoner, Edward Langton, was tried before me at the adjourned Quarter Sessions of the Peace held at Kirkdale, in the County of Lancaster, on the 11th July last past, upon an indictment charging him in the first and second counts with obtaining by false pretences from Thomas Chitson certain money of the Tawd Vale Colliery Company, Limited, with intent to defraud; and in the third count with obtaining by false pretences from Samuel Higginbottom certain other money of the said company with intent to defraud.

A copy of the indictment accompanies and is to be taken as part of this case.

The prisoner was in the service of the said company as one of their time keepers, and it was his duty to give in to another clerk fortnightly a list of the number of days on which the workmen in the employ of the company had worked during the preceding fortnight. It was the duty of the clerk to enter in the time book these numbers and the amount of the wages due to each workman

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according to the number of days worked, and from this time book at the time of paying the workmen's wages it was the prisoner's duty to read out aloud the number of the days each man had worked, and the wages were then paid to the workmen by the pay clerk accordingly. Robert Aspinwall, a workman in the employ of the company, kept a provision shop on his own account, at which the prisoner dealt, and at the time when the prisoner made the false pretences charged in the indictment, he was indebted to the said Robert Aspinwall. The 14th April last past was the day on which the wages earned during the fortnight preceding the 11th April became payable. During that fortnight Aspinwall had worked twelve days and no more, and there was due to him in respect of his said work the sum of 2*l.* 11*s.*, and no more, his wages, being 4*s.* 3*d.* a day. At some time between the said 11th and 14th April the prisoner asked Aspinwall how many days he had worked during the fortnight. Aspinwall told him as the fact was, that he had worked twelve days. The prisoner then asked Aspinwall how much money he, the prisoner, owed Aspinwall in respect of provisions bought of him by the prisoner, and on Aspinwall telling him the amount, the prisoner said, "I will put it down to your time." There was no evidence of the time list handed in by the prisoner in respect of that fortnight; but the time book was made up apparently according to the same course, and in the time book the number of fifteen days and a half day was entered as the time which Aspinwall had worked during that fortnight, and the sum of 3*l.* 5*s.* 10*d.*, being at the rate of 4*s.* 3*d.* per day for fifteen days and a half day, was entered as the amount of the wages due to him. These entries the prisoner read out aloud at the pay time on the said 14th April, and the pay clerk, the said Thomas Chitson, then handed to Aspinwall, in the presence of the prisoner, the sum of 3*l.* 5*s.* 10*d.* accordingly. The 12th day of the following month of May was the day on which the wages earned during the fortnight preceding the 9th May became payable. During that fortnight Aspinwall had worked twelve days and no more, and there was due to him in respect of such work, at the same rate of 4*s.* 3*d.* a day, the sum of 2*l.* 11*s.*, and no more. On the said 9th May the prisoner asked Aspinwall what time he had worked during that fortnight, and how much he, the prisoner, owed Aspinwall. Aspinwall then told the prisoner, as the facts were, that he, Aspinwall, had worked twelve days, and that the prisoner owed Aspinwall the sum of 18*s.* 6*d.*, which he had paid for the prisoner at his request. The prisoner then said that he would put the said sum of 18*s.* 6*d.* to Aspinwall's time. At the pay time on the said 12th May, the number of days' work entered in the time book to the credit of Aspinwall was sixteen days and a half day, and the sum of 3*l.* 10*s.* 1*d.* was entered as the amount due to him in respect of such work. These entries the prisoner read out aloud at the said pay time, and the said pay clerk then handed to Aspinwall the sum of 3*l.* 10*s.* 1*d.* accordingly.

The 9th day of the following month of June was the day on which the wages earned during the fortnight preceding the 6th June became payable. During that fortnight Aspinwall had worked twelve days, and no more, and there was due to him in respect of such work, at the same rate of

4*s.* 3*d.* a day, the sum of 2*l.* 11*s.*, and no more. On the said 6th June the prisoner asked Aspinwall what time he had worked during that fortnight, and what the prisoner owed Aspinwall for provisions. Aspinwall then told the prisoner, as the facts were, that he, Aspinwall, had worked twelve days, and the amount which the prisoner owed Aspinwall for provisions, upon which the prisoner said to Aspinwall that he, the prisoner, would put down to Aspinwall's time the amount so owing by the prisoner to Aspinwall. On the said 6th and 9th June, Samuel Higginbottom, the secretary of the said company, was acting as and for the pay clerk, and made up the time book for the wages which became payable on the said 9th June, and the prisoner gave in the number of fourteen days and three quarters of a day as the time which Aspinwall had worked during the said fortnight. The time book was then made up by Higginbottom according to the usual practice, and on the said 9th June the prisoner, at the pay time read out from the said time book fourteen days and three quarters of a day as Aspinwall's time, and 3*l.* 2*s.* 8*d.* as the sum owing to Aspinwall in respect of such work. As to all the charges against the prisoner, Aspinwall proved the sums of money he had received on the said pay days and the number of the days for which he had been so paid wages, but in respect of the charges mentioned in the first and second counts Thomas Chitson, the pay clerk, was called as a witness before Aspinwall gave his evidence. The prisoner's counsel objected to Chitson being allowed to refer to the time book to enable him to say for how many days work and what amounts of money he had paid Aspinwall on the said 14th April and 12th May. The counsel contended that as Chitson had not made the entries in the time book he ought not to be allowed to refer to it to refresh his memory, but as Chitson proved that he had seen those entries whilst the prisoner was reading out aloud at the pay time, and that though at the time of the trial he did not remember the particulars of the entries without referring to the book, yet he knew that at the pay time the prisoner read the entries correctly, and he, Chitson, had paid the sums which were mentioned in those entries.

I allowed his evidence to go to the jury, reserving the point for the opinion of this court.

As to all the counts the prisoner's counsel contended that it was necessary in support of the indictment to prove that the Tawd Vale Colliery Company (Limited) was an incorporated company; that this could not be proved by parol evidence only, and that as there was only the parol evidence of witnesses, who swore that the company was incorporated, I ought to direct an acquittal of the prisoner.

To this the counsel for the prosecution, replied that as by virtue of sect. 88 of the statute 24 & 25 Vict. c. 96, the indictment would be sufficient without alleging any ownership of the money, that the references to the company might have been omitted without vitiating the indictment, and that the allegations as to the company might, therefore, be rejected as surplusage.

I declined to direct an acquittal, and left the evidence to the jury accordingly, but I reserved a case on this point also for the opinion of this court.

The jury found the prisoner guilty.

The court sentenced him to twelve months'

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imprisonment with hard labour, subject to the opinion of this court as to whether I was right in overruling the objection raised on behalf of the prisoner by his counsel.

EDWARD GIBBON, Chairman.

No counsel appeared on either side.

COCKBURN, C.J.—As to the first point, whether under the circumstances the time book could be looked at by the pay clerk to refresh his memory, it appears to me that it could. It would be very dangerous to allow such a course where the entry has only been seen by the witness in the absence of the prisoner, but in this case the witness had actually seen the entry at the time it was read out aloud by the prisoner, and knew that the prisoner had read it correctly, and that he had paid the wages according to the entry. The witness was, therefore, properly allowed to refresh his memory from the time book. As to the second point, it was not necessary to prove strictly that the company was a limited company under the Joint Stock Companies Act. Evidence that the company had acted as such was sufficient.

LORD COLERIDGE, C.J., CLEASBY, B., POLLOCK, B., and FIELD, J. concurred.

Conviction affirmed.

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT WESTMINSTER.

Reported by W. APPLETON, Esq., Barrister-at-Law.

(Before COLERIDGE, C.J., MELLISH, L.J., BRETT, and AMPHLETT, JJ.A.)

Tuesday, Nov. 7, 1876.

REG. ON THE PROSECUTION OF HARGRAVES AND OTHERS v. STEEL AND OTHERS.

Appeal in criminal cases—Proceedings on Crown side of Queen's Bench Division—Order for costs on a criminal information—Judicature Act 1873 (36 & 37 Vict. c. 66), ss. 19, 47; Judicature Act 1875 (38 & 39 Vict. c. 77), s. 19, Order LXII., 6 & 7 Vict. c. 96, s. 8.

The Judicature Acts of 1873 and 1875 have not changed the practice and procedure in criminal cases; there is therefore no appeal in such cases unless there is error of law upon the record, or unless a point has been reserved for the consideration of the Court of Crown Cases Reserved. An order for costs made on the trial of a criminal information is a procedure in a criminal cause, and therefore such an order made on the Crown side of the Queen's Bench Division cannot be the subject of an appeal.

THIS was an appeal from an order made by the Queen's Bench Division (on the Crown side), discharging a rule calling on the defendants to show cause why the taxation of the defendant's costs should not be reviewed. A criminal information had been filed against the defendants for an alleged libel, and the trial had resulted in a verdict of not guilty. The defendants were accordingly entitled under the provisions of 6 & 7 Vict. c. 96, s. 8, "to recover from the prosecutors the costs sustained by the defendant by reason of such

information," and the master had allowed the defendants certain items to which the prosecutors had objected; they had accordingly obtained the above rule, and on its being discharged they appealed to this court. On the appeal being called on

C. Russell, Q.C. with him Crompton, for the respondents, objected to the jurisdiction of the court. This case is a criminal case, and in such a case there is no appeal, therefore the Court of Appeal has no jurisdiction to entertain this case. The order discharging the rule is an order made on the Crown side of the Queen's Bench Division, and is therefore an order in a criminal cause. A criminal information is the alternative given in the statute (6 & 7 Vict. c. 96 s. 8), for an indictment, and as on an indictment there can be no appeal save for some matter of error on the record, so on this order there can be no appeal. [MELLISH, L.J.—If there is an appeal in this case, would there not also be an appeal if the court were to refuse a rule for a criminal information?] It would seem so. The contention for the appellants would seem to be that sect. 19 of the Judicature Act 1873, gives a general right of appeal and that there is no provision in either of the Judicature Acts limiting that right, but it will be found that sect. 47 of the Act of 1873 expressly provides that "no appeal shall lie from any judgment of the High Court in any criminal cause or matter save for some error of law upon the records," and sect. 19 of the Act of 1875 provides that the practice and procedure in criminal cases shall be the same as it was before the passing of the Judicature Acts.

Aspinall, Q.C. (with him Sutton), for the appellants.—It is submitted that the general right of appeal given by sect. 19 of the Act of 1873, is not limited by sect. 47 of the same Act, nor by Order LXII., for they only apply to cases reserved for the Court of Criminal Appeal, and not to criminal proceedings in any other court. Further, this is not a criminal matter, it is merely a question of costs; a question which arises on the conclusion of all criminal and penal proceedings. The criminal proceedings were between the Crown and the defendants, whereas this is a civil right between the prosecutors and the defendants.

The following are the sections of the Acts of Parliament referred to in the argument:

Judicature Act, 1873, sect. 19. The said Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order, save as hereinafter mentioned, of Her Majesty's High Court of Justice, or of any judges or judge thereof subject to the provisions of this Act, and to such rules and orders of court for regulating the terms and conditions on which such appeals shall be allowed, as may be made pursuant to this Act. For all the purposes of and incidental to the hearing and determination of any appeal within its jurisdiction, and the amendment, execution, and enforcement of any judgment or order made on any such appeal, and for the purpose of every other authority expressly given to the Court of Appeal by this Act, the said Court of Appeal shall have all the power, authority, and jurisdiction by this Act vested in the High Court of Justice.

Sect. 47. The jurisdiction and authorities in relation to questions of law arising in criminal trials which are now vested in the justices of either bench, and the Barons of the Exchequer by the Act of the session of the eleventh and twelfth years of the reign of Her present Majesty, chapter seventy-eight, intituled "An Act for the further amendment of the administration of the Criminal Law," or any Act amending the same, shall and may be exercised after the commencement of this Act by the judges of the High Court of Justice, or five

of them at the least, of whom the Lord Chief Justice of England, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer, or one of such chiefs at least, shall be part. The determination of any such question by the judges of the said High Court in manner aforesaid shall be final and without appeal, and no appeal shall lie from any judgment of the said High Court in any criminal cause or matter, save for some error of law apparent upon the record, as to which no question shall have been reserved for the consideration of the said judges under the said Act of the eleventh and twelfth years of Her Majesty's reign.

Judicature Act 1875, sect. 19. Subject to the first schedule hereto and to any rules of court to be made under this Act, the practice and procedure in all criminal causes and matters whatsoever in the High Court of Justice, and in the Court of Appeal respectively, including the practice and procedure with respect to Crown Cases Reserved, shall be the same as the practice and procedure in similar cases in matters before the commencement of this Act.

Order LXII. Nothing in these rules shall affect the practice or procedure in any of the following causes or matters:

Criminal proceedings.

Proceedings on the Crown side of the Queen's Bench Division.

COLERIDGE, C.J.—I am of opinion that there is no jurisdiction in this court to entertain this appeal, and I am of this opinion on the ground that upon the true construction of sections 19 and 47 of the Judicature Act 1873, taken with the sect. 19 of the Judicature Act of 1875, there is no appeal from an order made on the Crown side of the Queen's Bench division. Section 47 of the Act of 1873 dealt in its earlier part with the court of Crown Cases Reserved alone, and it then goes on to enact as follows: "The determination of any such question by the judges in manner aforesaid shall be final and without appeal, and no appeal shall lie from any judgment of the High Court in any criminal cause or matter save for some error of law apparent upon the record, as to which no question shall have been reserved for the consideration of the judges." Now this latter clause applies to the present case, as this is a case where no question is reserved for the consideration of the judges, and doubtless it was inserted in order to save any right of appeal which did at the time of the passing of the Act exist, but it does not destroy the distinct enactment contained in the preceding sentence which is to the effect that no appeal shall lie from any judgment of the High Court in any criminal case. I asked during the course of the argument whether the words of the latter portion of section 47 must be held to be simply a repetition of, and in no way an extension of, the words which had been inserted just above, and it did not appear that any sufficient answer could be given to the question. I also observe that it is expressly provided by Order LXII. of the Rules of Court that nothing in the rules is to change the course of proceedings on the Crown side of the Queen's Bench Division, and that adds force to the contention that it was not the intention to give any appeal in criminal cases where there was not, prior to the Judicature Act, any right of appeal. Then it is argued that this is not a judgment in any criminal cause but that this is merely an order which follows on a side bar rule drawn up on a judgment. I am, however, of opinion that the word "judgment" in section 47 of the Act of 1873 includes such an order as this, and it appears to me that section 19 of the Act of 1875 confirms this view. That section enacts that the practice and procedure in all criminal causes and matters in-

cluding the practice and procedure with respect to Crown Cases Reserved shall be the same as the practice and procedure in similar causes and matters before the commencement of this Act. This is, as I think, a criminal matter, for although it is a criminal information and not an indictment, yet, speaking generally, such an information differs from an indictment only in the absence of certain forms, such as sending the bill up before the grand jury and the like, and it remains equally a criminal matter. I am of opinion that this is clearly part of a proceeding in a criminal cause or matter, that is of a cause as to the practice and procedure of which it is especially enacted that no change shall be made, and from which, by section 47 of the Act of 1873, no appeal can lie.

MELLISH, L.J.—I am of the same opinion. I think that the clause in the latter part of section 47 means that there is now no appeal in criminal matters unless where there is error of law upon the record, in which case alone was there, prior to the Judicature Act, an appeal. If the contention of the appellant before us to-day were right, it must follow that there would be an appeal from every order made on the Crown side of the Queen's Bench Division. Then is this an appeal in a criminal matter? I am of opinion that if the subject matter of the proceeding is criminal, that then the matter is a criminal matter in all its stages and that there is no appeal. It seems to me that this is the effect of section 47 of the Judicature Act of 1873, confirmed as it is by section 19 of the Act of 1875, and by Order 62, all of which when construed together show that there is not now, just as there was not before the Judicature Acts, any appeal in criminal cases unless there is error on the record.

BRETT, J.A.—The argument that an appeal has been given in criminal matters might *prima facie* gain some support from section 19 of the Judicature Act of 1873, but the doubt, if any, is cleared up by section 47 of the same Act. The earlier portion of this section is confined to cases which come before the Court for Crown Cases Reserved, while the latter part deals with criminal matters other than those which come before that court, and then it in general words declares that there shall be no right of appeal. Now, as to whether this order is a "judgment," it may be observed that although in the interpretation clause of the Act the word "judgment" is to include decree, still it does not expressly state that it is to include such an order as this; but as according to the provisions of 6 & 7 Vict. c. 96, s. 8, the costs, the subject of this order, are the inevitable result of the judgment of the court, I am of opinion that that which enforces this inevitable result of a judgment in a criminal matter is itself a proceeding in a criminal matter, and that no appeal can lie upon it now, just as no appeal could have been brought before the passing of the Judicature Acts.

AMPHLETT, J.A.—I am of the same opinion.

Solicitors for appellant, James, Curtis and James.

Solicitors for respondent, Carter and Bell.

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NICHOLLS v. MARSLAND.

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June 13, 14, and Dec. 1, 1876.

(Before COCKBURN, C.J., MELLISH, and JAMES, L.J.J., and BAGGALLAY, J.A., and ARCHIBALD, J.).

NICHOLLS v. MARSLAND.

Dangerous property—Artificial reservoirs—Act of God—Damage—Owner's liability.

The defendant was the owner of a series of artificial lakes, which had existed for a long time without causing damage. Upon a most unusual rainfall occurring, the bank at the end of the higher lake gave way and the water rushing with great violence into the lakes below caused their banks also to give way, and the aggregate volume of water from the lakes rushing down the valley, caused damage to certain county bridges lower down the stream. On the trial of an action by the plaintiff, the surveyor of the county, against the defendant to recover for the damage done to the bridges, the jury found that there had been no negligence in the construction or the maintenance of the lakes, but that if the flood had been anticipated, the effect might have been prevented.

Held (affirming the decision of the Exchequer Division below) that the rainfall being so unusual as to amount to "vis major" or the act of God, the defendant was not liable.

THIS was an appeal from a decision of the Exchequer Division making absolute a rule nisi to enter a verdict for the defendant. The plaintiff, who was the surveyor of the county of Chester, sued the defendant, the owner of some artificial lakes, for damage caused to a county bridge by reason of the bank of the defendant's lakes giving way.

At the trial, before Cockburn, C.J. at the Chester Summer Assizes 1874, the learned judge directed a verdict for the plaintiff, reserving leave to the defendant to move to have the verdict entered for her.

A rule nisi was accordingly obtained for the defendant, and on cause being shown was made absolute.

The plaintiff now appealed.

The case in the Exchequer Division below will be found fully reported 33 L. T. Rep. N. S. 265.

The facts sufficiently appear in the head note to this report, and in the judgment (*post*) of the court.

Cotton, Q.C. and McIntyre, Q.C. (with them Cowen) for the plaintiff.—It is proposed to argue two points for the plaintiff. First, whether notwithstanding the findings of the jury, the verdict for the plaintiff ought not to stand; secondly, that the findings were against evidence. [COCKBURN, C.J.—At the trial I did not intend to convey, as seems to be supposed, that the storm in this case could not amount to "vis major," what I meant to say was that it was a question whether a person, in the position of the defendant storing up water is not liable for the result which ensues if the act of God let the water loose.] That is the point of law which it is proposed to consider first. Conceded that the rainfall was so great as to amount to what is known as the act of God, the defendant is still liable, having stored up for her own pleasure and convenience that which from its nature is a source of danger to others. She is not in the position of a carrier, who is not liable to his employers for loss occasioned by the act of God. She is rather in the position of a person who keeps a dangerous animal, as was the case in

May v. Burdett (9 Q. B. Rep. 101), and who keeps it at his own peril, and is liable if by any means it escapes and injures a neighbour. Water which is stored up in great quantities is analogous to a dangerous animal, and it was held in *Fletcher v. Rylands* (19 L. T. Rep. N. S. 220; L. Rep. 3 Eng. & Ir. App. 330; 37 L. J. 161, Ex.) that a person stores it up on his land for his own purposes at his peril. [COCKBURN, C.J.—There was no *actus dei* in that case.] No, and there is no case precisely in point where the defendant has alleged "vis major." [JAMES, L.J.—Supposing rioters or the Queen's enemies had broken down the bank, your argument must go the length of saying that the plaintiff would be liable.] We do go that length; it is not the letting loose which is the injury complained of, it is the having the water stored up at all. The defendant keeps it so collected at her peril. The distinction contended for is pointed out in two railway cases. *Vaughan v. The Taff Vale Railway Company* (5 H. & N. 679), was an action against the railway company for damage caused by the sparks flying from an engine, and there the defendants were only excused from liability on the ground that an Act of Parliament authorised them to use the engine. In *Jones v. The Festiniog Railway Company* (L. Rep. 3 Q. B. 733) where the injury also was from sparks, it was held that as the defendants had not express power by statute to use locomotive steam engines, they were liable at common law. In the *Madras Railway Company v. Zemindar of Carvetinagarum* (30 L. T. Rep. N. S. 770) it was held that the defendant was excused from liability, on the ground that he was under an obligation to keep and maintain the works (which were large water tanks) for the benefit of the country. This case differs from all those, and is within *Fletcher v. Rylands* (*ubi sup.*). The defendant has made a stream, otherwise innocuous, into a dangerous reservoir; she is legally in fault, and cannot protect herself by setting up "vis major." It is not the natural use of the land to keep a large quantity of water stored up. The proximate cause of the injury to the bridges was not the storm, but the bank which the defendant maintained to dam up the water. The defendant cannot have the benefit of the act of God when she herself has contributed to the causing of the damage. On the evidence, and the findings of the jury, there is not sufficient to warrant the conclusion that this rainfall, although excessive, amounted to "vis major" or the act of God.

Gorst, Q.C. and G. B. Lloyd, for the defendant.

—The whole case for the plaintiff depends upon the analogy between water stored up, and a dangerous animal. The analogy fails, because the keeping of a reservoir is not in itself a wrongful act, and a reservoir is not necessarily a dangerous property. There is no property which cannot, under possible circumstances, be a source of danger, a stack of chimneys, or a field of corn for instance. But property may be in its nature so dangerous, that a man keeps it *suo periculo*. Where it is not, he is liable only for negligence in keeping it. The keeping of a dangerous animal is wrongful, and a person can be indicted for it. Water, no doubt, requires to be restrained, but so do the walls of a house, or they would fall outwards. As to the point whether the damage was caused by making of the reservoir, or by the act of God, it must be remembered that water is

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not an active agent, and has no volition of its own like a dangerous animal has. The proximate cause here was the act of God. There were culverts blown up by the water that night, and it was the rush of the flood in consequence that caused the reservoirs to give way. The defendant could not foresee the influx of this additional water. This case differs from *Fletcher v. Rylands*. Here there is the act of God, and the water was not stored up by the defendant herself as in *Fletcher v. Rylands*. The defendant has been a perfectly innocent person, and cannot be held responsible for what is occasioned by "vis major." They cited

Carstairs v. Taylor, L. Rep. 6 Ex. 217.

Cotton, Q.C. replied.—My argument was intended to apply to property which has a natural tendency to do mischief, when it once gets off the position it is placed in. The water has been kept on the land, and that is the same thing as if the defendant had brought it there.

Cur. adv. vult.

Dec. 1.—The following judgment was delivered by

MELLISH, L.J.—This was an action brought by the county surveyor of the county of Chester against the defendant to recover damages on account of the destruction of a county bridge, which had been carried away by the bursting of some reservoirs. At the trial before the Lord Chief Justice it appeared that the defendant was the owner of a series of artificial ornamental lakes, which had existed for a great number of years, and had never, previous to the 18th June 1872, caused any damage. On that day, however, after a most unusual fall of rain, the lakes overflowed; the dams at their end gave way; and the water out of the lakes carried away a county bridge lower down the stream. The jury found that there was no negligence either in the construction, or the maintenance of the reservoirs, but that if the flood could have been anticipated, the effect might have been prevented. Upon this finding the Lord Chief Justice, acting on the decision in *Fletcher v. Rylands* as the nearest authority applicable to the case, directed a verdict for the plaintiff, but gave leave to move to enter a verdict for the defendant. The Exchequer Division have ordered the verdict to be entered for the defendant, and from their decision an appeal has been brought before us. The appellant relied upon the decision of the case of *Fletcher v. Rylands*. In that case the rule of law on which the case was decided was thus laid down by Mr. Justice Blackburn in the Exchequer Chamber, "We think the true rule of law is that the person who, for his own purposes, brings on his land and collects, and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so is *primâ facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default, or perhaps that the escape was the consequence of "vis major" or the act of God, but as nothing of the sort exists here it is unnecessary to inquire what excuse would be sufficient." It appears to me that we have two questions to consider; first the question of law which was left undecided in *Fletcher v. Rylands*, can the defendant excuse herself by showing that the escape of the water was owing to "vis major," or as it is termed in the law books, "act of God," and, secondly, if she can,

did she in fact make out that the escape was so occasioned? Now, with respect to the first question, the ordinary rule of law is, that when the law creates a duty, and the party is disabled from performing it without any default of his own, by the act of God, or the King's enemies, the law will excuse him; but when a party by his own contract creates a duty, he is bound to make it good, notwithstanding any accident by inevitable necessity. We can see no good reason why that rule should not be applied to the case before us. The duty of keeping the water in and preventing its escape is a duty imposed by the law and not one created by contract. If, indeed, the making a reservoir was a wrongful act in itself, it might be right to hold that a person could not escape from the consequences of his own wrongful act. But it seems to us absurd to hold that the making or the keeping a reservoir is a wrongful act in itself. The wrongful act is not the making or keeping the reservoir, but the allowing or causing the water to escape. If, indeed, the damages were occasioned by the act of the party, without more, as where a man accumulates water on his own land, but owing to the peculiar nature of the soil the water escapes and does damage to his neighbour, the case of *Fletcher v. Rylands* established that he must be held liable. The accumulation of water in a reservoir is not itself wrongful, but the making it and suffering the water to escape, if damage ensue, constitute a wrong. But the present case is distinguished from that of *Fletcher v. Rylands* in this—that it is not the act of the defendant in keeping this reservoir, an act in itself lawful, which alone leads to the escape of the water, and so renders wrongful that which but for such escape would have been lawful. It is the supervening "vis major" of the water caused by the flood, which superadded to the water in the reservoir, which of itself would have been innocuous, caused the disaster. A person cannot, in our opinion, be properly said to have caused or allowed the water to escape, if the act of God or the Queen's enemies was the real cause of its escaping without any fault on the part of the defendant. If a reservoir was destroyed by an earthquake, or the Queen's enemies destroyed it in conducting some warlike operations, it would be contrary to all reason and justice to hold the owner of the reservoir liable for any damage that might be done by the escape of the water. We are of opinion, therefore, that the defendant was entitled to excuse herself by proving that the water escaped through the act of God. The remaining question is, did the defendant make out that the escape of the water was owing to the act of God? Now the jury have distinctly found, not only that there was no negligence in the construction or the maintenance of the reservoirs, but that the flood was so great that it could not reasonably have been anticipated; although, if it had been anticipated, it might have been prevented; and this seems to us in substance a finding that the escape of the water was owing to the act of God. However great the flood had been, if it had not been greater than floods that had happened before, and might be expected to occur again, the defendant might not have made out that she was free from fault; but we think she ought not to be held liable because she did not prevent the effect of an extraordinary act of nature which she could not anticipate. In the late case of *Nugent v. Smith*,

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we held that a carrier might be protected from liability for loss occasioned by the act of God if the loss by no reasonable precaution could be prevented, although it was not absolutely impossible to prevent it. It was ingeniously argued for the appellant that at any rate the escape of the water was not owing solely to the act of God, because the weight of the water originally in the reservoirs must have contributed to break down the dams, as well as the extraordinary water brought in by the flood. We think, however, that the extraordinary quantity of water brought in by the flood is in point of law the sole proximate cause of the escape of the water. It is the last drop which makes the cup overflow. On the whole, we are of opinion that the judgment of the Exchequer Division ought to be affirmed.

Judgment below affirmed.

Solicitors for plaintiff, *Philpot and Son*, for *Potts and Roberts*, Chester.

Solicitor for defendant, *E. Byrne*, for *Brocklehurst, Wright, and Muir*, Macclesfield.

Thursday, June 22, 1876.

HOWES v. PEAKE.

23 Vict. c. 27 s. 6—Refreshment house—"Entertainment," what is.

The appellant kept a shop consisting of one room only, open in front, and without any seats. Persons were in the habit of frequenting the shop for the purpose of obtaining lemonade and ginger beer, which they simply drank at the counter and went away.

The shop was kept open until two or three o'clock in the morning. The appellant had no licence to keep a refreshment house.

Held (affirming the decision of the Divisional Court for Appeals from inferior courts, diss. Baggallay, J.A.), that this was a shop kept open for "public refreshment, resort, and entertainment," and therefore a licence within s. 6 of 23 Vict. c. 27, was required.

APPEAL from a decision of the Divisional Court for Appeals from Inferior Courts.

The appellant was convicted (on a summons taken out by the respondent, an officer of excise) before one of the magistrates of the police courts of the metropolis, for keeping a refreshment house without having a licence for the sale of beer, cider, wine, or spirits, as required by s. 6 of 23 & 24 Vict. c. 27.

The Divisional Court of Appeal (Grove and Field, JJ., Cleasby, B., dissenting) affirmed the conviction, and the appellant appealed from this decision.

The case in the court below is fully reported (*ante*, p. 94; 33 L. T. Rep. N. S. 818).

The facts sufficiently appear from the head note to this report.

M'Intyre, Q.C., and *J. Thompson*, for the appellant.—Selling ginger beer over the counter is not keeping a refreshment room within the Act. Entertainment must mean something more than refreshment or resort. It cannot apply where the customers take their refreshment standing and go away. In *Muir v. Keay* (L. Rep. 10 Q. B. 594), the premises were held on appeal from the magistrates to be a refreshment house, but there the defendants' house was found open during the

night, and seventeen females and twenty men were there, and were being supplied with cigars, coffee, and ginger beer. [*MELLISH, L.J.*—The words "public resort" are perhaps meant to exclude clubs, where only certain persons and not the public have the right of admission.] In *Taylor v. Oram* (1 H. & C. 370), the defendants kept a dancing saloon, and the room where the defendants were found selling beer opened into the dancing room. There the magistrates held that it was not a refreshment house within sect. 6 (*ubi sup.*) on the ground that entertainment means something more than mere refreshment, and his decision was upheld.

O. Bowen, for the respondents.—This case does not differ from *Muir v. Keay* (*ubi sup.*). The word "entertainment" has a double meaning. It may mean refreshment only, but the facts here show something more than mere refreshment.

M'Intyre, Q.C., did not reply.

JAMES, L.J.—I think on the whole that the judgment of the majority of the court below must be affirmed. It is very difficult to apply a meaning to the word "entertainment" which would not extend to this case. In this shop the public are received and sheltered and refreshed, and I cannot myself put any meaning upon the word "entertainment" which would not include those facts.

MELLISH, L.J.—I am of the same opinion. The whole question arises upon the effect to be given to the addition of the word "entertainment." The main object of the Act is to deal with refreshment houses, in which refreshments are sold which are to be consumed upon the premises. In sect. 6, requiring licences to be taken out by all houses, rooms, shops, or buildings, no doubt the words "resort and entertainment" are added to the word "refreshment;" but I do not think it necessary to hold that "entertainment" must necessarily be something entirely distinct from "refreshment." I think the word "entertainment," as far as it has any meaning, qualifies the meaning of the word "refreshment," because "entertainment" has a plain and natural meaning, and it includes the receiving of a person and providing him with drink and food of an agreeable nature. If you receive a man into your house and give him drink and food of an agreeable nature you entertain him; and I do not think a man is less entertained because he is not asked to sit down while he takes his refreshment. It appears to me, therefore, the word "entertain" so far qualifies the word "refreshment" that it must be such a kind of "refreshment" as partakes of the character of "entertainment." *Mr. M'Intyre* referred to the case of a chemist's shop—that would be an instance of what probably would not be "entertainment." The refreshment must be such a refreshment as you would call entertainment. I think that persons who are supplied with ginger beer, there being at any rate enough accommodation furnished to the persons drinking the ginger beer to provide them with the means of drinking it comfortably, are entertained. Therefore in my opinion the judgment of the court below ought to be affirmed.

BAGGALLAY, J.A.—I am unable to take the same view of the case as the Lords Justices. It appears to me that refreshments supplied in the way in which they are found to have been supplied in the special case are not within these words of the Act,

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"houses, rooms, shops, or buildings kept open for public refreshment, resort, and entertainment." I rely upon the precise words used by the magistrate by whom this case was settled—viz., "That the appellant's shop consisted only of one room, only open in front, without seats of any kind." The persons who frequented the shop simply drank their ginger beer or lemonade at the counter and went away. I think the correct view of the construction of this Act was taken by Mr. Justice Lush in the case of *Muir v. Keay*, to which reference has been made, viz., that there must be something added towards the comfort of the persons resorting to the house, shop, or room, in which the refreshments are supplied. For instance, a room fitted up with little round tables might satisfy that word "entertainment." Of course I do not mean to say it is necessary to have chairs and tables to satisfy the word "entertainment;" but it appears to me that there must be something beyond the mere fact of selling the ginger beer at the counter, and the persons drinking it and going away. A similar view seems to have been taken by Mr. Justice Blackburn, who seems to take the view that some effect must be given to the word "entertainment." He says, "It is the correlative of resort—the reception and accommodation of the public who resort to the place in question." What meaning he would give to the word "reception" does not clearly appear, except from the facts which existed in that case of *Muir v. Keay*; in that case you have this distinct fact found, not only that cigars, and ginger beer, and lemonade were consumed on the premises, but that at one time seventeen females and twenty males were found together in the room, that is to say, they were resorting there. I entertain some doubt whether the mere going to this shop to take ginger beer at the counter, and then going straight away was a resorting to the place within the meaning of the Act of Parliament. I think what is pointed out by the Act is something more than the purchase of the article, and the consumption of the article at the counter. That is the view I take of this case; and having regard to the particular circumstances of the case, it appears to me that the conviction was wrong.

QUAIN, J.—I am of opinion that the judgment of the court below ought to be affirmed in this case. It strikes me that this shop is a shop kept open for "public refreshment, resort, and entertainment" within the meaning of the Act of Parliament. It is admitted that it is kept open for refreshment, and I do not share the doubts of Sir Richard Bagge, about whether it is kept open for resort. It is kept open for the public generally who may choose to resort to it as they did in this particular case. "Entertainment" includes refreshments, and may be something more. I cannot have any doubt that the object of this Act of Parliament is to include refreshment rooms; and it seems to me that a man who is refreshed is entertained at the same time that he is refreshed. He may be entertained without refreshment, but I do not think he can be refreshed without being entertained. It appears to me that the case comes within the terms of the Act of Parliament, and a house of this kind kept open till three o'clock in the morning is within the mischief pointed out by the statute; and therefore I think the judgment of the court below is right.

Judgment below affirmed.

Solicitors for appellant, *Hickin and Washington*.
Solicitor for respondent, *The Solicitor to the Inland Revenue*.

Friday, Nov. 24, 1876.

APPEAL FROM QUEEN'S BENCH DIVISION.

(Before MELLISH, L.J., BRETT and AMPHLETT, J.J.A.)

REG. v. FLETCHER; *Ex parte* BIRNIE.

Court of Appeal—Jurisdiction—Right of appeal in criminal cases—36 & 37 Vict. c. 66 (Judicature Act 1873) s. 47—38 & 39 Vict. c. 77 (Judicature Act 1875) s. 19—First schedule, Order LXII.

An application to the Court of Queen's Bench for a certiorari to bring up a conviction to be quashed, on the ground of want of jurisdiction in the convicting justice, is a "criminal cause or matter" within the meaning of the above sections of the Judicature Acts of 1873 and 1875, and there is consequently, no appeal from the decision of the Queen's Bench Division.

The appellant, Birnie, had been summoned before the respondent, one of the justices of the peace for the county of Cumberland, for an offence against the game laws. On the hearing of the summons he had asserted, as an objection to the jurisdiction of the justice, the existence of a *bonâ fide* claim of right to the land in question in himself. That objection was, however, overruled, and the appellant was convicted. Subsequently a rule *nisi* was obtained in the Queen's Bench Division, calling upon the respondent to show cause why a writ of *certiorari* should not issue to bring up the conviction to be quashed, on the ground of want of jurisdiction in the justice who tried the case. The rule, however, was discharged on the hearing by Lord Coleridge, C.J., and Quain, J., sitting to hear cases on the Crown side of the Queen's Bench Division. This appeal was from that decision.

Before counsel for the appellant proceeded to state his case,

Ford, for the respondent, took a preliminary objection that the court had no jurisdiction to try this appeal, as it was an appeal from a decision in "a criminal cause or matter," within the meaning of sect. 47 of the Act of 1873, and sect. 19 of the Act of 1875.

Bompas for the appellant.—The case lately decided in this court of *Reg v. Steel*, *ante* p. 399, may be said to be against me, but that case is distinguishable. That only decides that there shall be no appeal from the decision of a court of the High Court of Justice, where that decision is in a criminal proceeding. But here the decision in the Court of Queen's Bench was an application for a writ of *certiorari* to the justices on the ground that they had no jurisdiction to convict. The conviction itself was no doubt a criminal proceeding, but not the application for the prerogative writ of *certiorari*. The only question before the Queen's Bench Division was whether a claim had been set up *bonâ fide* or not. That was not a criminal proceeding in any sense, no more than a motion in the High Court with respect to the subpoena of a witness in a criminal case would be in itself a criminal proceeding. The writ of *certiorari* relates to Fletcher and not to Birnie.

MELLISH, L.J.—The question is, whether we

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have jurisdiction to hear an appeal from a decision of the Court of Queen's Bench refusing a writ of *certiorari* to be issued against the defendant, a justice of the peace for Cumberland. Now was that decision of the Court of Queen's Bench a decision "in a criminal cause or matter," within the meaning we gave to these words, in the case of *Reg. v. Steel* (*sup.*), which was before us a few days ago. We there held that those words were not confined to cases referred to the Court of Criminal Appeal, but went to criminal cases in the Court of Queen's Bench itself. Now a further and somewhat different question arises, whether there is an appeal from a proceeding in the Queen's Bench, which is not a criminal proceeding in that court, but arises out of a proceeding before the justices, which was a criminal proceeding. Under those circumstances was that proceeding in the Queen's Bench a proceeding in a criminal matter? In my opinion it is clear that, subject to the few exceptions specified, criminal procedure was intended to remain unaltered by the Judicature Act. The words of sect. 19 of the Act of 1875 are very wide, and relate to everything substantially a "criminal cause or matter." These words must be construed according to their natural meaning. Is this "a criminal cause or matter?" Before the magistrate it is, in the Queen's Bench it is not. If any appeal lies, it must lie on both sides. Suppose, here, the *certiorari* had been granted and the conviction had been brought up and quashed by the court of Queen's Bench. If there is an appeal here, there must be one also under those circumstances, and so a simple question of a small fine or a few days' imprisonment might ultimately get into the House of Lords. I think that cannot have been intended to be allowed. I think this is such a criminal cause or matter as is there intended. Sect. 19 of the Act of 1875 throws light on sect. 47 in the previous Act, and it assumes that the procedure has not been altered in criminal matters. It was not the intention of the Judicature Act to enlarge the jurisdiction of the Court of Appeal in this respect.

BRETT, J.A.—I am of the same opinion. It all turns on the 47th section of the Act of 1873. The 19th section of the later Act can only be used as it was in *Reg. v. Steel* (*sup.*), that is, as interpreting the 47th section, criminal practice is to remain as before, unless altered by Rules of Court. The Rules of Court do not alter it, and, further, Order LXII was put in for the sake of caution, to show that none of the rules should apply to proceedings on the Crown side of the Queen's Bench, and that is all. The 19th section, therefore, shows that criminal practice, inasmuch as it is not altered by the rules, remains the same. In *Reg. v. Steel* it was argued that s. 47 was confined to cases before the Court of Criminal Appeal, but the court said the scope of the words was much larger. It is said here that those words do not apply where the question before the Queen's Bench was not a "criminal cause or matter." Now, what is this case? There has been a conviction, and there is an application for a writ of *certiorari* to bring it up to be quashed. Is that not a "criminal cause or matter?" It is to decide whether a man is to be kept in prison or fined or not. The proper construction is that there is no appeal where there was not one before, therefore, this case follows *Reg. v. Steel* (*ante*, p. 399).

AMPHLETT, J.A.—I am of the same opinion. To oust the jurisdiction of the justices there must be a *bond fide* assertion of right. Before the Court of Queen's Bench what was the question? Not whether there had been poaching or not, but whether there was a *bond fide* assertion of right. That is whether the plea to the jurisdiction was a good one or not. The same sort of question as there was in the *Franconia* case. Therefore this case comes under sect. 47 of the Act of 1873, under the exact meaning of its words. And, if we are to look at the public convenience, would it not be most inconvenient that this case should go through all the courts, not to try a civil right, but whether there was a *bond fide* objection or not?

Appeal discharged with costs.

Solicitors for appellant, *Bischoff, Bompas, and Bischoff* for *Waugh*.

Solicitors for respondent, *Helder, Roberts, and Gillett* for *Webster, Whitehaven*.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

(Before the MASTER of the ROLLS.)

Reported by J. E. THOMPSON, Esq., Barrister-at-Law.

Friday, Nov. 17, 1876.

TAYLOR v. CORPORATION OF OLDHAM.

Sewers — Powers of local authority — "Street" —

Local Act (Oldham Borough Improvement Act 1865), sects. 16, 27, 59, 60, 62, 160, 366—*Public Health Act* 1875, sects. 16, 299—*Sewage Utilisation Act* 1865, sect. 4.

The term "street," both in its general meaning, and by the *Oldham Borough Improvement Act* 1865 (*Acts Local and Personal*, 28 & 29 Vict. c. 311), includes a private road, for passage over which a toll is charged, and over which the public have no right of way.

The plaintiff was the owner of a private road at Oldham, and set up a toll bar at one end, and charged tolls for passengers. The defendants, without any further notice than the erection of a board with a printed notice thereon, proceeded to dig and construct sewers in the said road. The plaintiff moved for an injunction to restrain them from proceeding with the work.

Motion refused.

Held, that the corporation was empowered to construct such sewers, both under sect. 4 of the *Utilisation of Sewage Act* (28 & 29 Vict. c. 75), s. 16, and the *Public Health Act* 1875 (28 & 29 Vict. c. 55), and by their *Private Act*.

The special rights and powers given by a *Private Act of Parliament* are not taken away by the general provisions of a *Public Act*.

THE plaintiffs are the present trustees of an indenture dated 3rd March 1837, whereby certain plots of ground, with the appurtenances, became vested in certain persons therein mentioned upon trust for "the Higginshaw and Lower Moor Road Company," thereby constituted. The object of the said company was to maintain the said road, and for that purpose to raise a sum not exceeding 1600*l.* in thirty-two shares of 50*l.* each, and no person, with the exception therein mentioned, was to travel on or use any part of the said road without paying such toll as was therein provided.

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The said road was duly completed, and toll bars erected, and the title of the company acknowledged from time to time by the defendants.

Some time previously to Oct. 1876, the defendants caused a notice, dated 3rd May 1876, to be posted up on a part of the said road or street, headed, "The Oldham Borough Improvement Act 1865," and addressed to all persons interested in the said road, to the effect that unless certain drainage works therein specified should be commenced within the period therein limited, the defendants might remove all obstructions in, upon, or under the said road or street, and sewer and drain, or otherwise complete the said street, or such part thereof as should not have been done, in such manner as they should think fit, and might charge the several owners of buildings or lands in such street with the expense of the execution by them (the defendants) of such works or incidental thereto, in the manner alleged to be prescribed by the said Act, the same to be paid or recoverable as therein provided in that behalf.

The said notice, as the plaintiffs alleged, was not brought to the knowledge of the plaintiffs previously to 20th Sept. 1876.

On or about 20th Sept. 1876, the defendants, without the consent of the said company or of the plaintiffs, and without any further notice than that above mentioned, acting, as they alleged, under the provisions of the Oldham Borough Improvement Act 1865, caused openings and excavations to be made in the surface and soil of the said road, called Shaw-road, for the purpose of laying or constructing a sewer, and threatened to proceed in the said excavations and construction without further notice to, or the consent of, any persons whatever. The defendants had in fact already caused several holes or shafts to be opened and made in Shaw-road, and were proceeding to cause cuttings or tunnels to be made to connect the said holes or shafts to a depth ultimately attaining 30ft. or thereabouts.

The plaintiffs claimed an injunction to restrain the defendants against proceeding with their works, and damages for the injury done thereby to the plaintiff's road.

Ince, Q.C. and *E. W. Byrne*, for the plaintiffs.—This is a close of land which has never been dedicated to the public. The defendants have been trespassing on our land and digging holes in it. There is no right of way for the public, and we had put up toll bars. The defendants have no authority under their private Act. See sect. 27 of the Private Act, in which this road, though spoken of for the sake of convenience as a "road" or "street," is treated as private property. It is in effect declared to be private property, which the corporation, if they wish to exercise any rights over it, must purchase. That section is not in any way repealed by the Public Act. [JESSEL, M.R.—What do you say is the meaning of the 5th subsection? That is the only point on which difficulty arises. Does the 5th subsection include this? It gets rid of sect. 60, does it not?] I go further. The Public Act does not repeal the Private Act, which in effect says: "Your close is not a street; if the corporation wish to treat it as a street they must buy up your rights." [JESSEL, M.R.—The third subsection seems to help your argument.]

Chitty, Q.C. and *Macnaghten* for defendants.—This is a street within the definitions in the

Private Act [read to words "commencement of the Act"]. In sect. 27 this particular road is spoken of as a street. We have proceeded regularly under sect. 16. [JESSEL, M.R.—That section hardly applies to private property.] Yes; if a man makes his private property into a street, and there are compensation clauses in this Act. (See also sect. 59, on which we rely, and sects. 60 and 65 and 62, which provide for compensation. [JESSEL, M.R.—That makes the whole thing rational. These large powers are vested in the corporation for the sake of the public health. But you cannot go under sect. 16.] We claim under sects. 16 to 21; and also under sect. 16 of the Public Health Act of 1875. [JESSEL, M.R.—I think you can go under sect. 60, but not under sect. 16. Sect. 16 gives you a power when you are continuing a sewer.] We are continuing the sewage system. The 16th and 60th sections are to the same effect, except that in one there is compensation, and not in the other. Then this is a street under sect. 16. Street has a very large definition: (See the case of the *Vestry of St. Mary's, Islington*, L. Rep. 9 Q. B. 278.) [JESSEL, M.R.—The 16th section of the Public Health Act 1875, helps you.] See also section 299 of the Public Health Act of 1875. [JESSEL, M.R.—My impression is that sect. 27 helps you more than sect. 16.] There was a similar clause in the Public Health Act 1848. [JESSEL, M.R.—My attention was not called to the 3rd sub-sect. of sect. 27. With regard to a private street, unless you have powers independently of the Act, you are prohibited from making sewers unless you buy.] There is no express prohibition in the Act. It is only implied. [JESSEL, M.R.—You cannot under sect. 27 touch this particular street.] Under the 16th section and the earlier ones we can. [JESSEL, M.R.—No; nor under the 60th. The only power there is to make sewers under streets.] That is plain by the 3rd sub-section. [JESSEL, M.R.—It is saved by sect. 366. I see by the Public Health Act of 1848 sewers are vested in the sewer authorities. It is not a mere easement. *Miller*, as *amicus curiæ*, referred to *Bigg v. Corporation of London* (38 L. T. Rep. N. S., 336; L. Rep. 15 Eq. 376)]. There is an express decision, (*Thomson v. Nutter*, 31 J. P.) which decides that a sewer is an easement. [JESSEL, M.R.—It is not so. It required an Act of Parliament to set this right. But I see the 45th section of the Act of 1848 is very like the 16th section of the Act of 1875. Were you the local board at the time of the passing of the Improvement Act of 1865?] Yes. [JESSEL, M.R.—The 366th section states the right you then had. If you had this right at the passing of the Act of 1865, you have not lost it.]

The following are the sections in the respective Acts referred to in the arguments and the judgment:—

The Oldham Borough Improvement Act 1865, Local and Personal Acts (28 & 29 Vict. c. cccxi).

Sect. 16. If at any time any street or court (not being a highway repairable by the inhabitants at large) formed, set out, or laid out, either before or after the commencement of this Act, is not sewered, drained, levelled, flagged, and paved, or macadamised to the satisfaction of the corporation, they may at any time, and from time to time, order that it be freed from obstruction, sewered, drained, levelled, flagged, paved, macadamised, and otherwise completed with such materials at such levels, with such inclinations, and with sewers and drains of such dimensions, and that the soil thereof be raised, lowered, or altered in such manner, and within such time, as the

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Order directs; and thereupon the respective owners of the buildings and lands in such street or court shall, at their own respective expense, remove all obstructions in, upon, or under, and sewer, drain, level, flag, pave, macadamise, and otherwise complete such street or court within the time and in the manner prescribed by the Order.

Sect. 27. With respect to the road or street called Shaw-road the following provisions shall take effect:

Then sub-sects. 1 and 2 give the corporation a right to purchase all private rights of way, and other rights connected with levying tolls and otherwise over the said road, and that such rights should be in the nature of land.

Sub-sect. 3. On the completion of such purchase and taking, all the rights and interests aforesaid shall be by virtue of this Act absolutely extinguished, and the corporation shall remove and abate all gates, &c., or other obstructions then existing in, on, or over any part of the carriageway or footway of the said road or street, and thenceforth the said road or street shall be and continue a street open to the passage of the public, and free from encroachment, and shall be subject to all the provisions relating to the sewerage, draining, levelling, flagging, and paving or macadamising, or otherwise completing of streets not being highways repairable by the inhabitants at large.

Sub-sect. 5. Nothing in this Act shall empower the corporation to purchase or take by compulsion any estate or interest in the soil of the said road or street.

Sect. 59. All existing and future public sewers and drains within the borough, and all existing and future sewers and drains in and under the streets and courts, with all the works and materials thereunto belonging, whether made or provided at the cost of the corporation, or otherwise, and the entire management of the same, with the appurtenances, shall vest in and belong to the corporation, and the corporation shall maintain, cleanse, and flush the same.

The 60th section gives the corporation power to construct sewers necessary for the effectual drainage of the borough, the conversion of open drains into sewers, the carrying under cellars and streets, the continuing of them to the most convenient place for the collection of sewage matter so as not to cause a nuisance; and, if necessary, to construct works within or beyond the borough, and to remove obstructions to any of the above purposes.

The 62nd provides compensation for works connected with the exercise of these powers.

Sect. 160: If any such delay or omission (i.e., on the part of the corporation in reinstating streets, &c., after the construction of sewers) as aforesaid takes place, the persons having the control or management of the street, bridge, sewer, drain, pipe, tunnel, work, or obstruction in respect of which such delay or omission takes place, may cause the work so delayed or omitted to be executed, and the expense of executing the same shall be repaid to such persons by the corporation.

Sect. 386 enacts: Nothing in this Act shall take away or abridge any right, power, or authority which the corporation have or may enjoy under the Municipal Corporation Acts, or otherwise, independently of this Act.

Utilization of Sewage Act 1865 (28 & 29 Vict. c. 75) sect. 4: Sewer authorities shall have power to construct such sewers as they may think necessary for keeping their district properly cleaned and drained, and shall, as respects all sewers constructed by them or under their control, whether the same were made before or after the passing of this Act, have all the powers that local boards have in respect of sewers vested in or constructed by them under the 45th and 46th sections of the Public Health Act 1848, and other Acts therein specified.

Public Health Act 1875, sect. 16: Any local authority may carry any sewer through, across, or under any turnpike road or any street or place laid out as or intended for a street, or under any cellar or vault which may be under the pavement or carriageway of any street; and after giving reasonable notice in writing to the owner or occupier (if on the report of the surveyor it appears necessary) into, through, or under any lands whatsoever within their district. They may also (subject to the provisions of this Act relating to sewage works without the district of the local authority) exercise all or any of

the powers given by this section without their district for the purpose of outfall or distribution of sewage.

The 299th section of the Act of 1875 provides that when complaint to the Local Government Board has been made of default on the part of the local authority in providing and cleansing sewers, the board, on being satisfied of the offence, may make an order giving the local authority a certain time to do the work, and if the latter fail to do so, the board may have the work done by its own officer, and charge the expense thereof on and recover the same from the local authority. And any person appointed by the Local Government Board to do the work shall have the same power in all respects as was vested in the local authority for that purpose.

JESSEL, M.R.—The first question I have to consider is, whether, independently of the local Act, there is any power in the corporation to do this work. Of course, if they had this power at all it must have been under the general Act, and I must say I cannot help thinking that the persons who were parties to this local Act, which received the Royal Assent on July 5th 1865, and which, following the terms of the preamble, was intended to comprise all the Acts which in any way related to the local government of this corporation with reference to streets, will be a little surprised to find that by means of another Act of Parliament, the public Act having received the Royal assent a few days before, the whole of that intention has been defeated so far, and that the corporation will, therefore, for many years, be under the control of two Acts. I think also that those persons interested in claiming special exemption, and special provisions as regards their own particular lands, will be a little surprised to find that by reason of this general saving in the local Act and all other powers, as regards the corporation then existing, in an important Act (not passed, no doubt, at the time) they assented to the provisions of the local Acts, but it had unfortunately received the royal assent a few days before. Whatever you may think of the extraordinary results, which are so caused, it is my duty to interpret Acts of Parliament as I find them. I must treat them according to the ordinary rules of construction—that is, literally, unless there is something in the context, or in the subject, to prevent that reading. I find in the 366th section of the Local Act this provision: "Nothing in this Act contained shall take away or abridge any right, power, or authority which the Corporation have, or may enjoy, under the Municipal Corporation Acts, or otherwise, independently of this Act." An argument was addressed to me to the effect that that meant Municipal Corporation Acts or other like Acts. I am unable to appreciate the argument. I do not know what Acts like the Municipal Corporation Acts are, and consequently I cannot understand what it is that is similar to a Municipal Corporation Act not being a corporation Act. As the Municipal Corporation Acts include all the Acts which are Corporation Acts, I must read "otherwise" to be "otherwise," and to have its proper meaning, and therefore it means "otherwise" independently of this Act. In other words, that all the rights, powers, and authorities which the Corporation had, independently of this Act, were preserved to them. Now this Act received the royal assent on the 5th July 1865, and consequently preserved to the Corporation, as I read it, any rights or powers they had not repealed by this Act. One of the Acts upon which great stress was laid last time, it now turns out, upon investigation, was repealed, and that another Act, only

passed a few days before, was not repealed (I suppose, accidentally, nobody knowing anything about it), and had received the royal assent on the 29th June 1865. So that on the 5th July this other Act was in force, and if I am to read the section of the Local Act, as I do read it, to be general, then the Corporation had the power under the Public Act to make the sewer under this street. That there can be no question about. At least, I think not, because they are to have power to construct "such sewers as they think fit." Now by sect. 4 of the Sewage Utilisation Act 1865, the powers of which are similar for this purpose to those of the Public Health Act 1875, the sewer authority, which this Corporation was, have all necessary powers "for keeping their district properly cleaned and drained." [His Lordship read down to the words "Public Health Act 1848."] There is no substantial difference. The result therefore is, that under this particular Act they have the powers vested in them for constructing a sewer under the street which are vested in authorities of this kind by the other Public Act. That being so, the only question which remains is whether that power has been taken away. Now the actual Public Act in question was repealed by the Public Health Act of 1875. It was repealed by what is called a Consolidation Act, that is it was repealed for the purpose of having its provisions consolidated into one Act. For the purpose for which I am now dealing with the Public Health Act of 1875, I take the Public Health Act of 1848 to have been substantially copied, because there is no appreciable variation. Therefore, in considering the effect of the Act of 1875 on the Local Act, I really must treat the Public Health Act of 1875 as a mere continuation of the powers of the Sewage Utilisation Act of 1865, not that it was really so in form, but that it was so in effect. In other words, if the intention of the Legislature in passing the Local Act was to preserve the general powers under the Sewage Utilisation Act, which I am bound to rule it was (whatever my own opinion may be upon the subject not being judicial), then I am of opinion that the rule which says that ordinary general legislation does not override special legislation, has no application to the case before me. General legislation was expressly reserved by the Local Act; and the Consolidated Act, being a mere continuance of that general legislation, is not in substance a new power conferred on the corporation, but simply a continuation of their old powers. It is in no way interfered with by the provisions of the Local Act. Now that brings me to the next point, viz., what is the power? If the power is contained anywhere, it is contained in the 16th section of the Public Health Act 1875: "Any local board may carry any sewer through, across, or under any turnpike road or any street, or place laid out or intended for a street." The question I have to consider is this: Is the place in question "a street or a place laid out as or intended for a street?" In considering that, I must also take into account the interpretation clause of this Act of Parliament, which says that a "street includes any road, lane, footway, square, court, alley, or passage, whether a thoroughfare or not." I must also take into consideration that the Act expressly calls places "streets," whether they are on public property or private property, and whether the public have any rights over them, or have no rights over them.

There is a series of sections beginning with the 150th, the marginal note of which explains what I mean: "power to compel paving, &c., of private streets." The word "streets" in the Act of Parliament clearly extends to places which are in all respects private, and over which the public have no right. If it is anything, therefore, this is a private street. Now, what is it? It is a strip of land which seems to have been sold for the purpose of being made or turned into a road. What exact rights the owners of the land reserved to themselves, except that it is said they reserved some, I do not know. The fact is, they built houses on each side of this private road, and these houses exist, and have been used by the occupiers from that day to this, and these houses are within the borough of Oldham. Now, the first question I have to consider is, Is it a street or not? I have no doubt it is a street. In the first place I was told that it could not be a street at all, unless the owners of the houses had a right of way along it. In this particular instance there is no evidence at all as to whether there was or was not a right of way. As I said before, all I know is, that there were some exceptions, but it is not denied that they do exercise such a right of way, and do pass and repass, and therefore I shall presume, in the absence of express evidence to the contrary, that they have some right of way, and if it is necessary, which I do not think it is, I shall assume that the owners of the houses have some sort of right of way in the street. That appears sufficiently for the purpose of this motion. I do not think it is necessary. The definition of a street is correctly laid down in the Imperial Dictionary, which I have sent for. "The street itself is no doubt the properly paved or prepared road, that is, the street. It sometimes includes the houses along each side of it. But that is not its proper meaning. It is called a street even without houses. There are some streets with no houses. But the usual common meaning of the word street, is a road with houses on one or both sides of it." Now, tried by that test, this is a street. It has houses on both sides of it. Therefore, in common parlance, it is a street. There is no need of a definition, because street is to include "street" according to this interpretation clause. It is really a street; supposing that were wrong, I find "street" is to include "road," and it certainly is a road. But not only that, it is to apply to any "place laid out as, or intended for, a street." It is laid out as a street, and distinguishable from any other street, so that in every way that you can define it, it appears to me to be within the section. Is it the common sense of the section? The learned counsel pressed upon me that we must have some regard to common sense, in the meaning of the section. I by no means wish it to be thought that I disregard it. It would be monstrously absurd to interpret the Act in any other way. What is the Act for? It is a Public Health Act with regard to the owners of these private courts and alleys, who are the worst people in the world for laying out money, because in these places the poor live, the people whose tenements are not provided with sewers and drains, are the very people who suffer from the want of sewage and drains, which are so requisite for public health. Is it to be imagined that the Legislature intended to except the very worst places from the operation of the powers of the Act? I should

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say, if the Act was passed for anybody, it must have been meant to include these people, who for the sake of gain, and requiring high rents in proportion to the wretched tenements they allow the poor to occupy, have neglected these ordinary and necessary sanitary precautions. If I am to interpret it by what I might think to be the mind of the Legislature, I should suppose that the first people to be included would be the owners of these crowded courts and alleys, on which the public have no strict right whatever, but which are intended to be used as streets and houses for the dwellings of the poor, without providing them with what, according to modern science, is known to be absolutely necessary for their well being. Looking at it in that way, common sense is entirely in accordance with what I conceive to be its true legal meaning. That being so, in my opinion, this is a street within the meaning of the Act, and the defendants have power to make the sewer under it, without any notice whatever. Now it must not be omitted to be mentioned, that if they do take property under these Acts, they must make compensation, consequently no injury is done to any one by their exercising these powers. They give health to the inhabitants, and they pay for the property which they take for a purpose which is a gain, and which common sense would dictate. It is on the same principle that when roads and canals and other public works are to be executed, there are powers given to take private property for that purpose, making due compensation. That gets rid of the argument on that Act. Now with regard to the local Act. I must say (and this may have hereafter a bearing on the question of costs) that I think the corporation was entirely mistaken in the course they pursued, because, as I read the 27th section (and if it was necessary I might call in aid that the very local Act calls these places a street or road, but I do not think it is necessary, and it is very difficult to describe it in any other way), as regards this particular road, I cannot help thinking that the corporation made a bargain on the 27th section which they did not intend to repudiate, by giving notice under the 16th section; the corporation, by the 27th section, obtained the right to purchase the private rights over this road. They were to do it within a year. And when they completed the purchase, then it was to be subject to the provisions relating to sewerage, &c., which affect streets not being highways. When we come to look at the 16th section, which is the section in question, it obviously applies to a private street—a street not being a highway, and, consequently, according to all ordinary rules of interpretation, when you find this particular power is to be subject to those provisions in the completion of the purchase, you import into it a negative: that is, that until completion it is not to be so subject. On that ground I have no hesitation in saying that the advisers of the corporation were mistaken, and their counsel have given up that point. Then there is another point of much more difficulty, on which I have heard a great deal of argument, as to whether, introducing this 3rd sub-section of sect. 27 of the Local Act, they might do it under another section of the same Act of Parliament—the 160th. No doubt it is not very easy to reconcile all the clauses in this Act, and I am very far from saying that there is not a good deal to be said in favour of the view

which has been presented to me with a great deal of energy; but I think in all these Acts of Parliament the first thing you have to consider is, that when you have general provisions, whether contained in the same Act, or another Act of Parliament, and when you have special provisions as to a particular property, in the ownership of an individual, you must read the special provisions as excepted out of the general. That is the only way of reconciling these Acts of Parliament. It is the practice of Parliament (as those who have the misfortune of going before parliamentary committees know), to insert the clauses which are agreed on, and then these persons who have obtained their insertion leave the room, and have nothing further to do with the Act of Parliament. The committee would not listen to them on the general clauses. They would only say: "It is no business of yours. You have been provided for, and you have had all your clauses put in." If you once admit the doctrine, that the general provisions are to override the special ones, anybody who could get a clause in the Act ought to be heard on every clause of that Act. I can only say I think it would be simply impossible to conduct private legislation at all, if any such doctrine were admitted, or prevailed. I consider it to be the established rule, that when you find general provisions of this sort, either in the same Act or in other Acts, they are not to control or repeal the special provisions, which are considered to provide for the particular property. I should, therefore, on that ground, not be disposed to hold that the 59th and 60th sections were intended to override the 27th. It is said they do not override them at all. The 60th clause enables the corporation to make from time to time the sewers which are necessary for the effectual drainage of the borough. That is general—"under any street." It cannot, properly speaking, affect the 16th section, because the meaning of the section is that where it is a private street the corporation is not to make the sewer; that is, not at the public expense. The owners of the houses are to make the sewer, and it is only on their refusal that the corporation is to make it. Then what is to happen? The owners of the houses are to pay for it. They have no business to throw the burden of making the new sewers in their private streets on the whole of the town, which they would do if the 60th section was intended to apply. But it is not, because it is a general provision, and you must except out of it the special provision, on the principles which I have mentioned. Then it goes further, because the 59th section makes the corporation owners of the sewers when once made. The words are: "All existing and future public sewers and drains within the borough, and all existing and future sewers and drains," and so forth, are to vest in the corporation, whether made or provided at the cost of the corporation or otherwise." Now, that is a very useful provision. It was found under the old law, and it was sometimes held that the sewer authorities (they were not sewer authorities in those days) had only an easement, and it was found to be very inconvenient, and consequently, therefore, in the modern Acts the property in the sewers has been vested in the sewer authorities, that is to say, that instead of allowing the subsoil to remain in the owner of the soil, subject to an easement, or right of sewage or drainage,

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the absolute property in the sewer (which means not merely the brick barrel, or whatever it may be made of, forming the sewer, but the whole interior of the sewer, that is the whole of the soil included in it, and, if I may say so, the barrel of the sewer), is now vested in the sewage authorities, and if the sewer is a large one, it amounts in substance, for all useful purposes, to the whole of the subsoil, and that is absolutely vested in the corporation. That being so, what would follow if I am to allow the 60th section to apply? They would make the sewer under the private street, and then become the owners, for all substantial purposes, of the subsoil; of course making compensation to the owners. But I find that the 5th sub-section of sect. 27 is this: "Nothing in this Act shall empower the corporation to purchase or take by compulsion any estate or interest in the soil of the said road or street." If I am right as to the meaning of the 59th and 60th sections, they do acquire it by compulsion, because they make compensation for the interest in the soil of the road or street. Why should I depart from the literal meaning of the words when I find that they exactly accord with what I should describe as the common sense of the arrangement—viz., that you shall not make a sewer under this street, and shall not interfere with it at all, unless you pay for it. That is the meaning of the arrangement between the parties, and that the literal meaning of the Act. The words are: "Nothing in this Act shall empower." It is not "nothing in this section." I asked the learned counsel who argued it so strenuously for the plaintiff, what possible meaning there could be to it, if that was not it. The answer, which was more ingenious than successful, was that it was a saving clause, and that he did not feel bound to put any meaning on it at all, and that a saving clause does not necessarily import that the thing that it is saving was included in any of the provisions. That, at all events, is not a satisfactory answer, when you do find something that does affect the property in question. It would be available, if it was desired to press the saving clause, to say, as has sometimes been tried, that you must import a provision in the Act, affecting the subject matter to which the saving clause applies. If that were so, then it might be well to say this was put in *ex abundanti cautela*, and you cannot imply from the effect of the saving clause that there is an enactment affecting the thing saved, when the saving clause is not there. But when you have a saving clause and find another enactment which does directly affect the subject matter of the saving clause, then I think the natural construction, and the proper one, is to say that the saving clause was intended to be an exception out of the Act, and not to say that it was put in *ex abundanti cautela*, when it is really wanted for the very purpose which by the terms of the saving clause itself it does effect. I think, therefore, if it stood on the local Act alone, or on the local Act independently of the Sewage Utilization Act, I should have been in favour of the plaintiff, but as it is, and for the reasons I have given, I am in favour of the defendants. I therefore enforce the motion, making the costs costs in the cause.

Solicitors: *Clarke, Woodcock, and Rylands, for Tweedale, Son, and Lees, Oldham; Chester, Urquhart, Mayhew, and Holden, for H. Booth, Oldham.*

(Before Vice-Chancellor MALINS)

Reported by JAMES E. HOARE, Esq., Barrister-at-Law.

Wednesday, Dec. 6, 1876.

*Re THE METROPOLITAN BUILDING ACT 1855; Ex parte McBRYDE.**Party-wall—Metropolitan Building Act 1855 s. 85—Appointment of third surveyor—Common Law Procedure Act 1854, s. 12—Pending action.*

Where "a difference arises" between a "building owner" and the "adjoining owner" with reference to a party-wall, and the two surveyors appointed by the parties refuse to appoint a third surveyor, the court has power, under the Common Law Procedure Act 1854, s. 12, to appoint a third surveyor to act with the other two in settling the matters in dispute between the parties under the Metropolitan Building Act 1855, s. 85, sub-sect. 7, although an action be then pending to restrain the building owner from interfering with an ancient light of the adjoining owner in the party-wall.

ADJOURNED summons. This was an application by James Montgomerie McBryde and Thomas Workman Orr (the building owners of the premises known as No. 10, Jewin-crescent, in the City of London), that an umpire or third arbitrator might be appointed to act with the surveyors appointed by them and Mr. Warner (the adjoining owner of the premises known as No. 9, Jerwin-crescent) to settle the matters in dispute between such building and adjoining owners respectively under the Metropolitan Building Act 1855.

On the 19th Nov. 1875, Messrs. McBryde and Orr served on Mr. Warner, pursuant to sect. 85 of the Metropolitan Building Act 1855, a notice with reference to the party wall separating the premises known as No. 10 from the premises known as No. 9, Jewin-crescent, stating (amongst other things) that they proposed "to brick up all openings in such wall," and that they had appointed "Messrs. Herbert Ford and R. Lempriere Hesketh, of 21, Aldermanbury, City," as their surveyors to superintend the work, and to settle on their behalf all matters of difference that might arise in relation thereto.

On the 29th March 1876, Mr. Warner wrote to Messrs. McBryde and Orr, informing them that he had appointed Mr. Frederick Todd as his surveyor.

On the 20th April 1876, Mr. Warner commenced an action against Messrs. McBryde and Orr and the Goldsmiths' Company, claiming, amongst other things, an injunction to restrain the defendants from erecting any building on the site of No. 10, Jewin-crescent, and from doing anything to darken or interfere with the windows or lights in the premises No. 9, Jewin-crescent.

On the 25th May 1876, Mr. Warner moved for an injunction, which the Vice-Chancellor refused to grant. Mr. Warner then took the matter to the Court of Appeal, who affirmed the decision of the Vice-Chancellor, and refused to grant the injunction.

On the 1st Aug. 1876, Messrs. McBryde and Orr wrote to Mr. Warner (with reference to their party-wall notice of the 19th Nov. 1875) to inform him that the surveyor appointed by them was Mr. Frederick Todd, and that Mr. R. Lempriere Hesketh, mentioned in such notice, was not to act.

On the same day Messrs. McBryde and Orr

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served upon Mr. Herbert Ford (as their surveyor) and Mr. Frederick Todd (as the surveyor of Mr. Warner) a notice requiring them to appoint an umpire or third arbitrator, pursuant to the 12th section of the Common Law Procedure Act 1854, in consequence of differences having arisen between Messrs. McBryde and Orr (as building owners) and Mr. Warner (as adjoining owner) with regard to the party wall.

Mr. Todd, acting on Mr. Warner's instructions, refused to concur with Mr. Ford in the appointment of an umpire.

The main question in argument was whether, under the above circumstances, the court had power, under the Common Law Procedure Act 1854, sect. 12, to appoint a third surveyor.

The Common Law Procedure Act 1854, sect. 12, is as follows: "If in any case of arbitration the document authorising the reference provide that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator . . . or if, where the parties, or two arbitrators, are at liberty to appoint an umpire or third arbitrator, such parties or arbitrators do not appoint an umpire or third arbitrator . . . then in every such instance any party may serve the remaining parties, or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire, or third arbitrator respectively; and if within seven clear days after such notice shall have been served, no arbitrator, umpire, or third arbitrator be appointed, it shall be lawful for any judge of any of the superior courts of law or equity at Westminster, upon summons to be taken out by the party having served such notice as aforesaid, to appoint an arbitrator, umpire, or third arbitrator, as the case may be; and such arbitrator, umpire, and third arbitrator respectively, shall have the like power to act in the reference, and make an award as if he had been appointed by consent of all parties."

John Pearson, Q.C. and Ferrers, in support of the summons.—On the 19th Nov. 1875, Messrs. McBryde and Orr gave Mr. Warner a proper notice of what they proposed to do to the party wall. The informality (if any) in the notice in naming Messrs. Ford and Hesketh (who are partners) as our surveyors, was set right by the letter of the 1st Aug. 1876, appointing Mr. Ford alone as our surveyor. Mr. Todd was duly appointed by Mr. Warner as his surveyor before the commencement of the action. Our surveyor is willing to concur with Mr. Todd in selecting a third surveyor, pursuant to the Metropolitan Building Act 1855, sect. 85, sub-s. 7; but Mr. Todd, acting on Mr. Warner's instructions, refuses to concur. We have served the two surveyors with a proper notice under the Common Law Procedure Act 1854, sect. 12, to appoint a third surveyor, and, as no such surveyor has been appointed, we are now entitled to ask the court to make the appointment under that section.

Glasse, Q.C. and Nalder for Mr. Warner.—The main object of the action of *Warner v. McBryde*, which is now pending, is to restrain the defendants from interfering with an ancient light of Mr. Warner's house by raising the party wall; and Messrs. McBryde and Orr are now seeking, by an application to raise their party-wall, under the Metropolitan Building Act 1855, to interfere with one of our ancient

lights; this they have no power to do under that Act, which has reference only to structural damage:

Titterton v. Conyers, 5 Taunt. 465;

Wells v. Ody, 1 M. & W. 452;

Crofts v. Haldane, 16 L. T. Rep. N. S. 116; L. Rep. 2 Q.B. 194.

The "difference between" the parties not being a matter within the scope of the Building Act, the court has no power, under sect. 12 of the Common Law Procedure Act 1854, to appoint a third surveyor. A subsequent Act of Parliament cannot be "a document authorising the reference" within the meaning of that section. They also referred to

The Metropolitan Building Act 1855, sect. 85, sub-s. 9.

J. Pearson, Q.C., in reply.—The third clause of the Common Law Procedure Act 1854, s. 12, refers to any case of arbitration whatever, where "two arbitrators do not appoint a third arbitrator:"

Re Lyon, 1 K. & J. 90.

MALINS, V.C. said.—I will first take the case as if there had been no pending suit between the parties. The Metropolitan Building Act 1855, sect. 85, sub-sect. 7, provides that "In all cases not hereby specially provided for, where a difference arises between a building owner"—here Messrs. McBryde and Orr are the building owners—"and adjoining owner"—here Mr. Warner is the adjoining owner—"in respect of any matter arising under this Act, unless both parties concur in the appointment of one surveyor, they shall each appoint a surveyor, and the two surveyors so appointed shall select a third surveyor, and such one surveyor, or three surveyors, or any two of them, shall settle any matter in dispute between such building and adjoining owner, with power by his or their award to determine the right to do, and the time and manner of doing, any work, and generally any other matter arising out of or incidental to such difference." Under these circumstances, a difference having arisen, Messrs. McBryde and Orr, on the 19th Nov. 1875, appointed Messrs. Ford and Hesketh as their surveyors. They may have been right, or they may have been wrong, in appointing two instead of one; but that was set right by the notice of the 1st Aug. 1876, which withdrew the name of Mr. Hesketh, and stated that Mr. Ford was alone to act. In the meantime, on the 29th March 1876, Mr. Warner had appointed his surveyor, Mr. Todd. Mr. Ford, on the one side, and Mr. Todd on the other side, being thus appointed, it was their obvious duty to appoint a third surveyor. Mr. Ford is perfectly willing to do so now, but Mr. Todd is not, because he is forbidden to do so by the gentleman who has named him as his surveyor. Under these circumstances what is to be done? This is an arbitration. But it was gravely argued by the plaintiff that sect. 12 of the Common Law Procedure Act 1854 does not apply because there is here no "document authorising the reference" within the meaning of that section. I was about to decide that the Act of Parliament is a "document" within the meaning of that section; or at all events, that the section applies to every case where there is an arbitration between parties, whether the reference to arbitration be by parol or by a document in the strict sense of the word, or (as in the present case) by an Act of Parliament. The plain object of the Legis-

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lature is that, whenever the parties refuse to appoint an arbitrator the court may do so. I am glad to find that the view which I had entertained has already been entertained by Vice-Chancellor Page Wood in *Re Lyon*. That decision meets with my entire concurrence. I am, therefore, of opinion that the case is within sect. 12 of the Common Law Procedure Act 1854. That section provides by the third clause that "if, where the parties or two arbitrators are at liberty to appoint an umpire, or third arbitrator, such parties or arbitrators do not appoint an umpire or third arbitrator . . . then in every such instance any party may serve the remaining parties." This evidently means that one party to the arbitration may serve the other party. I am very sorry that the plaintiff should have thought fit to take the technical objection that the arbitrator and not Mr. Warner was the person to be served. Then the Act goes on—"In every such instance any party may serve the remaining parties or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire, or third arbitrator respectively; and if, within seven clear days after such notice shall have been served, no arbitrator, umpire, or third arbitrator be appointed, it shall be lawful for any judge of any of the Superior Courts of law or equity at Westminster, upon summons to be taken out by the party having served such notice as aforesaid, to appoint an arbitrator, umpire, or third arbitrator, as the case may be." Therefore, assuming that no suit is pending, the case is, in my opinion, of the simplest description. The surveyors, appointed by each party, refuse to appoint a third surveyor; and it therefore falls upon the court, under the third clause of the section which I have just read, as a matter of simple justice, to do for the parties that which they refuse to do for themselves. But then it is said that the court must not interfere, because there is a pending suit. It is quite true that, on the 20th April last, Mr. Warner commenced an action against Messrs. McBryde and Orr and the Goldsmiths' Company, to restrain interference with a small window which was in the old party wall. On the 25th May last I decided that the plaintiff had not made out a case for the interference of the court by injunction in regard to that window. The case went from me to the Court of Appeal, who came to the same conclusion, that there was no case for the interference of the court; and so the matter stands at present. I quite agree with the plaintiff that neither my decision, nor the decision of the Court of Appeal is conclusive, because the matter may be decided a different way at the hearing. If I were to accede to the argument that the court must not interfere because there is a pending suit, it would follow that whenever "the adjoining owner," wishing to vex his neighbour and to impede his building operations, refuses to concur in appointing an umpire, he has only to file a bill and let the court see that there is a pending litigation; and then the mere fact of the pending of such litigation (however ridiculous the litigation might be) would paralyse the arm of the court. I cannot accede to any such argument. And it is unnecessary for me to do so, because the cases cited by Mr. Glasse (and concurred in by Mr. Pearson) decide that the surveyors so appointed cannot decide any question between the parties as to the existence of ancient lights. All

that these surveyors are to decide is in what manner and under what circumstances the party wall is to be built; and if they should fail in their duty, and make any order with regard to this ancient light, such order would be entirely disregarded by the court, as being beyond their powers, and entitled to no consideration. If Messrs. McBryde and Orr go on, and erect this wall, with full notice of the claim of the plaintiff in the suit now pending, and stop up a window which ought not to be stopped up, I shall have no hesitation in ordering them (at the hearing) to undo that which they have improperly done. I shall, therefore, accede to this application. The substance of the order will be as follows: It appearing that the surveyors appointed by the parties refuse to appoint an umpire, the court, in pursuance of the Common Law Procedure Act 1854, appoints Mr. Christopher, if he will act, as third surveyor to settle the matters in dispute between the parties under the Metropolitan Building Act 1853, s. 85, sub-sect. 7: and Mr. Warner must pay the costs of the adjournment into court.

Solicitors: *Prideaux and Son; John W. Sykes.*

QUEEN'S BENCH DIVISION.

Reported by J. M. LEEY, H. F. DICKENS, and A. H. POTTER,
Esqrs., Barristers-at-Law.

June 27 and 28, 1876.

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*Conspiracy to obtain quotation on Stock Exchange
—Terms of indictment.*

It is an indictable offence to conspire to induce the committee of the Stock Exchange to allow a quotation of the shares of a joint-stock company, whereby to persuade persons who should buy and sell shares of the company, that the company has been duly constituted, and has so complied with the rules of the Stock Exchange as to entitle the company to have its shares quoted in the official list of the Stock Exchange.

THE defendants, being six in number, had been tried at the London Hilary Sittings 1875, before Cockburn, C.J., and a special jury, on an indictment for conspiracy to defraud. The indictment contained twelve counts, the defendants being found guilty on the first and second counts only.

The first count set out at great length the establishment, constitution of the committee of the London Stock Exchange, and that the said committee had formed certain rules and regulations for the management of the Stock Exchange, and had power to expel any member of the Stock Exchange who should break such rules; that two of the defendants had been directors, and one of them secretary, of a new joint-stock company called the Eupion Fuel and Gas Company, Limited, and three of them had aided in the establishment of such company; that all persons dealing in the shares of a new company, required, according to the rules of the Stock Exchange, that a "special settling day" should be fixed by the said committee for delivery of and payment in respect of all shares in such new company theretofore bought and sold; that the defendants applied for a special settling day; that it thereupon became necessary that the company should comply with the following rules of the Stock Exchange committee:

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127. The committee will appoint a special settling-day for transactions in the shares of a new company, provided that no allegation of fraud be substantiated; that there has been no misrepresentation or suppression of material facts; that sufficient scrip or shares are ready for delivery, and that no impediment exists to the settlement of the account.

128. The secretary to the share and loan department shall give one week's notice to the Stock Exchange of any application for a special settling-day for transactions in the shares of a new company, previously to such application being submitted to the committee, and shall require the production of the following documents, viz.:—

The prospectus, the Act of Parliament, the articles of association, or a certificate that the company is constituted upon the cost book system, under the statutory laws.

The original applications for shares, the allotment book, signed by the chairman and secretary to the company, and a certificate verified by the statutory declaration of the chairman and the secretary, stating the number of shares applied for and unconditionally allotted to the public, the amount of deposits paid thereon, and that such deposits are absolutely free from any lien.

The banker's pass-book, and a certificate from the bankers, stating the amount of deposits received.

That the defendants had conspired to induce certain members of the committee of the Stock Exchange, contrary to the true intent and meaning of the rules above set forth, to grant a special settling-day; and that the defendants falsely pretended to the said members of the said committee (*inter alia*), that the number of shares of the said company applied for by the public was 34,365, whereas the number of shares applied for by the public was not 34,365, nor any number whatsoever.

The second count stated that the defendants were directors, &c., of the said company, and that application had been made on behalf of the company to the committee of the Stock Exchange, to order the quotation of the new company in the official list of the Stock Exchange, in pursuance of the following rule of the Stock Exchange:

129. The committee will order the quotation of a new company in the official list, provided that the company is of *bona fide* character, and of sufficient magnitude and importance; that the requirements of Rule 128 have been complied with, and that the prospectus has been publicly advertised, and agrees substantially with the Act of Parliament, or the articles of association, and in the case of limited companies contains the memorandum of association; that it provides for the issue of not less than one-half of the nominal capital, and for the payment of ten per cent. upon the amount subscribed, and sets forth the arrangements for raising the capital, whether by shares fully or partly paid up, with the amounts of each respectively, and also states the amount paid, or to be paid, in money or otherwise to concessionaires, owners of property, or others on the formation of the company, or to contractors for works to be executed, and the number of shares, if any, proposed to be conditionally allotted;

That two-thirds of the whole nominal capital proposed to be issued have been applied for and unconditionally allotted to the public (shares reserved or granted in lieu of money payments to concessionaires, owners of property or others, not being considered to form part of such public allotment), that the articles of association restrain the directors from employing the funds of the company in the purchase of its own shares, and that a member of the Stock Exchange is authorised by the company to give full information as to the formation of the undertaking, and be able to furnish the committee with all particulars they may require.

That the defendants had authorised Sir Robert Carden and others, being a firm of stockbrokers, and members of the Stock Exchange, to apply to the committee to order the quotation of the shares of the company in the official list of the Stock Exchange; and that the defendants conspired to

deceive the members of the said committee, and to induce them, contrary to the intent of the three rules above set forth, to order a quotation of the shares of the company in the official list of the Stock Exchange, and thereby to persuade divers liege subjects who should thereafter buy and sell the shares of the said company, to believe that the said company was duly formed, and had complied with the said three rules, so as to entitle the company to have their shares quoted in the official list of the Stock Exchange.

At the trial it appeared that the defendants were connected with the company as alleged in the indictment, and it was also proved that none of the shares of the company had been unconditionally allotted to the public, and that the Committee of the Stock Exchange had granted a special settling day and a quotation, under the belief that all the provisions of the three rules above set forth had been complied with. The manner in which the false representations charged were made by the defendants sufficiently appears from the judgments below. The defendants having been convicted, a rule was obtained on their behalf for arrest of judgment, or to enter the verdict for the defendants, or for a new trial on the ground that the facts proved did not amount to a conspiracy.

The Solicitor-General (Sir H. Giffard, Q.C.) (*Poland and Besley* with him), now showed cause, and cited

British American Telegraph Company v. Albion Bank, L. Rep. 7 Ex. 119; 26 L. T. Rep. N. S. 257; *Rey. v. De Berenger*, 3 M. & S. 67.

Ballantine, Serjt., and *W. Ballantine, Pope, Q.C.*, and *Metcalf, Q.C.*, and *A. Collins and Hodson*, for the defendants, severally supported the rule.

COCKBURN, C.J.—I have entertained considerable doubts as to the sufficiency of the counts upon which the defendants have been found guilty, and am still of opinion that the first count is insufficient. It alleges that the defendants entered into a conspiracy by means of false and fraudulent representations to induce the Committee of the Stock Exchange to grant a "settling day" and a "quotation" on the Stock Exchange. If it had gone on to allege that the object was to defraud the public, it would have been sufficient, but it does not in terms allege that. Even as to the second count, I confess that it is not without much hesitation and doubt I have come to the conclusion that it is sufficient. That count states, in substance, that the defendants entered into a conspiracy in order to obtain a quotation of the shares, in order to induce persons who should thereafter buy and sell the shares to believe that the company was duly formed, and that it had duly complied with the rules of the Stock Exchange, so as to get the shares quoted in the official lists. If it had gone on to state that the purpose for which this was done was to injure those in whose minds this belief was produced by inducing them to buy the shares, believing them to be of more value than they really were, then I should have had no hesitation in holding that the count was sufficient according to law, though, if the object was to induce them thus to believe without inducing them to purchase the shares under that belief, it would be otherwise. But looking at the words used, "Intending to induce those who should thereafter buy the shares" to believe that they were what they were represented to be, on the whole I think it is sufficient; for it

is difficult to see how that belief could be engendered in the minds of persons buying and selling the shares without inducing them to buy and sell under such belief; so that a conspiracy to induce them to entertain that belief must be taken to be a conspiracy to induce them to deal in the shares under that belief, as they would not otherwise have done. On the whole, therefore, though not without considerable doubt, I have come to the conclusion that the charge in this count is sufficiently stated. That it was proved in fact I can entertain no doubt at all. I cannot accede to the proposition that the facts as proved were not sufficient to constitute the offence. The facts undoubtedly were that persons were induced to apply for and appear to take shares they never meant to take, which shares were at once handed over to the defendant Aspinall—that the allotment of shares was fictitious, and that the funds of the company were fictitious, a small sum being obtained by way of advance from the Midland Bank, which was manipulated so as to represent the capital of the company as paid up, when, in point of fact, the whole thing was a fiction from beginning to end. This was done for the purpose of obtaining a settling day and a quotation on the Stock Exchange. That there was a fraud and a very serious fraud on the Stock Exchange committee no one can doubt. Then the question is, as the company had nothing but its shares and had no real capital at all, and the only object one can conceive in getting the shares quoted on the Stock Exchange was that they should be dealt in, whether such a conspiracy sustains the charge on which the defendants have been found guilty, and I think there can be no doubt that it does.

BLACKBURN, J.—I also am clearly of opinion that on the evidence an indictable offence was amply proved, supposing it sufficiently stated in the indictment. Ever since *R. v. De Berenger* it has been established that where parties conspire together by false representations and pretences—in short, by telling lies—to raise the price of any vendible commodity—for though it was a case of dealing in the funds, the doctrine laid down extends to all vendible commodity—and with the intent to produce the belief in the minds of men that they may give a higher price for the commodity than they otherwise would do, such a conspiracy is an injury to the public, and is an indictable offence. Here it was proved beyond all doubt that there was a conspiracy to procure a settling day and a quotation of the shares on the Stock Exchange, to induce those who should deal on the Exchange, and should see the quotation, to believe that the company had been formed to the satisfaction of the Stock Exchange, and was a real or *bona fide* company, and, in consequence of that belief, to think the company better than it really was, the company, in fact, not being real, the shares not having really been allotted, and the deposits not having really been paid, and the company altogether being one which, if its nature had been known, would not have been allowed to be introduced on the Stock Exchange at all. All this was done in order that, the quotation of the shares being thus obtained, persons dealing on the Stock Exchange might be induced to believe that the shares were of greater value than they really were, and that they should thus be influenced in the prices they should pay for them. I cannot doubt that, all this being clearly

proved, there was a criminal and indictable conspiracy on the part of the defendants. Then, was it properly stated and charged? Now, as to the first count, I will not say whether it is good or bad; but the second goes further and is clearer than the other, and I cannot understand how it should not be sufficient. After alleging that a quotation of shares upon the Stock Exchange imports a representation that the Stock Exchange committee has authorised them to be so quoted, and, therefore, has been satisfied that the company was duly formed, it proceeds to state that the defendants combined together, by false pretences and artful and subtle devices, to deceive the committee of the Stock Exchange, to induce them to allow a quotation of the shares, and thereby to induce and persuade those who should thereafter buy or sell the shares—that is, future dealers in the shares—to believe that it was duly formed and constituted, and had in all respects complied with the rules. If it had gone on to state, “and consequently, believing that it was better than it was, to induce persons to buy at higher prices than they otherwise would have given,” the charge would have been identical in its terms with that in *R. v. De Berenger*. These words, however, are not inserted, and the question is whether the effect is not in substance the same, and whether it does not really mean that the defendants represented the shares to be of greater value than they really were, and thus induced other persons to give higher prices for them than they otherwise would have done. Now, as Lord Ellenborough said, in *R. v. De Berenger*, “It is an universal principle that when a man is charged with an act of which the natural and probable consequence is a certain injury, the intention is an inference of law.” We should be carrying critical nicety to a greater extent than ever before known, and wresting words from their plain and natural meaning, if we were to say that the intention to obtain a quotation of the shares in order to induce persons who may buy or sell shares to believe that the company is a real and good company, whereas it is not so, is not doing that, the necessary consequence of which is not injurious to those buying and selling the shares. It must be taken, therefore, that the offence—which was proved—is stated sufficiently, and is in substance the same as that in *Reg. v. De Berenger*. It was argued that the question of the intent ought to have been put specifically to the jury. But if that were necessary, few verdicts in such cases could stand good. When everything is beyond doubt except a certain question, and that is put to the jury and they find it distinctly, then they really find a verdict including and implying all the rest. Here the intention expressly found by the jury—that is, the intention to obtain the quotation of the shares by false pretences—necessarily involves the intention to defraud, and it would be monstrous to say that we must grant a new trial because the formal question whether the quotation would have the effect suggested and would affect the price of the shares was not in terms put to the jury. I am, therefore, clearly of opinion that the second count is sufficient to support a judgment, and that the verdict upon that count ought not to be disturbed.

FIELD, J.—I also am of opinion that there ought to be judgment for the Crown. After the doubt the Lord Chief Justice has expressed, it would be presumptuous in me, perhaps, to say that I am

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clearly of opinion—but I certainly am of opinion—that the second count is good. As to the first count, it is based on the allegation that the frauds undoubtedly committed were committed for the purpose of inducing the committee of the Stock Exchange to appoint a special settling day. It appears that in all cases of new companies, the Stock Exchange committee, before they appoint a settling day, require certain vouchers to be laid before them as to the position of the new company; and, among other things, they require that they should be satisfied that the proper amount of capital was subscribed, and that the shares have been *bond fide* applied for and allotted, and the deposits upon them actually paid; and they are not satisfied with the mere statements of the parties, but require vouchers to be produced, as the banker's book, to prove the payments made: and the result is that not only are the committee satisfied that the new company is good, but the public, on seeing the quotation of its shares in the official lists, believe that the proper authorities have been thus satisfied of it. In the first count, the fraud alleged is that, by means of false pretences, the Stock Exchange committee were induced to appoint a settling day—that is, a day on which all transactions in shares would be settled, and the amounts due paid or secured. Now, as to put a company on the market without the sanction of the Stock Exchange would be difficult, I think that count contains all the elements of a grave offence, for thereby the public would naturally suppose that as the committee of the Stock Exchange had fixed a settling day, all the requirements had been complied with, and the brokers and others might safely deal in the shares. And as to the second count, it is alleged that the object was to obtain a quotation of the shares in the Stock Exchange lists, and there can be no doubt that the public resort to those lists for the purpose of knowing where they may safely put their money. Then the count alleges that this was done for the purpose of inducing those who should thereafter deal in the shares to believe that the company was duly formed and constituted and had complied with the rules of the Stock Exchange. It does not, indeed, in terms allege that it was with intent to induce people to buy and sell the shares. But the question is, whether it is not fairly to be inferred that such is the meaning; and to me it seems that it is so, and that it would be a mere barren fraud if it was not done with a view to induce people to buy or sell the shares on the Stock Exchange. That being so, I think that meaning ought to be put upon it, and, therefore, that our judgment ought to be for the Crown.

NOTE.—On a subsequent day two of the defendants were sentenced to twelve months and two of them to two months' imprisonment, in each case without hard labour. And the judgment of the court was during the present (Hilary) sittings affirmed by the Court of Appeal. As to the jurisdiction of that court to hear the appeal, see sect. 47 of the Judicature Act of 1873.

Judgment for the Crown.

Solicitors for the prosecution, *Abrahams and Roffey*.

Solicitors for the defendants, *Goldring; Wontner and Co.; Huaham*.

Nov. 8 and 15, 1876.

REG. (ON THE PROSECUTION OF THE ASSESSMENT COMMITTEE OF THE POPLAR UNION (resps.), v. INGALL AND ANOTHER (apps.).

Rating in Metropolis—Making valuation list, statutory time for—Whether statute imperative or directory—Valuation of Property Metropolis Act 1869, 32 & 33 Vict. c. 67, s. 42.

By sect. 42 of the Valuation of Property Metropolis Act 1869, the overseers "shall make and deposit the valuation list" before the 1st June, and the assessment committee "shall hold a meeting for hearing objections to the list" before the 1st Oct., and "shall finally approve the list" before the 1st Nov.

Held, that the section was directory and not imperative, and that a valuation list deposited on 27th Sept., and finally approved on 21st Jan., was good.

THIS was a case stated by the Justices of the Court of General Assessment Sessions, holden under the Valuation (Metropolis) Act 1869, at the Guildhall, Westminster.

1. The appellants are the occupiers of premises used as oil and turpentine stores, and situate in the West Ferry-road in the parish of All Saints', Poplar.

2. Previous to the valuation made as hereinafter stated, the appellants were rated at 445*l.* gross, and 371*l.* rateable value.

3. Upon the 27th Sept. 1875, the overseers of the said parish of All Saints', Poplar, made and deposited a valuation list for the said parish in which the appellants' premises were assessed at 666*l.* gross and 555*l.* rateable value.

4. Upon the 18th Oct. 1875, the said list was transmitted to the Assessment Committee of the Poplar Union.

5. Upon the 7th Dec. 1875, at a meeting of the Assessment Committee to hear objections to the said list, the appellants appeared by counsel, who said that on behalf of the appellants he reserved their right to dispute the validity of such list, and of the proceedings then being and about to be taken thereon, and objected to the valuation of their premises contained in such list, but notwithstanding such reservation, urged objections and adduced evidence in support thereof, and after duly weighing and considering the same, the Assessment Committee altered the valuation of the said premises, and fixed 550*l.* gross and 460*l.* rateable as the value thereof.

6. The said Assessment Committee approved the valuation list as altered by them upon the 4th Jan. 1876, and sent the said list to be re-deposited upon the 7th Jan. 1876.

7. By the 3rd of the General Orders made at the General Assessment Sessions holden on the 23rd June 1870, it is required that all appeals to the Assessment Sessions shall be entered by petition to be lodged with the clerk to the Assessment Sessions on or before the 14th Jan. next following the final approval of the valuation list by the Assessment Committee.

8. The appellants duly gave the required notice of appeal to the Assessment Sessions before the 14th Jan. 1876.

9. Upon 21st Jan. 1876, the Assessment Committee held a meeting to hear objections on behalf of persons or parties other than the appellants to the alterations made by the Assessment Com-

mittee in the said valuation, but no objections were made to the alteration of the valuation of the appellants' premises.

10. Upon the hearing of the appeal the said valuation list was produced, and it appeared that the same had been finally approved upon the 21st Jan. 1876.

11. Between the hearing of the Assessment Committee of objections to the said valuation list and the holding of the court of general assessment sessions, no special sessions had been held to which the appellants could appeal against the decision of such assessment committee in accordance with the directions and provisions of the Valuation of Property (Metropolis) Act 1869; neither appellants or respondents took any steps to obtain the holding of any special sessions for hearing an appeal.

The question for the opinion of the court is whether the said valuation list is null, void, bad in law, and of no effect, by reason of such valuation list not having been made and deposited by the overseers of the parish of All Saints, Poplar, nor transmitted by them to the assessment committee, nor by the said assessment committee finally approved and signed within the time limited by the Valuation (Metropolis) Act 1869.

If the court should be of opinion in the affirmative, judgment is to pass for the appellants, and the said valuation list shall be dealt with as to the court shall seem fit.

If the court should be of opinion in the negative, judgment is to pass for the respondents.

E. Clarke, for the appellants, argued that the result of the delay had been to extinguish the appellants' right of appeal, and that therefore sect. 42 of the Valuation of Property Act 1869, ought to be construed as imperative.

Tindal Atkinson and W. English Harrison, for the respondents, argued that the present case fell within the rule that where public convenience required it, a statute as to time would be construed as directory on this point; they cited

Lefevre v. Miller, 26 L. J. 175, M. C.;

Reg. v. Fordham, 11 Ad. & E., 73;

Reg. v. Mayor of Rochester, 7 E. & B. 910.

E. Clarke, in reply, cited

Bowman v. Blyth, 7 E. & B. 26; 27 L. J. 22, M. C.;

Hunt v. Hibbs, 5 H. & N. 123; 29 L. J. 222, Ex.

The following sections of the Valuation of Property Metropolis Act 1869 (32 & 33 Vict. c. 67), were referred to in the course of the arguments and judgments:

Sect. 13. If the overseers of any parish fail to transmit such a valuation list as is required by this Act, the assessment committee shall appoint some person to make a valuation list, and may allow such person such remuneration in addition to his expenses as they think fit; and all expenses incurred by the assessment committee in pursuance of this section shall be paid by the guardians, and charged to such parish. The person so appointed shall have for the purposes of this section the same powers and duties as overseers, and the valuation list so made shall be dealt with in like manner as if it had been duly made and transmitted by the overseers.

Sect. 32. Any ratepayer and any surveyor of taxes, and any overseer, with the consent of the vestry of his parish, who may feel aggrieved by any decision of the assessment committee on an objection made before them to which he was a party, or by any decision of special sessions, whether he was a party or not, may appeal against such decision to the assessment sessions. Any assessment committee in the metropolis, or in the county in which the parish to which the appeal relates

is situate, any overseers in the metropolis, or such county with the consent of the vestry of their parish, any ratepayer in the metropolis or such county, and any body of persons authorised by law to levy rates, or require contributions payable out of rates in the metropolis or such county, may appeal to the assessment sessions, if they or he feel aggrieved by reason,

- (1) Of the total of the gross value of any parish being too high or too low.
- (2) Of the total of the rateable value of any parish being too high or too low.
- (3) Of there being no approved valuation list for some parish.

Sect. 35. If it appears to the justices in assessment sessions, on any appeal that there is no approved valuation list for some parish, they may appoint some proper person (with such remuneration as they may appoint) to make a valuation list. Such person shall have for that purpose the same powers and duties as overseers. The valuation list so made shall be deposited and otherwise made known to the persons interested in such manner as the court may direct, but in manner as near as may be as is provided in this Act, with respect to the list originally made. The costs of making such valuation list shall be paid by the assessment committee, who failed to approve the list, and shall be deemed part of their expenses under the principal Act.

Sect. 42. With respect to the times within which proceedings under this Act, and the Acts incorporated herewith, are to be done, the following provisions shall have effect, that is to say:

- (1) The overseers shall make and deposit the valuation before the 1st June, in the first year after passing of this Act.
- (2) The overseers shall transmit the valuation list to the assessment committee, not sooner than fourteen and not later than seventeen days after notice is given of deposit of such list.
- (3) Notice of any objection by any person other than the surveyor of taxes and the overseers, shall be given before the expiration of twenty-five days after the list is deposited.
- (4) The assessment committee shall revise the valuation list before the 1st Oct. in the same year, and, before the same day, but not less than sixteen days after the transmission of the list to them by the overseers, shall hold a meeting for hearing objections to such list.
- (5) The assessment committee shall give notice of a meeting for hearing objections to a list not less than sixteen days before such meeting.
- (6) Notice of objection with respect to any list by the surveyor of taxes and by the overseers, shall be given not less than seven days before the meeting at which objections to such list will be heard by the assessment committee.
- (7) The assessment committee shall send the valuation list to be redeposited within three days after it is approved by them, and shall appoint a day not less than fourteen nor more than twenty-eight days after such redeposit for hearing objections to the alterations of which objections seven days notice shall be given by the objector.
- (8) The assessment committee shall finally approve and send the valuation list to the overseers and the clerk of the managers of the Metropolitan Asylum district before the 1st Nov. in the same year.
- (9) Notices of appeal to special sessions shall be given on or before the 21st Nov. in the same year.
- (10) The justices may hold the special sessions at any time after the 30th Nov. in the same year, which will enable them to determine all appeals before the ensuing 1st Jan.
- (11) The clerk of the said managers shall send out the printed totals before the 1st Dec. in the same year, and shall return the valuation list to the assessment committee not sooner than fourteen, nor later than twenty-one, days after the totals are sent out.
- (12) Notices of appeals to assessment sessions shall be given on or before the 14th Jan. in the same year.
- (13) The justices may hold the assessment sessions at any time after the 1st Feb. in the same year, which will enable them to determine all appeals (except

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where a valuation list or valuation is ordered) before the ensuing 31st March.

- (14) Notices of the times at which the assessment sessions will be held at each place shall be given by the clerk ten days at least before the first court is held.

MELLOR, J.—My mind has fluctuated much during the progress of the argument, but on the whole I am of opinion that section 42 is directory, and that this valuation list was in time. It was intended by the Legislature that the valuation list should be made up in time for the assessment sessions, in order that it might be discussed there whether it was good or bad. It has, indeed, been very plausibly argued before us that the valuation list was too late, on the ground that certain things were not done. But on the whole I think that these arguments ought not to prevail. Mr. Clarke's clients have full power of appealing to sessions on the merits of their case, but it would seem as if they appealed against the list because they had no case upon the merits. The sessions having confirmed the list, the only question for us is whether it is bad on the ground of its being out of time, and I am of opinion that it is not. It is, I think, absurd to suppose that the Legislature could have intended these sections to be other than directory. Perhaps, however, the Legislature may have intended that if a party should suffer any damage by the delay of the overseers in making up the list, he should have a remedy against the overseers by action.

LUSH, J.—I am of the same opinion. In order to interpret sections of an Act of Parliament which require certain things to be done within a certain time, we must look to the object of the Act in which those sections occur. Now the object of this Valuation Act is clearly to secure a valuation of property every five years, in order that the valuation list may be quite uniform. It is, therefore, of the utmost importance that the whole list be completed every five years, and a machinery is provided by the statute for bringing objections and hearing appeals. The 42nd section is framed to effect this purpose. [The learned judge read the section and proceeded.] It appears from this section that a time is limited for every stage of the process until the appeal is arrived at, and it also appears that the Legislature contemplated that all the stages should be gone through before the 5th April. Next in order we come to the provision for certain failures. "If the overseers," says the 13th section, "fail to transmit the required valuation list," the committee shall appoint some person to make a valuation list. The assessment committee, therefore, have power to intervene and to fine a defaulting parish. The appeal is not against the valuation list as a whole, but against a particular decision of the assessment committee. [The learned judge then read the 35th section, and proceeded.] Mr. Clarke says that before the words "for some parish," we must read in the words "or no list signed within the time hereinbefore mentioned." Now can we insert these words? I think not. If the Legislature had intended the insertion of such a provision it would have been inserted expressly—especially in a statute of this kind, which is by no means an elliptical one, but is rather too full in its terms than otherwise. Consider too, the consequences of reading in the provision suggested. All the delay and expense of making a fresh list would have to be incurred. I cannot think that the

Legislature ever intended such a consequence. But then it is asked—what is to be done if the overseers delay so long as to deprive a party of his power to appeal. This would be a defect in the statute, for which it would be for the Legislature to provide a remedy, but the existence of such a defect cannot make the statute other than directory. If, however, a party be deprived of his appeal by the neglect of the overseers, it may well be that those who undertake public duties, and fail in them, would be liable to an action at the suit of the party aggrieved.

Judgment for the respondents.

Solicitors for the appellants, *Pontifex and Co.*
Solicitors for the respondents, *Baker and Nairnd.*

Wednesday, Nov. 8, 1876.

REG. (ON THE PROSECUTION OF BAXTER AND ANOTHER)
v. GREAT NORTHERN RAILWAY COMPANY.

Compensation to tenant for longer term than a year whose term has less than a year to run—Whether justices have jurisdiction to determine—8 Vict. c. 18, s. 121.

Justices under the Lands Clauses Consolidation Act 1845 (8 Vict. c. 18, s. 121) may award compensation in respect of any interest being less than that of a tenant from year to year, although such interest arises out of a lease originally created for a longer term.

In August 1871, A. demised to the prosecutors for one year a piece of land by an agreement, giving option of renewal for a further two years afterwards. In August 1873, the defendants served the prosecutors with a notice to treat, and in the same month of that year the prosecutors served the defendants with a notice of claim, requiring them to proceed to arbitration. An arbitrator was appointed by the defendants under protest, and an award was made, which the defendants refused to take up.

Held, upon a special case stated in an action by the prosecutors for a writ of mandamus, that the claim was one for the determination of justices under the 121st section of the Lands Clauses Consolidation Act.

THE pleadings in this cause raised certain issues on a claim by the prosecutors for a writ of mandamus to the defendants. The issues in fact came on to be tried before Cleasby, B., at the Guildford Summer Assizes, when, by consent, a verdict was found for the Crown, subject to the opinion of the court upon a case which set out the facts at great length, and raised other questions between the parties not material to this report. The facts are sufficiently stated in the head note. The 121st section of the Lands Clauses Consolidation Act 1845 (8 Vict. c. 18) is as follows:

If any such lands shall be in the possession of any person having no greater interest therein than as tenant for a year or from year to year, and if such person be required to give up possession of any lands so occupied by him before the expiration of his term or interest therein, he shall be entitled to compensation for the value of his unexpired term or interest in such lands and for any just allowance which ought to be made to him by an incoming tenant, and for any loss or injury he may sustain, or if a part only of such lands be required, to compensation of the damage done to him in his tenancy by severing the lands held by him or otherwise injuriously affecting the same; and the amount of such compensation shall be determined by two justices in case the

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parties differ about the same; and upon payment or tender of the amount of such compensation all such persons shall respectively deliver up to the promoters of the undertaking or to the person appointed by them to take possession thereof any such lands in their possession required for the purposes of the special Act.

Philbrick, Q.C. for the prosecutors of the writ.

Reginald Brown, for the defendants, was not called upon to argue.

MELLOR, J.—This is clearly a case provided for by sect. 121 of the Lands Clauses Consolidation Act 1845. The very object of that section was to send small and insignificant—I do not say unfounded—claims for compensation to justices of the peace or a stipendiary magistrate, a tribunal which is just as likely to be right as an arbitrator or a jury.

LUSH, J.—I am of the same opinion. I have the impression that the point has been decided on a former occasion, but, however, that may be, I do not entertain the slightest doubt in relation to it. The intention of the 121st section was to give compensation for every species of interest being less than the interest of a tenant from year to year, and I observe that the justices have full powers to award compensation in respect of the tenant having to give up possession before the expiration of his term.

Solicitor for the prosecutors, *Vant*.

Solicitors for the defendants, *Johnston, Farquhar, and Leech*.

Tuesday, Nov. 28, 1876.

REG. ON THE PROSECUTION OF OWEN v. MAYOR, ALDERMEN, AND BURGESSES OF WELCHPOOL.

Municipal Corporations Act (5 & 6 Vict. c. 76) s. 52—*Debtors Act* 1869 (32 & 33 Vict. c. 62) s. 21—*Disqualification of town councillor by composition with creditors*—22 Vict. c. 35, s. 8, subsect. 4—*Retiring councillor—Election of town councillor*—*Corrupt Practices (Municipal Elections) Act* (35 & 36 Vict. c. 60), s. 12—*Avoidance of elections*—*Election petition—Mandamus*.

By sect. 52 of the *Municipal Corporations Act* (5 & 6 Will. 4), c. 76, it is enacted that a town councillor who becomes bankrupt or compounds with his creditors by deed shall "thereupon immediately become disqualified, and shall cease to hold the office of such councillor, and the council thereupon shall forthwith declare the office void, and shall signify the same by notice, under the hands of three or more of them, countersigned by the Town Clerk, to be affixed to some public place within the borough, and the said office shall thereupon become void," but that "every person so becoming disqualified and ceasing to hold such office on account of his being so declared bankrupt or having compounded with his creditors aforesaid, shall, on obtaining his certificate, or on payment of his debts in full, be capable of being re-elected to such office." And by sect. 21 of the *Debtors' Act* 1869 (32 & 33 Vict. c. 62) those provisions are extended to persons who have compounded with their creditors "whether by deed or otherwise."

By 22 Vict. c. 35, s. 8, subsect. 4, it is enacted that if at any election of councillors to be held for any borough or ward, no person be duly nominated for election, "the retiring councillors shall be deemed to be re-elected, and the mayor, &c. shall publish a list of the names of all the persons so elected."

J., a town councillor of the borough of Welchpool, whose term of office would expire by lapse of time on the 1st Nov. 1876, on the 29th June in that year filed a petition for liquidation of his affairs by arrangement. On the 29th July a statutory majority of his creditors by special resolution declared that his affairs should be liquidated by arrangement, and his discharge was granted to him on the 29th Sept. No declaration was made by the council under sect. 52 that the office held by him was void under that section, but he did not, in fact, act as town councillor after the institution of these proceedings with his creditors until after the 1st Nov.

On the 1st Nov. the offices of three other councillors besides that of *J.* would become vacant by lapse of time, and for these four vacancies seven candidates presented themselves for election. In consequence of all the candidates being nominated by one and the same person, contrary to the provisions of the Act regulating the elections, the mayor declared no one to be duly nominated. Thereupon the returning officer, under 22 Vict. c. 35, s. 8, subsect. 4, declared that the retiring councillors, among whom he included *J.*, had been re-elected to their offices. Upon a rule for a mandamus calling upon the mayor, &c. of Welchpool to declare the office of councillor lately held by *J.* void, as required by 5 & 6 Will. 4. c. 76, s. 52, and to proceed to the election of another person to supply such vacancy,

Held, on the first part of the rule, that the office "lately held by *J.*" was in fact filled up, and that the time had, therefore, passed when it could be declared void.

Held also that the mandamus would not lie for a fresh election, for inasmuch as the council had not declared *J.*'s office void under sect. 52, the office was still full on the 1st Nov.; that *J.* was, therefore, a retiring councillor within the meaning of 22 Vict. c. 35, s. 8, subsect. 4, and under that section was properly declared to be re-elected to his office.

By the *Corrupt Practices (Municipal Elections) Act* (35 & 36 Vict. c. 60), s. 12, it is enacted that the election of any person at an election for a borough may be questioned by petition before an election court constituted under that Act on the ground that the election was wholly avoided because "he was, at the time of the election, disqualified for election to the office for which the election was held," and that "an election shall not, except in the manner provided by this Act, be questioned upon an information in the nature of a quo warranto or by or in any other process or manner whatsoever for a matter for which it might be questioned under the provisions of this Act."

Held that if there were any remedy, it would have been under this section by petition and not by mandamus.

Quære, whether the mandamus should not have been addressed to the town council, instead of to the mayor, &c.

RULE calling upon the mayor, aldermen, and burgesses of the borough of Welchpool in the county of Montgomery to show cause why a writ of mandamus should not issue directed to them and every of them having a right so to do to declare the office of councillor of the said borough, lately held by Thomas Pugh Jones, void as required by the statute 5 & 6 Will. 4, c. 76, s. 52; and

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further commanding them, and every of them having a right to vote at or to do any act necessary to be done in order to the election of a councillor of the said borough, to proceed to the election of another qualified person as a councillor to supply such vacancy.

On the 1st Nov. 1873, Mr. Thomas Pugh Jones was elected a councillor of the borough of Welchpool for the term of three years; in due course, therefore, his term of office would expire on the 1st Nov. 1876.

On the 29th June 1876, at which time he was still a councillor of the said borough, Thomas Pugh Jones filed a petition for liquidations of his affairs with his creditors by arrangement and composition. On the 29th July a general meeting of his creditors was held, in which the statutory majority then assembled by special resolutions pursuant to sect. 125 of the Bankruptcy Act 1869 declared that his affairs should be liquidated by arrangement and not in bankruptcy, and also that his discharge should be granted to him on the 29th Sept. His affairs were in consequence so liquidated, and he obtained his certificate of discharge, but through some delay or inadvertence his certificate was not granted him until the 6th Nov. No point, however, was raised on that, and in the argument of this rule it was taken that he had obtained his certificate on the 29th Sept.

On or about the 16th Aug., after these proceedings of Thomas Pugh Jones had been begun, D. Owen called upon the town council of Welchpool to declare the office held by Thomas Pugh Jones void under 5 & 6 Will. 4, c. 76, s. 52.(a)

The town council, knowing that the term of office of Thomas Pugh Jones would of itself expire on the 1st Nov. took no action under sect. 52 of 5 & 6 Will. 4, c. 76, but simply proceeded

(a) Provided always and be it enacted, that if any person holding the office of mayor, alderman, or councillor for any borough shall be declared bankrupt, or shall apply to take the benefit of any Act for the relief of insolvent debtors, or shall compound by deed with his creditors, or, being mayor, shall be absent for more than two calendar months, or, being an alderman or councillor, for more than six months, at one and the same time (unless in case of illness), from the borough from which he shall be mayor, alderman, or councillor, then and in every such case, such person shall thereupon immediately become disqualified and shall cease to hold the office of such mayor, alderman, or councillor as aforesaid; and in the case of such absence shall be liable to the same fine, to be recovered in the same manner, as if he had refused to accept the said office; and the council thereupon shall forthwith declare the said office to be void, and shall signify the same by notice in writing under the hands of three or more of them, countersigned by the town clerk, to be affixed to some public place within the borough, and the said office shall thereupon become void; but every person so becoming disqualified and ceasing to hold such office on account of his being declared a bankrupt, or of his applying to take the benefit of any Act for the relief of insolvent debtors, or having compounded with his creditors as aforesaid, shall, on obtaining his certificate or on payment of his debts in full, be capable (if otherwise qualified) of being re-elected to such office.

And by 32 & 33 Vict. c. 62, s. 21, it is enacted that The provisions of the Act of the session of the 5 & 6 Will. 4, c. 76, for the regulation of municipal corporations, sects. 52 and 53, as to the disqualification of mayors, aldermen, and town councillors having been declared bankrupt, or having compounded by deed with their creditors, shall extend to every arrangement or composition by a mayor, alderman, or town councillor with his creditors under the Bankruptcy Act 1869, whether the same be by deed or otherwise.

to the nomination of candidates to fill up the vacancies consequent upon the retirement of Thomas Pugh Jones and three other councillors whose term of office also expired on the 1st Nov. For these four vacancies seven candidates presented themselves; but in consequence of one nominator nominating all the candidates, contrary to the provisions of the Act regulating the elections, the mayor declared all the nominations bad, and that no one was duly nominated (b).

The returning officer, on the 1st Nov., declared the four retiring councillors, Thomas Pugh Jones being of the number, to be all re-elected to the office of town councillors, and made the following declaration to that effect:

Borough of Welchpool—Municipal Election 1876.

I, the undersigned Edward Thomas David Harrison, returning officer of the said election, hereby declare that Mr. Edwd. Maurice Jones, solicitor, Mr. Saml. Davies tailor and draper, Mr. Willm. Beattie, farmer, and Mr. Thos. Pugh Jones, chemist and druggist, were this day elected councillors of the said borough.

Dated 1st Nov. 1876.

E. T. D. HARRISON.

After the said Thomas Pugh Jones had been so declared to be re-elected under the provisions of 22 Vict. c. 35, sect. 8, sub-sect. 4, D. Owen called upon the council to declare this election void, and to proceed to the election of another councillor in his place, upon the ground that he was not a retiring councillor within that section, seeing that by his proceedings in liquidation his office had become void, and that he could not therefore be re-elected under that section; and a rule *nisi* for a mandamus was afterwards obtained.

Mellor, Q.C. and Channell, now showed cause against the rule, nominally on behalf of the defendants, but virtually on behalf of Thomas Pugh Jones.—The election of Mr. Jones was in every way valid and cannot be impeached. The mere fact of his entering into an arrangement with his creditors does not make the office void, but simply disentitles him to act. The office is not void until the council have declared it to be void; "thereupon" it does become void, but not until that is done. It has been held that the fact of a man becoming bankrupt within sect. 42 of the Municipal Corporations Act does not make the office void, but that it remains full until it is declared void: (*Hardwicke v. Brown*, 28 L. T. Rep. N. S. 502; L. Rep. 8, C. P. 406.) As no such declaration was made, Mr. Jones's office remained full until the 1st Nov., although no doubt he could not, nor did he, act in his capacity of town councillor after he had begun his proceedings with his creditors. That being so, Mr. Jones—during the whole time up to the 1st Nov., on which day his term of office expired by lapse of time, and on which day the new election was held—was a "retiring councillor" within the meaning of 22 Vict. c. 35, s. 8, sub-sect. 4. There being then no one duly nominated at the fresh election, he would by that section be deemed to have been duly re-elected, and was so declared to be re-elected by the returning officer. Therefore the election was good and this rule for

(b) 22 Vict. c. 35, s. 4, enacts as follows: At any election of councillors to be held for any borough or ward, if no persons be so nominated, the retiring councillors shall be deemed to be re-elected, and the mayor or alderman and two assessors, as the case may be, shall publish a list of the names of all the persons so elected, not later than eleven o'clock in the morning of the said day of election

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a mandamus should be refused. But then again this application is too late. It is an application for a rule for a mandamus to the Mayor, &c., of Welchpool to declare the "office lately held by Thomas Pugh Jones," void. But that office which they seek to have declared void is already a thing of the past. It has expired and has been filled up. What would be the use, if this mandamus were allowed to issue, of declaring that office void? Thirdly, a mandamus is not the proper remedy. If there be any remedy it is by a petition under the Corrupt Practices at Municipal Elections Act, 35 & Vict. c. 60, s. 12, which is as follows:

The election of any person at an election for a borough or ward may be questioned by petition before an election court constituted as hereinafter in this Act provided, and hereinafter in this Act referred to as the "court," on the ground that the election was as to the borough or ward wholly avoided by general bribery, &c., or on the ground that he was at the time of the election disqualified for election to the office for which the election was held, or on the ground that he was not duly elected by a majority of lawful votes.

An election shall not, except in the manner provided by this Act, be questioned upon an information in the nature of a *quo warranto*, or by or in any process or manner whatsoever for a matter for which it might be questioned under the provisions of this Act.

The effect of this section is to substitute a petition for any other process in cases within the section, which this obviously is; seeing that if they can impeach this election at all, it must be on the ground that "he was at the time of the election disqualified for the election." On this point he cited

Hovess v. Turner, L. Rep. 1 C. P. D. 670.

Reg. v. Chitty, 5 A. & E. 609.

Charles and McIntyre, Q.C., in support of the rule. [KELLY, C.B.—Is this mandamus rightly addressed? Ought it not to be to the town council?] It is rightly addressed to the mayor, aldermen, and burgesses acting by their council. The town council are described in sect. 6 of the Act. In the analogous case of a mandamus to churchwardens it is addressed in a similar way. The practice always is to address a mandamus in this way. The corporation can do nothing without the town council, and in this case the mandamus is directed to "such of the burgesses who have a right to do the act." In *Reg. v. Mayor, Aldermen, and Burgesses of Oxford* (6 A. & E. 649), the mandamus was so addressed, and no objection taken. Now, as to the other points. In August Thomas Pugh Jones became disqualified to hold the office of town councillor. The town council ought to have declared the office void, and proceeded to a further election to fill the vacancy so caused. A substantial injustice has been done to the burgesses, which requires a remedy. It is contended on behalf of the plaintiff that this case may now be argued just in the same way as it could have been argued in September, and no act of the returning officer can affect that right. It is said the court will not make this rule absolute on account of what took place on 1st Nov. But there is no particular time mentioned in which the proceedings under sect. 52 are to be taken, and the town council can even now declare the office lately held by Jones void. Jones was not a retiring councillor at all within the meaning of sect. 8, sub-sect. 4 of 22 Vict. c. 35, but that is not enough to entitle them to proceed to a fresh election; they could not do so until they declared

his office void. A retiring councillor within that section must mean one who is in reality a retiring councillor, and if the returning officer inserts in the list of retiring councillors the name of a man who is not a retiring councillor, we are entitled to ask for a mandamus. The election on 1st Nov. was only a colourable election, and the result of these proceedings will be to set it aside. As to the last point, there is nothing in the Corrupt Practices at Municipal Elections Act which precludes us from raising this question by mandamus. That Act applies only where the burgesses are assembled, and an election held, and a person is disqualified at the time of election. But it is not contended that Jones was disqualified on 1st Nov.; on the contrary, it is admitted that at that time he was qualified to be re-elected by a new election: but there was in fact no new election, the only election being the declaration by the returning officer that the retiring officers, among whom he named Mr. Jones, were duly elected. But we challenge that, in that he was not a retiring councillor. That being so, as Mr. Jones was not disqualified at the time of election, the Corrupt Practices Act does not apply, and we are entitled to proceed by mandamus. [KELLY, C.B.—But there has been an election in fact. Have you any authority for saying that a mandamus will lie where there has in fact been an election, and where the office is full, on the ground that the election was void?] *Reg. v. Mayor, &c., of Leeds* (11 A. & E. 512.) [CLEASBY, B., referred to *Reg. v. Mayor, &c., of Chester* (25 L. J. 61, Q. B.) to the contrary.] They also referred to

Corner's Practice, 206, 207.

KELLY, C.B.—I am of opinion that the rule should be discharged. It is an application for a mandamus calling upon the mayor, aldermen, and burgesses of the borough of Welchpool to declare the office of councillor of the said borough lately held by Thomas Pugh Jones void as required by 5 & 6 Will. 4, c. 76, s. 52, and to proceed to the election of a new councillor. It may be doubted, perhaps, whether this mandamus is properly addressed to the mayor, aldermen, and burgesses, instead of being addressed to the town council, but I should be sorry to decide this case upon such a technical ground as that, even if it were quite clear that such was the case, and I therefore pronounce no opinion as to whom it should of right be addressed. The council are first called upon to declare the office of councillor lately held by T. P. Jones void. Now I am clearly of opinion that that part of the rule cannot be maintained. First, upon the ground that the time has passed; sect. 52 enacts, that upon the happening of the events in that section contained, the person doing them shall cease to hold the office, and "the council thereupon shall forthwith declare the said office to be void, and shall signify the same by notice in writing under the hands of three or more of them, countersigned by the town clerk, to be affixed to some public place within the borough, and the said office shall thereupon become void." But of what use or consequence could such a declaration be now, when the office which the declaration is to make absolutely void is already an office which has ceased to exist? The power conferred on the town council, as provided for in sect. 52, is where the office has become vacant by reason of bankruptcy, &c., on the part of him who held the office, but now though he

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has ceased to have power to act in the office, yet the town council are called upon to make public declaration that it is void in order that, as provided by sect. 47, the borough may proceed to a fresh election. The office lately held by Jones, if not void, yet ceased to exist on the 1st Nov. It would be superfluous to allow a mandamus to issue for the purpose of having that office declared void. But, again, upon the terms of the Act, the office was an office which was conferred on Nov. 1, 1873; and it is the office conferred on him on that day that the council are called upon to declare void, not the office which he now holds, and which he was elected to on Nov. 1, 1876. Yet the terms of the mandamus would refer to that office. Therefore it is clear if the office had ceased already, it would be useless to declare it void. I think, on the ground that the time has passed when it is competent for the town council to give a declaration, the application for the mandamus cannot be maintained. But then comes the question whether the mandamus will lie to declare "that the office is void, and further commanding them and every of them having a right to vote at or to do any act necessary to be done in order to the election of a councillor of the said borough to proceed to the election of another qualified person as a councillor to supply such vacancy." I am clearly of opinion that it cannot. Let us see what are the facts. First of all was this gentleman a town councillor, or had he ceased to be so on the 1st Nov.? If he still was a town councillor, then he was properly put among those who had retired under the provisions of the statute; and consequently no person being duly nominated, he, as well as the other retiring councillor by the terms of the Act, was deemed to be duly elected. The question then first arises, whether Jones did continue to be a town councillor on that day. Sect. 52 begins as follows: "If any person holding the office of town councillor for any borough shall be declared bankrupt, or shall apply to take the benefit of any Act for the relief of insolvent debtors, or shall compound by deed with his creditors, &c., then and in every such case such person shall thereupon immediately become disqualified, and shall cease to hold the office of such councillor." Now if the provision had stopped there it might very reasonably have been contended that the office was at an end, and that he ceased to hold that office, but it goes on, "and the council thereupon shall forthwith declare the said office to be void, and shall signify the same by notice in writing under the hands of three or more of them, countersigned by the town clerk, to be affixed to some public place within the borough, and the said office shall 'thereupon' become void." How can it be contended that looking at the meaning of the word "thereupon" the office can be said to become void until all these acts have been done? For the statute says not only that the man shall cease to hold the office, but that a public notice is to be given that the office is void, and that "thereupon" the office shall become void. Therefore it does not become void until there has been a public declaration to that effect. When we look to the object of it all, it becomes clear. Sect. 47 provides that occasional vacancies of councillors shall be filled up by fresh election. Therefore, taking the sections together it really comes to this: if the man cease to hold the office, the council shall declare the office void, and that then within

ten days a new election shall be held. The office here still existed until and on Nov. 1. The effect of this is that the term of office then ceased, and by the legal effect of that the officers retired, and on Nov. 1, a new election was held. I am clearly of opinion that all four still continued in the office of town councillor on Nov. 1, and the office only became vacant so as to authorise a new election on Nov. 1. But then there is this further question; supposing by reason of the words in sect. 52, it could be held that Jones had ceased to hold the office before Nov. 1, and was not a retiring officer on Nov. 1, and consequently this election might be questioned, can the validity of this election be impeached by mandamus, or must it be under the old law by a *quo warranto*, and now under the Corrupt Practices Act by petition? I asked the counsel for the applicant in the course of the argument if they could show me any authority for the proposition that a mandamus will lie to declare an election void, when there has been in fact an election. I was not aware that the contrary of that proposition had been so well put as it is in the case of *Reg. v. Mayor, &c., of Chester* (25 L. J. 61, Q. B.), to which my brother Cleasby has called my attention. There it was held that "it is an inflexible rule of law that where a person has been *de facto* elected to a corporate office, and has accepted and acted in the office, the validity of the election and the title to the office can only be tried by proceeding on a *quo warranto* information; and that a mandamus will not lie unless the election can be shown to be merely colourable." It appears to me, therefore, that where there has been an election *de facto*, an election in fact acted on, that there is no authority for holding that it is impeachable by mandamus, but it can only be impeached by *quo warranto* under the old law or now by petition under the Corrupt Practices at Municipal Elections Act. If authority were wanting the case of *Hardwick v. Brown* (L. Rep. 8 C. P. 406) would be sufficient on the point whether the office was still full on Nov. 1. The facts in that case were totally different to those now before us, and were in substance as follows: B., a town councillor of Newcastle, in July, 1872, made a composition with his creditors under sect. 126 of the Bankruptcy Act 1869, under which a resolution was come to, and registered on the 23rd Sept. On the 4th Nov. B. placed the resignation of his office of councillor in the hands of the town clerk, and announced the resignation by advertisement on the 6th Nov., and by the same advertisement offered himself for re-election at the annual meeting of the town council. On the 9th Nov. B.'s resignation was accepted, and on the 18th, there having been no declaration by the council that the office was void, he was re-elected a town councillor. It was held that B., having by reason of his having compounded with his creditors, ceased to hold the office of councillor, was incapable of resigning it; and the council not having pursued the course pointed out by sect. 52 of the Municipal Corporations Act, the election was void. It will be seen, therefore, that though the facts were different, it was necessary to decide whether the office was void or not; and it was held that it was not void until so declared by the council, under sect. 52. Bovill, C.J. in his judgment expressly holding this. As there was no such declaration in this case, I am of

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opinion that this office was full up to the date of the new election, and that Mr. Jones was among the retiring officers on Nov. 1, and was re-elected on that day. His office, therefore, cannot be impeached.

CLEARY, B.—I am of the same opinion. If the only application were for a mandamus calling upon the mayor, aldermen, and burgesses of Welchpool, to hold a fresh election, I cannot think it could be granted. Everything connected with this election was done quite regularly. The case is entirely distinguishable from that of *Reg. v. Mayor, &c., of Leeds* (11 A. & E. 512). In that case the election was complete. The facts of that case appear to have been shortly these. On an election of councillors for a ward in the borough, the presiding aldermen and two assessors, before two in the afternoon of the day next but one after the election, published under 5 & 6 Will. 4, c. 76, s. 35, a declaration containing a list of the councillors elected, which declaration included the name of P.; after two o'clock the aldermen and assessors, on the discovery of a supposed error in counting the legal votes, signed and published a second list, omitting the name of P., and substituting that of R. P. afterwards made the declaration required, and R. did the same afterwards; upon P. claiming to act, the mayor and town council refused to permit him to do so, and allowed R. to act. On application by P. for a mandamus to receive and count his vote, it was held that the office was not full; and that the proper remedy was by mandamus, the second publication and subsequent acting by or on behalf of R. being merely void, and P. being in *de facto*. The Attorney-General (Sir John Campbell) in showing cause cited *Reg. v. Mayor of Oxford* (6 A. & E. 349), where it was held that if a councillor be ousted and another elected, and such election be merely colourable, a mandamus will go to permit the ousted party to exercise his office, not to restore him to his office; though if the ousting and election be *bona fide*, the proper remedy is, not by mandamus to restore the ousted party, but by a *quo warranto* against him who is in *de facto*. To this Patterson, J. replied, "There the regular forms had been gone through. According to that the town council might admit a party who had not a single vote, and then say that the office was full. Potts was in *de facto*, and the *quo warranto* should have been against him." That was the real ground of their decision. I think, therefore, the mandamus to compel a fresh election will not lie. But that is not all. The mandamus also seeks to compel the town council to do this ministerial act, viz., to declare the office lately held by Mr. Jones to be void, or in other words to declare that on Nov. 1, this gentleman could not succeed to the office by virtue of being a retiring councillor. Now, in the first place, it is quite clear that this can only have reference to a declaration arising from Mr. Jones's bankruptcy during the period of his holding his office, and can have no reference to the election which took place afterwards. In fact the object of this mandamus is to compel the town council now to make a declaration which they ought to have made before. I quite agree with what has been said by the Lord Chief Baron, that this office was in contemplation of law full up to the 1st Nov. Now it is to be taken that before the 1st Nov. Jones had obtained his certificate, and therefore was capable of being elected

on that day to his own vacant office, and therefore if, previous to the 1st Nov., the town council had in fact declared his office to be void, he might have been re-elected to the vacant post. Under these circumstances, there being no new nominations, the retiring councillors are by the statute declared to be deemed re-elected. Now I will not repeat what has been said by the Lord Chief Baron as to Mr. Jones's office being continuing and full up to 1st Nov., but will content myself by referring to the case of *Reg. v. Mayor, &c., of Leeds* (7 A. & E. 963), where the point appears to have arisen, and been discussed. For these reasons I think this rule ought to be discharged.

Rule discharged.

Solicitors for plaintiff, Jones, Blaxland, and Son, for Charles Jones, Welchpool.

Solicitors for defendant, Milne, Riddle and Mellor, for E. Maurice Jones, Welchpool.

Friday, Nov. 10, 1876.

(Before MELLOR and LUSH, JJ.)

FINCH AND ANOTHER v. THE GUARDIANS OF THE POOR OF THE YORK UNION.

Pauper lunatic—Lunatic Asylums Act 1853 (16 & 17 Vict. c. 97, ss. 96, 97, 98, 121)—*Maintenance—Power of justices to make retrospective order.*

Under sect. 96 of the Lunatic Asylums' Act 1853 a retrospective order may be made by the justices for the maintenance of a pauper lunatic for a longer period than twelve months.

J. P. was convicted of felony at York on the 18th Oct. 1869. He was removed to plaintiffs' asylum on the 28th Sept. 1870, and his sentence expired 18th Feb. 1871, when he became a lunatic wandering at large. The corporation of York paid for his maintenance up to June 1873 when they refused to do so any longer. In Oct. 1875 plaintiffs obtained an order from two visiting justices upon the defendants for maintenance for J. P. for two years and a quarter. This defendants refused to pay.

Held, that under sect. 96 of the Lunatic Asylums Act 1853, the justices had power to make such an order.

This was a special case stated by order of the court before whom the action was originally tried, and was as follows:

The action is brought by plaintiffs upon an order made by two visiting justices of plaintiffs' asylum at Fisherton near Salisbury, and dated the 23rd Oct. 1875 by virtue of powers conferred upon them by the Criminal Lunatics Act 1867, and the Lunatic Asylums Act 1853, for the sum of 102l. 14s., that being the balance due for the support of one James Powell, from the 23rd June 1873, to the 23rd Oct. 1875, and for a further sum of 11l. 18s. for the support of the said James Powell from the 23rd Oct. 1875 to the 29th Jan. 1876, being at the rate of 17s. a week.

James Powell was convicted of felony at York on the 18th Oct. 1869, and sentenced to sixteen months' imprisonment with hard labour.

He became insane, and was removed to the plaintiffs' asylum on the 28th Sept. 1870, by an order of the Secretary of State, made under 27 & 28 Vict. c. 29, amending 3 & 4 Vict. c. 54.

James Powell's sentence expired on the 18th Feb. 1871, when as he was still insane he became

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in the position of a "lunatic wandering at large in the place where the offence was committed," that is York.

The corporation of York, through their treasurer, paid for the maintenance of James Powell in plaintiffs' asylum until the expiration of his sentence, and afterwards until June 1873, when they refused to pay for his support any longer.

Plaintiffs, on the 23rd Oct. 1875, applied to two visiting justices of their asylum, and obtained the order mentioned.

The said order was duly served upon defendants, who refused to pay the sums therein ordered to be paid by them.

The plaintiffs, after the expiration of twenty days from the date of the order, brought this action under 16 & 17 Vict. c. 97, s. 121.

The question for the opinion of the court is, are the plaintiffs entitled to recover the whole or any and what portion of their claim.

Herschell, Q.C. (Bromley with him) for the plaintiffs.—The questions for the determination of the court is whether the justices had power to make a retrospective order for a longer period than one year. This order is for two years and three months, and the defendants contend that it ought not to extend beyond twelve months and is, therefore, *pro tanto* bad. But the words of the sections are clear: "It shall be lawful . . . for two justices, being visitors of such asylum (in which the pauper lunatic is confined) to make an order upon the guardians of the union or parish from which . . . such lunatic is or has been sent for confinement for payment to the proprietor of the asylum of the reasonable charges of the lodging, maintenance, medicine, clothing, and care of such lunatic in such asylum, and any such order may be retrospective or prospective or partly retrospective and partly prospective; and the guardians upon whom such order shall be made shall from time to time pay to the said proprietor the charges aforesaid" (16 & 17 Vict. c. 97, s. 96). The Legislature have not limited the time to which a retrospective order may extend—where they intended so to limit it they have done so in terms, as will be seen by reference to the two following sects. 97 and 98 of the same Act. This is a strong argument in favour of plaintiffs' claim.

Poland (Grain with him) for the defendants.—If plaintiffs' contention is correct an order may be made which will cause the ratepayers of one year to pay for the maintenance of a pauper for fifty years; such could not have been the intention of the Legislature. Sects. 95, 96, 97, 98 are a series of enactments intended to be read together. Sect. 95 makes the parish in which a lunatic is confined primarily liable for his maintenance, and sect. 96 gives the proprietor of an asylum the right to recover from such parish. But such liability is only in force until the proper settlement has been discovered as authorised by sect. 97, and if the parish of settlement cannot be discovered then the charge is to fall upon the county under sect. 98. The innocent parish, so to speak, is only made temporarily liable by these provisions, but if the plaintiffs are correct, the proprietor of an asylum might lie by for fifty years, and then upon an order such as the one in question, might recover from the innocent parish all the charges incurred during that time, whereas the innocent parish could only recover back from those who ought strictly to pay

the whole amount, the charges for a single year as limited by sects. 97 and 98. This would be a very great hardship. The Legislature have used the word retrospective in sect. 96, and we give due weight to that if we read it as retrospective to the extent of the other sections, i.e., for twelve months. He then cited

Bradford Union v. Clerk of the Peace for Wills, 18 L. T. Rep. N. S. 514; L. Rep. 3 Q. B. 604.
Kettering Union v. Northampton Asylum, 18 W. R. 894.

MELLOR, J.—There may have been some mistake or omission in drawing up this Act, but I do not see my way to add to it. The words of the sections are clear in themselves, and it may be that the Legislature thought that self interest would prevent a proprietor of an asylum lying by for any length of time, whereas it might be quite necessary to limit the time allowed to a public body for making a retrospective demand. However, that may be our duty is simply to interpret the Act, and that being so our judgment must be for the plaintiffs.

LUSH, J.—I am of the same opinion. To give any other interpretation to the section would be to make law rather than to expound it.

Judgment for plaintiffs.

Solicitors for the plaintiffs, *Gregory, Rowcliffes, and Rawle*.

Solicitors for the defendants, *Sharp and Ullithorne*.

Wednesday, Nov. 15, 1876.

LONDON AND NORTH-WESTERN RAILWAY COMPANY
v. OVERSEERS OF WALSHALL.

Railway, rating of to improvement rate—Quarter rating under Local Act—Effect of Public Health Acts upon local Act.

By the Walsall Improvement and Market Act 1848, commissioners had power to levy an improvement rate within a district not comprising the whole municipal borough as afterwards constituted, but the Act contained a proviso that the occupiers of land used as a railway should be assessed in proportion only of one-fourth part of the net value. The Public Health Acts 1872 and 1875 formed the whole municipal borough of Walsall into an urban sanitary district.

Held that the assessment ought to be made under the local Act and not under the Public Health Acts.

THIS is a case stated on an appeal against a borough rate laid on that part of the foreign of Walsall which is situated within the municipal borough of Walsall.

The said rate was made on the 12th Nov. 1875, and on the hearing of the appeal by the recorder of the borough at the quarter sessions held on the 31st Jan. 1876, the court, after hearing the arguments on both sides, decided in favour of the respondents, and confirmed the said rate subject to a special case stated by consent for the opinion of this court on the points hereinafter raised.

CASE.

1. The appellants are the London and North-Western Railway Company. The respondents are the parish officers of the township of the foreign of Walsall and the corporation of the borough of Walsall.

2. The borough of Walsall is an ancient borough in Staffordshire having a separate court of quarter

sessions. It forms a part of the parish of Walsall, and comprises the whole of the township of the borough of Walsall, and a part of the township of the foreign of Walsall. Each of the said townships has its own overseers and maintains its own poor.

3. The appellants are the owners and occupiers of land within that part of the foreign of Walsall which is within the borough, part of which land is used as a railway constructed under the powers of an Act of Parliament for public conveyance.

4. By an Act of Parliament passed on the 31st Aug. 1848 called the Walsall Improvement and Market Act 1848, commissioners were appointed for improvement and sanitary purposes over a district consisting of the whole of the said township of the borough, a part of the said township of the foreign lying within the borough, and part of the adjoining parish of Rushall lying without the said borough, but it does not include the whole of the municipal borough.

5. The 7th section appointing such commissioners is as follows :

And be it enacted that the mayor and town council of the borough of Walsall aforesaid together with three such other person, as shall be elected by the owners of property and ratepayers within such part of the limits of this Act, as are situated within the parish of Rushall in respect of the same part of the said limits shall be and are hereby empowered to act as commissioners to carry this Act and the several Acts incorporated therewith, and the several powers thereof respectively into execution.

6. By the 40th section it is enacted as follows :

For the purposes of defraying the costs and expenses of carrying this Act and of the powers and provisions thereof into execution (except the purposes to which any rates to be made for sewers, drains, and private improvement are hereby or by any Act incorporated herewith directed to be applied), and including the costs and expenses of making and maintaining and promoting such gas works as are herein mentioned and of defraying the expenses of and incidental to the obtaining of this Act which shall be charged on the improvement rate, it shall be lawful for the said commissioners from time to time to make, assess, and levy such equal rate to be called the improvement rate, as may be necessary for the purposes aforesaid not exceeding in any one year 3s. in the pound of the full net annual value of the property included in such rate, Provided always that the occupiers of any land used as arable meadow or pasture ground only or as woodlands, market gardens, or nursery grounds, and the occupier of any land used as a railway constructed under the powers of any Act of Parliament for public conveyance shall not be assessed to any rate or assessment made by virtue of this Act or any Act incorporated therewith in any greater proportion in respect of the same than in proportion of one-fourth part only of the net value thereof.

7. By an Act of Parliament passed on the 31st May 1850 called "The Walsall Improvement and Market Amendment Act 1850," certain modifications were made in the powers of the commissioners appointed under the Act of 1848 which do not affect the questions in dispute in the present case.

8. Up to the passing of the Public Health Act 1872 improvement rates were levied under the above-mentioned local Acts for the purpose of meeting the expenses of their execution, and to all such rates, the railway of the appellants was rated at one-fourth of its full value in accordance with the 40th section of "The Walsall Improvement and Market Act 1848."

9. By the Public Health Act 1872, urban and rural sanitary districts were constituted throughout England, and the 4th section of that Act provides what places shall be urban sanitary districts, and

who shall be urban sanitary authorities in such districts respectively.

10. By the 7th section it is provided :

Subject to the provisions of this Act the Local Government Acts shall be deemed to be in force within the district of every urban sanitary authority, and from and after the first meeting of an urban sanitary authority in pursuance of this Act there shall be transferred and attach to an urban sanitary authority to the exclusion of any other authority which may have previously exercised or been subject to the same, all powers, rights, duties, capacities, liabilities, and obligations within such district exercising or attaching by and to a local board under the Local Government Acts, and by and to the sewer authority under the Sewage Utilization Acts and by and to the nuisance authority under the Nuisances Removal Acts, and by and to the local authority under the Common Lodging Houses Act, the Artizans and Labourers' Dwellings Act, and the Bakehouse Regulation Act, or by and to any of the said authorities under any of such Acts or any Acts amending such Acts.

11. By the 16th section it is provided as follows :

All expenses incurred or payable by an urban sanitary authority under the Sanitary Acts shall, if the Local Government Acts or the provisions of those Acts with respect to rating were at or immediately before the passing of this Act in force throughout the district of such authority, or within a local government district wholly within such district, be defrayed in manner provided by those Acts; and if the Local Government Acts were not so in force at or immediately before the passing of this Act, be defrayed as follows, that to say :

1. In the case of a council of a borough out of the borough fund or borough rate.

2. In the case of improvement commissioners out of any rate in the nature of a general district rate leviable by them, as such commissioners throughout the whole of their district.

Provided that where an urban sanitary authority had, before the passing of this Act, power to levy within its district a rate or rates for paving, sewerage, or other sanitary purposes, all expenses incurred by such authority in the performance of its duties under the Sanitary Acts shall be defrayed out of such rate or rates except where at the time of the passing of this Act any such expenses were chargeable upon the borough fund or borough rate in which case such expenses shall continue so chargeable.

12. By the Sanitary Law Amendment Act 1874, s. 3, it is provided as follows :—

Whereas doubts have arisen as to the extent and meaning of the 7th section of the principal Act, Be it therefore declared and enacted that the provisions of the said section shall be deemed to have applied to every authority acting at the time of the passing of the principal Act under the powers conferred upon them by a local Act with respect to any sanitary purposes, and that all the powers, rights, duties, capacities, liabilities, and obligations of any authority having jurisdiction under a local Act in the district of an urban sanitary authority at the time of the passing of the principal Act so far as they or any of them related to such purposes were transferred to and became attached to the urban sanitary authority therein referred to.

13. By the Public Health Act 1875, ss. 5 & 6, further provision is made for the constitution of urban sanitary districts and urban sanitary authorities to execute the powers of the Sanitary Acts within such districts.

14. By sect. 10 of the Public Health Act 1875, it is provided that

When any local Act other than an Act for the conservancy of any river is in force within the district of an urban authority conferring on any commissioners, trustees, or other persons, powers for purposes the same, as or similar to those of this Act (but not for their own pecuniary benefit) all the powers, right, duties, capacities, liabilities, and obligations of such commissioners, trustees, or person in relation to such purposes shall be transferred and attach to the said urban authority.

By the 20th section of that Act it is enacted as follows :

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All expenses incurred or payable by an urban authority in the execution of this Act, and not otherwise provided for, shall be charged on and defrayed out of the district fund and general district rate leviable by them under this Act, subject to the following exceptions (namely): That if in any district the expenses incurred by an urban authority being the council of a borough in the execution of the Sanitary Acts were, at the time of the passing of this Act, payable out of the borough fund or borough rate then the expenses incurred by that authority in the execution of this Act shall be charged on and defrayed out of the borough fund or borough rate, and that if in any district the expenses incurred by an urban authority being improvement commissioners in the execution of the Sanitary Acts were at the time of the passing of this Act payable out of any rate in the nature of a general district rate leviable by them, as such commissioners throughout the whole of their district, then the expenses incurred by that authority in the execution of this Act shall be charged on and defrayed out of such rate, and for the purposes of this section the council of the borough of Folkestone, shall be deemed to be improvement commissioners, and that where at the time of the passing of this Act the expense incurred by an urban authority in the execution of certain purposes of the Sanitary Acts were payable out of the borough fund and borough rate, and the expenses incurred by such authority in the execution of the other purposes of the said Acts were payable out of a rate or rates leviable by that authority throughout the whole of their district for paving, sewerage, or other sanitary purposes, then the expenses incurred by that authority in the execution of the same or similar purposes respectively under this Act, shall respectively be charged on and defrayed out of the borough fund or borough rate and of the rate or rates leviable as aforesaid.

15. By the 211th section of that Act it is provided with respect to the assessment, and levying of general district rates under that Act as follows:

The owner of any tithes or any tithe commutation rentcharge, or the occupier of any land used as arable, meadow, or pasture ground only, or as woodlands, market gardens, or nursery grounds, and the occupier of any land covered with water or used only as a canal or towing path for the same, or as a railway constructed under the powers of any Act of Parliament for public conveyance, shall be assessed in respect of the same in the proportion of one-fourth part only of such net annual value thereof.

16. At a meeting of the town council of the borough of Walsall held on the 9th Nov. 1875, an estimate was presented of the expense to be incurred during the ensuing six months in carrying into effect the powers of the Local Improvement Act and other Sanitary Acts as well as for the purposes to which the borough fund it applicable under 5 & 6 Will. 4, c. 76 and the amending Acts, and it was resolved that a borough rate of 2s. 3d. in the pound should be made and assessed upon all rateable property within the borough to meet those expenses, and that the sum of 7267l. 10s. should be levied in that part of the foreign of Walsall which is situate within the borough as the proportion of the said borough rate assessable on that part.

17. It was also resolved that the mayor should issue his warrant to the parish officers of the foreign of Walsall, commanding them to pay the said sum of 7267l. 10s. so rated and assessed on the part of the foreign of Walsall within the borough.

18. The overseers of the foreign of Walsall upon receiving the mayor's warrant in pursuance of the before-mentioned resolutions made a rate upon the rateable property in the part of the township with the borough by which they assessed certain land and buildings of the appellants, including the land used as a railway at 2202l. 10s., its full rateable value taking as their basis the valuation list then in force made by the union assessment committee.

19. The appellants gave all necessary notices of appeal, but they had not when the said valuation list was published made any objection thereto before the assessment committee, or sought relief from them, having no objection to make to such list, and the assessment committee having no power to give any relief in respect of the matters now in dispute.

20. It is necessary to set out at length the appellants' grounds of appeal, the ground of objection to the said rate or assessment being that they are thereby rated on the full value of their railway to the expenses of carrying into execution the improvement and sanitary Acts; whereas they contend that they ought only to be rated to such expenses in respect of their said railway on one-fourth part of the full value thereof.

21. It was agreed, for the purposes of this case, that one-half of the amount leviable by the said rate is to meet expenses under the sanitary Acts and expenses for which under the local improvement Acts, rates would have been levied to which the said railway was only rateable at a fourth part of its value.

22. It is further agreed, for the purposes of this case, that the annual rateable value of the land used as railway is one half of the said sum of 2202l. 10s.

The questions for the opinion of the court are: First, Was it a condition precedent of the appellants' right of appeal that they should have objected to the valuation list before the assessment committee; and, secondly, Were the appellants liable to be assessed upon the full value of their railway towards all the expenses for which the said rate is made? If the court shall be of opinion in the affirmative on either of these questions, the rate is to be confirmed. If the court shall be of opinion in the negative on both questions, the order of the court of quarter sessions is to be quashed, and the rate is to be remitted to the said court to be amended.

Austie and Jelf, for the respondents, submitted, first, that the appeal could not be heard, as no notice had been given to the assessment committee, under 27 & 28 Vict. c. 39, s. 1, which makes notice to the assessment committee a condition precedent to the right to appeal to the quarter sessions. [*LUSH, J.*—But by 25 & 26 Vict. c. 103, s. 36, no person not aggrieved can appeal to the assessment committee, and here the railway company were not aggrieved by any act of the committee.] On the main point, they submitted that sect. 4 of the Public Health Act of 1872 made the respondents the sanitary authority within the borough, and that they only had power to levy a borough rate to meet the sanitary expenses, and that the local Acts were now impliedly repealed by the Public Health Acts of 1872 and 1875.

Bosanquet and Neville, for the appellants, argued that although the respondents were constituted the urban sanitary authority, they were only so constituted to carry out the powers of the commissioners under the local Acts, and that the incidence of the rating remained unaltered. That if not, this would be an imposition of a new liability upon the appellants by the Legislature, and that clear words are necessary to impose a new burthen, and that an exemption from rating cannot be abolished by implication. They cited

Commissioners of Walton v. Walford, L. Rep. 10 Q.B. 180.

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The Court (Mellor and Lush, JJ.) were of opinion that the exemption contained in the local Acts is not affected by the Public Health Acts. Sect. 23 of the Public Health Act of 1872 clearly contemplates the continuance of the local Acts, unless certain steps are taken which have not been taken in this case. Sect. 43 also assumes their validity. That being so, the respondents must levy their rates in the same manner as the commissioners under the local Acts, and subject to the same exemption.

Rule absolute to quash the order of sessions.

Solicitor for the appellants, *Roberts*.

Solicitors for the respondents, *Pearse and Son*.

Wednesday, Jan. 17, 1877.

DARGAN v. DAVIES.

Impounding—Neglect to supply impounded animals with provender—Whether pound-keeper or party impounding liable to penalty—12 & 13 Vict. c. 92, s. 5.

By 12 & 13 Vict. c. 92, s. 5, "every person who shall impound or cause to be impounded any animal, and shall neglect to provide such animal with food and water, is liable to a penalty of 20s."

Held (upon a case stated by justices who had dismissed an information against the keeper of a common pound under this section), that the section did not apply to the keeper of the pound, but to the party bringing the animal to the pound.

THIS was a case stated under 20 & 21 Vict. c. 43, by John Lort Stokes, Vice-Admiral, and Peter Phelps Clerks, two of the justices of the peace for the county of Pembroke, and the following are the material parts of such case:

An information had been preferred by Thomas Dargan, the appellant, against Martha Davies, the respondent, under 12 & 13 Vict. c. 92, charging that the respondent did impound forty-eight sheep in the common pound on the 6th Jan. 1876, and on that and the two following days did unlawfully neglect to provide and supply the said sheep with a sufficient quantity of fit and wholesome food and water contrary to that statute. The justices had dismissed the information with costs. It was proved that one D. Williams, between 10 a.m. and 11 a.m. on the 6th Jan. 1876, impounded forty-two sheep, which he had theretofore seized damage feasant. They were confined until their release as follows: thirty-four were taken out at midday on the following Friday, and the remaining eight on the next Tuesday. During the whole time the thirty-four sheep were so confined the said D. Williams did not provide any of the forty-two with food or water, but after the release of the thirty-four the remaining eight were about 7 a.m. on Saturday the 8th Jan. provided with hay. The respondent was at the time of the said sheep being so impounded and confined the keeper of the pound, but she did not provide or supply the sheep with any food or water or in any way interfere beyond receiving and keeping them in such pound until their release. The key of such pound was in the sole possession of the respondent during this period, and she in her capacity of pound-keeper had the sole control over such pound.

The justices having dismissed the information on the ground that 12 & 13 Vict. c. 92, s. 5 "did

not, under these circumstances, apply to or include the respondent, but to the person or persons who delivered or caused to be delivered the said sheep into her custody," the question for the opinion of this court was "whether under the above circumstances the said information was legally and properly dismissed."

Morton Smith referred to the Acts *in pari materia* (being 5 & 6 Will. 4, c. 59, s. 4; 17 & 18 Vict. c. 60, s. 1), and argued that the section in question extended to the respondent.

No counsel appeared for the respondent.

MELLOR, J.—This case has been extremely well argued by Mr. Smith, but I have come to the conclusion that the keeper of the pound is not within the terms of 12 & 13 Vict. c. 92, s. 5. That section provides that "every person who shall impound or confine, or cause to be impounded or confined, in any pound or receptacle of the like nature any animal, shall provide and supply during such confinement a sufficient quantity of fit and wholesome food and water to such animal; and every such person who shall refuse or neglect to provide and supply such animal with such food and water as aforesaid shall for every such offence forfeit and pay a penalty of 20s." It appears to me that this section applies to the real actor, to the person who delivers the animal to the pound-keeper, and not to the pound-keeper himself. The Legislature has made no special provision as to the keeper of the pound, and, from the absence of such a provision, the Legislature must be taken to have considered that the imposition of the 20s. penalty on the person employing the keeper of the pound was sufficient to ensure the object in view. The providing of food and water for twelve hours is left to such person, and if such person omits to provide the food and water during such twelve hours, any person of a benevolent mind may, by the 6th section, enter the pound, supply the food and water, and recover the cost of the food and water from the owner of the animal.

LUSH, J.—I also am of opinion that these statutes contain no words to embrace the keeper of the pound within their sanction. The recital contained in the preamble of the Act 17 & 18 Vict. c. 60, is very strongly in favour of the respondent. From that preamble it appears that the history of the law is as follows: First, by 5 & 6 Will. 4, c. 59, every person impounding any animal was required to supply such animal daily with good and sufficient food and nourishment while impounded. By the same Act every such person so providing the animal with food and nourishment was authorised to recover from the owner of the animal not exceeding double the value of the food and nourishment supplied. Such person was also at liberty, instead of proceeding for the value of the provender, to sell the animal after seven days from the time of the impounding. Then came the Act 12 & 13 Vict. c. 92, which repealed the Act 4 & 5 Will. 4, c. 59, and the 5th and 6th sections contained the provisions which my brother Mellor has referred to. Finally comes the Act 17 & 18 Vict. c. 60. This recites, after summarising the two previous Acts, that "it is doubtful whether the Act 12 & 13 Vict. c. 49, gives any remedy to the person impounding for the recovery of a compensation for the food and water supplied for any animal, and no power is given to sell the animal, although full

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provisions for these purposes were contained " in 5 & 6 Will. 4, c. 59. The Act then provides that every person who has impounded an animal, and supplied him with food and water, may recover double the value of the food and water supplied from the owner, or may, if he please, sell the animal and pay himself, rendering the overplus, if any, to the owner. I think the mention of the "person impounding," in this section, and the absence of any mention of the keeper of the pound, is conclusive to show that the keeper of the pound is not subject to the penalty imposed by 12 & 13 Vict. c. 92, s. 5.

Judgment for the respondent.

Solicitor for the appellant, *A. Leslie.*

COMMON PLEAS DIVISION.

Reported by S. HANE, Esq., Barrister-at-Law.

APPEAL FROM INFERIOR COURT.

Thursday, Jan. 18, 1877.

DUFFELL v. CURTIS.

Sunday trading—Refreshment-house licence—Hours of closing where no wine licence—29 Car. 2, c. 7, sect. 1—23 Vict. c. 27, sects. 6, 7, & 27—27 & 28 Vict. c. 64, s. 5.

A licensed refreshment-house keeper, although he does not hold a wine licence, may not sell articles for consumption off the premises on Sundays.

CASE stated by the magistrates of Yarmouth.

The appellant was convicted at the petty sessions of the borough, held on 19th July 1876, under 29 Car. 2, c. 7, sect. 1, for having exercised the worldly business of his ordinary calling, between the hours of 3 and 6 p.m., on Sunday, 16th July 1876.

He was a baker and confectioner, and held a refreshment licence under 23 Vict. c. 27, s. 6; but did not hold a wine licence under sect. 7.

The question for the decision of the court was whether sect. 27 of the latter Act, which enacts that the house of a person holding a wine licence "shall not be open for the sale or consumption therein of any article whatever at any time during which the houses of licensed victuallers shall be closed on Sunday," . . . &c., applied to the present case.

Poland, for the appellant.—The words of the Act (23 Vict. c. 27), apply to a refreshment house keeper who does, and not to one who does not, hold a wine licence. 27 & 28 Vict. c. 64, sect. 5, only enacts that a refreshment house must not be open between 1 and 4 a.m. The cakes were sold for consumption off the premises. The Statute 29 Car. 2, c. 7, is suspended by the limited licence obtained.

No counsel appeared to support the conviction.

Lord COLERIDGE, C.J.—I am of opinion this conviction ought to be confirmed. The observance of the Lord's Day Act is enforced or neglected according to the public opinion of the moment, or to the zeal of the informers. In this case the appellant sold cakes and sweetmeats to grown-up people and children; and from the fact that he carried on his trade Sunday after Sunday, there is good reason to infer that he knew the articles he sold would not be consumed on the premises. *Prima facie* the statute of Charles II. is against

him. Is there anything that takes his case out of its provisions? Does the license to keep a refreshment house do so? I am clearly of opinion that it does not. The statute 23 Vict. c. 27, s. 6, permits a person who keeps a house for the purpose of selling refreshment to be consumed therein to procure a licence for his house; and, having done so, he may proceed to take out a wine licence under sect. 7, when he will come within the provisions of sect. 2. But the later statute contains nothing to exempt the appellant from the penalty of breaking the statute of Charles II., for the trading of which he has been convicted, that is, the selling of articles to be consumed elsewhere, is not part of the calling of a refreshment house keeper, as defined by the statute mentioned above, under which the license was granted.

GROVE, J.—I am of the same opinion. I hold that the construction of the statute as permitting the sale in licensed houses on Sunday of refreshments to be consumed on the premises to be a reasonable one; but it must not, in my judgment, be extended to make a licensed refreshment house an ordinary trading one in such articles. The other part of the case is matter of police regulation. Since the legislature has fixed closing hours for public houses, I cannot see why closing hours should not be fixed for other refreshment houses; and that has been done. As to 27 & 28 Vict. c. 64, s. 5, it distinctly says that nothing therein contained shall authorise any person to keep open any refreshment house, or to sell refreshments otherwise than at the times and upon the conditions prescribed by the Acts of Parliament in that behalf made.

Conviction upheld.

Solicitor for the appellant, *A. Storey.*

APPEALS FROM INFERIOR COURTS.

Monday, Jan. 29, 1877.

TYNE COAL COMPANY (LIMITED) v. OVERSEERS OF WALLSEND PARISH.

Rating appeal—Colliery drowned out—Value to a tenant of pumping machinery—Principle of assessment.

A colliery, the pumping engines of which only were at work, and which appeared to be a hopeless loss, was assessed to the relief of the poor at a rate calculated upon the land and machinery as a going concern, having a prospective value.

Held, that the land must be rated at its value to a tenant for year to year, and the machinery at its value independently of the land.

CASE stated by the justices of the County of Northumberland.

The question for the opinion of the court was whether the Tyne Coal Company (Limited), the appellants, were rateable for certain reservoirs, buildings, engine, railway and colliery.

The appellants are under-lessees of the Wallsend Colliery at a rent of 200*l.* a-year certain. They have power to work existing shafts, and to take surface lands, paying compensation for them. Upon this surface land they have constructed two large reservoirs, boiler sheds, and an engine house, with a large chimney. A railway has been laid from the colliery to a wharf on the river Tyne. The greater part of the buildings, reservoirs, plant, and railway, are substantially constructed. All of

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them are intended for permanent use, and are used with the sole object of getting coal. The boiler shed contains twelve boilers set in masonry.

The mine was drowned out many years ago, and no coal has been got since 1854. The water was considerably reduced before 1870, but since then, notwithstanding continual pumping, it has remained at about the same level.

The appellants have been assessed to the relief of the poor of the parish in respect of "land, shafts, buildings, engines, pumps, and fixed plant" at the rateable value of 1250*l.*, upon a gross estimated rental of 1500*l.* They admit that they are rateable in respect of the lands taken by them; but they contend that, as the mine is totally unproductive, they are not rateable in respect of any of the other particulars, which are used solely for the purpose of unwatering the mine.

Herschel, Q.C. and *E. Ridley*, for the appellants, admitted that the principle is well established that in valuing mining property for rating purposes, the value of the plant may be taken into consideration; and that, in estimating the plant and buildings, an extra value may be put upon them because of the mine beneath them. They contended that this principle should work the opposite way when the mine is valueless.

Sir *Henry James*, Q.C. and *Webster*, for the overseers.—The mine is not rated. What is rated is the land, with what is upon it, which includes the shaft or opening in the land. The reservoirs also, and the railway and wharf, used for bringing coal to the pumping engines, are not exempted. They are all beneficially occupied, and the fact that they do not produce any return is immaterial. The machinery, &c., are there for the purpose of pumping out water; and making the mine a valuable property. Suppose the pumping were done by a contractor, his works would be rateable. This case stands upon the same footing; here the owner is his own contractor. [Lord COLERIDGE.—The question in these cases is always what would a person give for the tenancy?] The working of the mine has been beneficial in the sense that the water in it has not been allowed to increase. [Lord COLERIDGE.—The time will come when the engines will be rateable.] Then the duty of the engine and its rateability will be at an end. You cannot levy a rate for past years. The engines are now worked in the hope of future profits. Why do the appellants continue to pump if they consider the mine of no value?

Reg. v. Metropolitan Board of Works, L. Rep. 4 Q. B. 15;

Staley v. Castleton, 5 B. & S. 505;

Guest v. East Dean, L. Rep. 7 Q. B. 334;

Talargoch Mining Company v. St. Asaph, L. Rep., 3 Q. B., 778;

Kitlow v. St. Cleer, 44 L. J. 23, M. C.

Herschel, Q.C., in reply.—None of the cases cited support the claim of the respondents. They have failed to show any case in which property not capable of being let to a tenant from year to year, and not producing any profit, has been held to be rateable. The case of *Staley v. Castleton* was that of a cotton mill which, owing to the scarcity of cotton during the American war, was idle, and used as a warehouse. There the rate allowed was that of a warehouse. In *Reg. v. Metropolitan Board of Works*, the pumping station, &c., had an occupation value as land. The board must have rented them if it had not been proprietor, and a tenant might easily have been found to

take them off its hands. That is not our case. The case of *Metropolitan Board of Works v. West Ham* (40 L. J. 30, M. C.) applies the principle of the last case to the buildings upon the land; that is, they were capable of being let, and had an independent value apart from that of the land. Neither is that our case. *Harter v. Salford* (6 B. & S. 591), was a case where the owner of a silk mill, having ceased to work it, was rated for a building used as a warehouse for machinery. In *Reg. v. Bilston* (5 B. & C. 851), the pumping engines of a mine were exempted from rating.

Lord COLERIDGE, C.J.—In this case our judgment must be for the appellants. This is an appeal against a rate assessed upon certain machinery, and buildings in connection with the machinery, all of which are occupied and used to drain a coal mine drowned out, and yielding no profits. In order to bring myself within the authority of the decided cases, I must decide that the surface of the land is rateable at whatever it would be worth in the hands of a tenant from year to year; and that the engine-house, pumps, &c., are to be assessed separately, if they have any independent value, upon the authority of the case of *Metropolitan Board of Works v. West Ham*. If there be any independent value in them apart from that of the worthless mine, upon the principle of that case, to that extent they ought to be rated. This fact was not raised by the case, and so I express no opinion upon it. I decide upon the assumption that these engines, &c., are of value only in connection with something at present valueless, and that they have no separate and independent value; that they are part of a valueless whole, which has been valuable at some time now past, and may be so again, when they will be rated at the value which they may then be ascertained to have. When they do so become valuable, either the land will be rated at an additional value, or the mine itself, or perhaps the subjects of this appeal themselves, will be rated. In deciding as I do, I desire to conform to the cases which have already been decided.

GROVE, J.—I concur in the opinion expressed by my Lord. It is not disputed that the land is rateable, or that if it has any adjuncts which increase its value they may be rated; but the appellants contend that besides the land there is nothing in this case rateable. The facts stated show that the mine is absolutely valueless, that it has no value for which a person would give anything. It was argued that a rent might be obtained from a speculator. But that is not the principal upon which rating should be settled. If there were a house to live in upon the land, then there might be some reason for assessing the rate higher than the actual value of the land. At the most the work going on now could only give the property a prospective value, and that we cannot value for rating purposes. The case of *Metropolitan Board of Works v. West Ham* is inconsistent with such a principle. You do not rate land because it may have a contingent value, any more than you reduce a rate because there may possibly be a loss upon the rated property in the future; you take its present value. I should be prepared to decide this case upon that ground only. But the case goes further. My brother Lush, J., in the case of *Reg. v. Metropolitan Board of Works*, held that the rateable quality of the land and buildings of the defendants was not affected by the particular use to which it was ap-

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plied. Here is a stronger case. The mine has no reasonably prospective value. It has been in the same position for six years, during which time the engines have done no useful work. It would not be right to rate them, because they may at some future time have some value, whilst there is no probability of their having a future, or any, value. I conceive nothing would induce a tenant to give 1s. more rent for the land because the engines were on it. The only cases at all supporting the contention of the respondents, but falling far short of it, are the case of *Reg. v. Metropolitan Board of Works*, from which it would appear that there was a rateability upon pumping engines, because they had a value, explained by the case of *Metropolitan Board of Works v. West Ham*, which shows that the sewage works had a value, not because they were sewage works, but because they might be valuable in the hands of a tenant, and might be used by him for some other purpose. The only utility of the pumps, &c., in question, is in respect of the mine, and the same remark applies to the wharf and the railway. They are so unprofitable that they would even be a drawback to a tenant.

Rate ordered to be amended in terms of the judgment. No costs.

Solicitors: Cookson, Wainwright, and Pennington; H. O. Coots.

APPEAL FROM INFERIOR COURT.

Thursday, Jan. 18, 1877.

WARDEN v. TYE.

Drunkenness, penalty for—Licensed person drunk on his own premises—The Licensing Act 1872, ss. 12 and 13.

A publican cannot be convicted under sect. 13 of the Licensing Act 1872, for being drunk on his own premises.

CASE stated by the justices of Northamptonshire.

The appellant was summarily convicted under sect. 13 of the Licensing Act 1872, which enacts that "if any licensed person permits drunkenness, or any violent, quarrelsome, or riotous conduct to take place on his premises, or sells any intoxicating liquor to any drunken person," he shall be liable to a penalty, &c.

It appeared that the appellant was a licensed person, and that he was found drunk by the respondent, a policeman, upon his own licensed premises. He was fined 5s. and costs, and the conviction was ordered to be indorsed upon the licence.

Poland, against the conviction.—The conviction is under the wrong section. Sect. 13 makes it an offence for a licensed person to permit a person to be drunk on his premises; but the drunkenness must be that of another person—the landlord cannot be the person drunk. The section goes on to say that if any licensed person "sells any intoxicating liquor to any drunken person." This shows that the person must be another than the person, for he cannot sell to himself. Sect. 12 is the one applicable to this case, by which every person found drunk is liable to a penalty of 10s.

Lord COLERIDGE, C.J.—I come to the conclusion that the case does not fall within the section under which the conviction has been made, and that it cannot be sustained. The Licensing Act 1872, is divided into heads, one of which, entitled

"Offences against public order," consists of several sections, numbered 12 to 18 respectively, all except the first regulating the duty of licensed persons in relation to others. Except sect. 12, every one of them is clear in this respect; and sect. 13 in particular says that "if any licensed person permits drunkenness, &c., on his premises, or sells any intoxicating liquor," &c., he shall be liable to conviction. He cannot sell to himself in his own house. Part of the section, therefore, cannot apply to the licensed person; and, using a fair construction of the whole of the Act, I think the rest of the section cannot. I come to the conclusion, therefore, reluctantly but clearly, that the words of sect. 13 do not include the publican himself, but reserve his case to be dealt with in another way.

GROVE, J.—I am of the same opinion. Sect. 13 clearly points to the conduct of the landlord with relation to others; for he must take care persons do not get drunk, &c., &c., but it does not relate to a licensed person himself getting drunk. There is another provision made for that case. By sect. 12 any person found drunk is liable to punishment. However much we may regret it, we cannot uphold this conviction. The court has only to construe an Act as it finds it, and in my opinion sect. 13 was not intended to apply to this case.

Conviction quashed.

Solicitor for the appellant, J. J. Rae.

EXCHEQUER DIVISION.

Reported by HENRY LEIGH, Esq., Barrister-at-Law.

Wednesday, Nov. 15, 1876.

(Before CLEASBY, B.)

BULLOCK v. DUNLAP.

Detinue and trover—Property found on a person suspected of having stolen it—Trial and acquittal of suspected party—Property detained by constable—Application by constable to magistrate for order, under 2 & 3 Vict. c. 71, s. 29, as to disposal of property—Adjournment by magistrate to a day not yet expired—Action by acquitted party against constable—Demurrer.

The plaintiff being found by a police constable wearing a diamond pin and diamond ring, was taken into custody and charged by him with stealing them, and being committed by a police magistrate for trial on such charge, was afterwards indicted and tried thereon and acquitted. The defendant, a superintendent of police into whose possession the pin and ring had lawfully come in the course of the proceedings, did not deliver them up to the plaintiff upon the latter's acquittal, but, before action and within a reasonable time after such acquittal, applied to a magistrate for an order under sect. 29 of the 2 & 3 Vict. c. 71, "for the delivery of the said goods to the party who should appear to the magistrate to be the rightful owner thereof, or such other order as to the magistrate should seem meet." The magistrate entertained the application, and, after hearing evidence in support of it, and the evidence of the plaintiff in support of his claim to the goods, adjourned the hearing to a day which has not expired, and no order has yet been made.

In an action by the plaintiff against the defendant for the detention and conversion of the said pin

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and ring, in answer to which the defendant stated the facts as above set forth, and alleged that he detained the goods as a constable in the performance of his duty, it was

Held by the Exchequer Division (Cleasby, B.), overruling a demurrer to the statement of defence, that the action was not maintainable, and that the defendant having within a reasonable time applied to the magistrate for an order under sect. 29 of the statute, and done all that the Act of Parliament called upon him to do to render up possession of the goods in question, and the matter being still in the hands of the magistrate, the defendant was not responsible because he was not able before action to relieve himself of the possession of the goods.

The statement of claim in this case was as follows:

The plaintiff is a dealer in jewellery, in Church-street, Soho, and the defendant is a superintendent of the metropolitan police.

1. The plaintiff, in the month of Oct. 1875, was in possession, as his own property, of a certain diamond pin, which he was then wearing in his cravat scarf, as well as of a certain diamond ring, which was also in his possession as his own property.

2. One Charles Butcher, a metropolitan detective police constable, on seeing the plaintiff and observing the said diamond pin being so worn by him as aforesaid, charged him with stealing the same, as well as the diamond ring, and took him into custody upon such charge, and then took from him both the said pin and the ring.

3, 4. The plaintiff was, thereupon, subsequently taken before Mr. Newton, a metropolitan police magistrate, who, after various repeated remands, committed him for trial on such charge, upon which he was subsequently indicted and tried, and acquitted.

5. The said Charles Butcher delivered the said pin and ring to the defendant, as his superior officer.

6. The defendant detains from the plaintiff the use and possession of the plaintiff's goods and property, that is to say, the diamond pin and ring, and has also converted to his own use and wrongfully deprived the plaintiff of the use and possession of his said goods and property.

The plaintiff claims a return of the said goods or their value, and 20*l.* for their detention, and in respect of the conversion of the said goods, the plaintiff claims 100*l.*

The statement of defence:—

1. That the said goods and property were not the plaintiff's, as alleged.

2. As to the alleged conversion of the said goods and property, the defendant denies the statement in paragraph 6 of the plaintiff's statement of claim.

3. As to the alleged detention of the said goods and property, and depriving the plaintiff of the use and possession thereof, the defendant says that, after the plaintiff had been charged with stealing the said goods and property, and had been tried and acquitted (as alleged), the said goods and property were in the lawful possession of the defendant, as and being a constable, within the meaning of the 2 & 3 Vict. c. 71, s. 29; and the defendant, as such constable, being ignorant as to who was the rightful owner thereof, before the commencement of this suit, and within a

reasonable time after he became possessed thereof, duly made an application to a magistrate then having jurisdiction in that behalf, under the said section of the said statute, to make an order for the delivery of the said goods to the party who should appear to be the rightful owner thereof, or such other order as to such magistrate should seem meet.

4. That the said magistrate entertained the said application, and heard evidence in support thereof, and the plaintiff appeared before the said magistrate in the matter of the said application, and gave evidence in support of his claim to the said goods and property.

5. That the said magistrate afterwards adjourned the hearing of the said application to a day which has not yet expired.

6. That the said application is still pending before the said magistrate, and no order has yet been made therein by the said magistrate, under the said section of the said statute.

7. That the defendant, as such constable as aforesaid, and in the performance of his duty in that behalf, and not otherwise, detained, and still detains, the said goods and property, and the possession thereof from the plaintiff, until an order has been made under the said section of the said statute, as he lawfully might for the cause aforesaid.

Demurrer to the 3rd, 4th, 5th, 6th, and 7th paragraphs of the statement of defence as bad in law, on the ground that the matters therein contained do not disclose any legal defence.

Sect. 29 of the 2 & 3 Vict. c. 71, referred to in the above statement of defence, enacts "That if any goods or money charged to be stolen or fraudulently obtained, shall be in the custody of any constable, by virtue of any warrant of a justice, or in prosecution of any charge of felony or misdemeanour in regard to the obtaining thereof, and the person charged with stealing or obtaining possession as aforesaid, shall not be found, or shall have been summarily convicted or discharged, or shall have been tried and acquitted, or if such person shall have been tried and found guilty, but the property so in custody shall not have been included in any such indictment upon which he shall have been found guilty, it shall be lawful for any magistrate to make an order for the delivery of such goods or money to the party who shall appear to be the rightful owner thereof, or, in case the owner cannot be ascertained, then to make such order with respect to such goods or money as to such magistrate shall seem meet. Provided always, that no such order shall be any bar to the right of any person or persons to sue the party to whom such goods or money shall be delivered, and to recover such goods or money from him by action at law, so that such action shall be commenced within six calendar months next after such order shall be made."

The plaintiff's points for argument.—First, that the paragraphs demurred to disclose no facts which in law disentitle the plaintiff to maintain and continue this action; secondly, that the plaintiff being no party to the said proceedings before the magistrate, the said statute does not take away his right to maintain and continue an action in a court of law; thirdly, that the statute referred to, although enabling a magistrate under certain circumstances to make an order as to the property, does not interfere with the liability of

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the constable; fourthly, that even if an order by a magistrate within the meaning of the said statute would prevent an action being brought against the constable, yet nothing less than an order (and not the pending of the proceedings) would have that effect; fifthly, that the statute could only have reference to a case in which the application to the magistrate was made before action commenced; sixthly, that the facts disclosed in the statement of defence admit that the adjournment has taken place for the purpose of the continuance of the action, and therefore the magistrate in his discretion must be taken to have declined to adjudicate while the said action is pending.

The defendant's points: First, the defendant, on the argument of the demurrer, will contend (amongst other things) that the statements in the paragraphs demurred to, show that the goods were in the lawful possession of the defendant as a constable, and that such lawful possession was not determined at or before the commencement of the action; secondly, that if the magistrate were now to order the goods to be given up to another person than the plaintiff, the defendant would be obliged to comply with such order; thirdly, that the plaintiff, by submitting to the jurisdiction of the magistrate, and giving evidence in support of his claim, authorised the detention of the goods by the defendant as such constable as aforesaid, until the ownership was determined; fourthly, that it appears from the statement of defence that the defendant only performed his duty as a constable, and is not liable to be sued for the detention of the goods from the plaintiff.

Talfourd Salter, Q.C. (with whom was *L. Glyn*), for the plaintiff, supported the demurrer, and submitted that even if an order had been made by the magistrate under the 29th section of the statute for the delivery of these articles, or that they should remain in the custody of the constable, it would have been no answer to the present action, nor have afforded any protection against a person claiming the goods from the person having possession of them. The decision of the magistrate as to the ownership under sect. 29 could in no way affect the plaintiff's title or his right to bring that action, nor could the proceeding under that section determine the right of property. The object and intention of the statute was to relieve and protect persons in the position of police officers encumbered with the custody of property under such circumstances by providing a place of deposit for the property, but not thereby in any way to affect the title to it. The question is not whether a reasonable time elapsed before the application to the magistrate, but whether a reasonable time had elapsed before the commencement of the action. All that the defendant could want a reasonable time for was to find out the title and obtain the magistrate's order, but that did not affect the plaintiff's right. It is possible that the magistrate delays making any order until this action has been decided, and should the court now give judgment against the plaintiff a deadlock may occur, and the constable be placed in peril from which the statute was intended to protect him. The plaintiff's action and the proceedings before the magistrate are for two different purposes, the former is to try the right of property, the other is to ascertain and define a place of deposit for it. He cited and referred to

Pillott v. Wilkinson, 8 L. T. Rep. N. S. 361; 3 H. & C. 347; 34 L. J. 22, Ex.; and
Dover v. Child, 34 L. T. Rep. N. S. 737; L. Rep. 1 Ex. Div. 172; 45 L. J. 462, Q. B., C. P., and Ex.

The *Solicitor-General* (Sir H. S. Giffard, Q.C.), with him were *F. M. White* and *Paine*, for the defendant *contra*.—It is not disputed by the other side that the defendant is a police constable, and that the plaintiff had been charged and indicted for stealing the goods in question which are therefore clearly within sect. 29. That section assumes such goods to be in *custodia legis*, and the constable is not to be disturbed or vexed in his possession by an action like the present. He was bound to take possession of the goods and not to allow them to be put under the control or in the possession of the accused, nor to part with them except under the order of the magistrate. The fact that the plaintiff was acquitted at his trial for stealing the goods makes no difference. The section does not direct the goods to be delivered to the acquitted party, but expressly enables the magistrate to exercise his discretion with respect to an order for their disposition notwithstanding such acquittal. The order of the magistrate is only an adjudication on the right to present possession; it cannot affect the ultimate right or bind the title to the goods, or estop the plaintiff from asserting his right to them hereafter; but, until an order is made, the constable's possession is lawful. The matter is still *sub judice*, and should the plaintiff succeed in this action the defendant would be thereby prevented from obeying an order of the magistrate to deliver the goods to some other person than the plaintiff. The plaintiff must show both a right to the present possession and an ultimate right to the property, and that he has not done. He cited

Vaughan v. Watt, 6 M. & W. 492; 9 L. J., N.S., 272, Ex.

Talfourd Salter, Q.C. in reply submitted that the keeping of the goods by the constable after the plaintiff's acquittal was totally unlawful. A reasonable time was of course allowed to a constable under such circumstances to ascertain the facts, but he was bound to exercise his judgment upon them in a reasonable time, and not to withhold property from the owner of it.

CLEASBY, B.—It appears to me that the statement of defence in this case is a good defence to the action, and that, therefore, the defendant is entitled to the judgment of the court upon this demurrer. The case turns entirely upon the 29th section of the Act of Parliament that has been referred to, viz., the 2 & 3 Vict. c. 71. Now, what was the object of that section? It was to protect a person who is placed by virtue of his office in possession of the property of some other person, to which he himself has no title. That is always a dangerous position for a person to be in, because although he may take time to make up his mind what to do, he is eventually bound by what he does do, and renders himself responsible if he does not deliver the property to the right person. The object of this section obviously was to protect a constable from that difficulty, and to enable him to go to the magistrate and say, "Tell me what I am to do with these goods, which do not belong to me; let me know who is the person to whom I am to deliver them." The Act says that it shall be lawful for the magistrate to make the order; and the person who obeys that order will be protected in

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obeying it, without any reference to the title of the person claiming the goods. That being so under the circumstances of this case, which comes within the Act of Parliament, the defendant applied to the magistrate to know what he was to do with these goods. The application was not disposed of by the magistrate at the time, but was adjourned by him for further and future consideration. He may possibly entertain a doubt in his own mind whether the plaintiff, the person who has been tried and acquitted on the charge of stealing the goods, is or not the person to whom he ought to order them to be delivered. It is hardly contended that had an order been made at once the plaintiff could have maintained this action. Indeed, it seems to be almost admitted that under that state of things it would be impossible for him to do so. That being so, and the matter being in the hands of the magistrate, what difference can it possibly make that he takes some time in order to enable him to make up his mind what his decision ought to be before he gives it? Is it possible, in construing a clause of an Act of Parliament which is made for the protection of an officer, to hold that the officer becomes responsible for the way in which the magistrate, the judge to whom by law the officer is to apply, deals with the case, the matter being within the magistrate's jurisdiction? The magistrate may say, "I cannot dispose of this case now, it requires further consideration, and I desire to have the proper persons to attend me upon it again." I do not suppose otherwise than that a judge or magistrate in dealing with a case is influenced by proper motives, and that he will deal with the case properly, so long as it is pending before him. That being so, it appears to me that the defendant here has done all that the Act of Parliament calls upon him to do to render up possession of the goods in question, and that therefore he cannot be responsible to the plaintiff, because he was not able, before the commencement of this Act, to relieve himself of the possession of them. I think, therefore, that the judgment of the court must be for the defendant with costs.

Judgment for the defendant, overruling the demurrer, with costs.

Solicitors for the plaintiff, *J. O. Fisher and Co.*
Solicitors for the defendant, *Ellis and Ellis.*

DIVISIONAL COURT FOR APPEALS FROM INFERIOR COURTS.

Reported by M. W. McKILLAR, Esq., Barrister-at-Law.

Feb. 24 and May 25, 1876

HILL (app.) v. HALL (resp.)

Repeal of statute by implication—Inconsistent provisions—Different penalties—Conviction.

By 3 & 4 Vict., c. 85, s. 6, all partitions between any chimney or flue shall be of brick or stone, and at least equal to half a brick in thickness; every chimney or flue in any wall, or of greater length than four feet out of the wall, not being a circular chimney or flue twelve inches in diameter, shall be in every section not less than fourteen by nine inches; no chimney or flue shall be constructed with any angle therein which shall be less obtuse than an angle of 120 degrees; and every salient or projecting angle in any chimney or flue shall be rounded off four inches at the

least, upon pain of forfeiture by every master builder or workman making such chimney or flue of any sum not less than 10l. or exceeding 50l.

The Huddersfield Improvement Act 1871, makes no mention of the said general Act; but by section 111 enacts that the chimneys and flues of every new building shall be constructed in such mode and of such materials and dimensions as shall be determined or approved by the corporation. Unless otherwise prescribed or ordered every chimney or flue shall be constructed of good brick or stone work, and if circular, must be formed of earthenware pipes of not less than ten inches diameter; and if not circular, must be pargeted with mortar, and not less than fourteen by twelve inches clear interior measurement. No chimney or flue shall have angles less obtuse than 120 degrees, except when proper iron or stone doors or openings are left for cleaning purposes. Other provisions are made about materials, but nothing is said about the other matters provided by the general Act. Section 150 makes the penalty for breach of the local Act any sum not exceeding 5l.

Held, upon a case stated by justices, that the local Act did not impliedly repeal the general Act with respect to new chimneys in Huddersfield; but that the appellant, who had there made a partition less than half a brick in thickness, and had not rounded off a projecting angle four inches, was rightly convicted and fined 10l. for each offence, under the general Act.

THIS was an information preferred by Peter Hall against John Hill for that he the said John Hill did unlawfully make or cause to be made a certain chimney or flue, the salient or projecting angle of the same not being rounded off four inches at the least. Two of the justices of the peace for the borough of Huddersfield ordered that the said John Hill should for the said offence forfeit and pay the sum of 10l. The following case was stated for the opinion of the court:

At the hearing of the said information it was admitted before the said justices that the said John Hill, who is a master builder, had built a chimney or flue, the salient or projecting angle of the same not being rounded off four inches at the least, and that he had in that respect contravened the provisions of the 6th section of 3 & 4 Vict., c. 85. At the close of the complainant's case, the solicitor for the said John Hill was heard in answer to the matter of the said information, and he then contended before the said justices—

1. That the sum which an offender under sect. 6 renders himself liable to forfeit, viz., a sum not less than 10l. nor exceeding 50l., is not a penalty upon conviction, but a forfeiture only, and that there was no power on the part of the justices to direct the payment of any such sum; and that the remedy was only before a civil tribunal, the jurisdiction of the justices being limited to convictions for penalties only, and the appeal given by the statute not applying to forfeitures.

2. That the provisions of 3 & 4 Vict., c. 85, had been impliedly repealed, so far as respects the borough of Huddersfield (within the limits of which the chimney or flue complained of is built), by the Public Health Act, and by "The Huddersfield Improvement Act 1871," and the bye-laws made thereunder.

3. That the building, of which the chimney or flue complained of formed part, had been erected in accordance with plans which had been pre-

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pared and submitted to the Huddersfield Corporation for their approval in pursuance of sect. 103 of the said Huddersfield Improvement Act 1871, and which plans had been approved by them.

The questions upon which the opinion of the court is desired, are:

Whether the said justices had upon the above statement of fact power to order and adjudge that the said John Hill should forfeit and pay the sum of 10*l.*; and whether the statute under which such penalty was inflicted was impliedly repealed; whereupon the opinion of the said court is asked upon the said questions of law.

Whether they were correct in their determination as aforesaid; and if not, what should be done or ordered by the said court in the premises.

A second case was stated by the same justices, between the same parties and in the same words, *mutatis mutandis*, the information alleging that John Hill did unlawfully make or cause to be made a certain, or partition of a certain, chimney or flue, less than half a brick in thickness, to wit, one and a half inch.

The two cases were separately argued, the first before Cleasby B. and Field J., on the 24th Feb.; and the second before Cleasby B., Grove, and Field, JJ., on the 25th May.

Manisty, Q.O. (with him *Beresford*), for the appellant.—No doubt at the time of its passing, the statute 3 & 4 Vict., c. 85, which is called An Act for the regulation of chimney sweepers and chimneys, had a general application, even to the borough of Huddersfield; section 6 is—"And whereas it is expedient, for the better security from accidents by fire or otherwise, the improved construction of chimneys and flues provided by the said Act, viz. (4 & 5 Will. 4, c. 35) be continued: Be it enacted that all wits and partitions between any chimney or flue, which at any time after the passing of this Act shall be built or re-built, shall be of brick or stone, and at least equal to half a brick in thickness; and every breast-back and with, or partition of any chimney or flue, hereafter to be built or re-built, shall be built of sound materials, and the joints of the work well filled in with good mortar or cement, and rendered or stuccoed within; and also that every chimney or flue hereafter to be built or re-built in any wall, or of greater length than four feet out of the wall, not being a circular chimney or flue twelve inches in diameter, shall be in every section of the same not less than fourteen inches by nine inches; and no chimney or flue shall be constructed with any angle therein which shall be less obtuse than an angle of one hundred and twenty degrees, except as is hereinafter excepted; and every salient or projecting angle in any chimney or flue shall be rounded off four inches at the least, upon pain of forfeiture by every master builder or other master workman, who shall make or cause to be made such chimney or flue, of any sum of not less than ten pounds nor exceeding fifty pounds." The provisions of the local Act however on this particular subject, differ so much that they impliedly repeal, within the limits of the borough of Huddersfield, the general Act. By section 111 of the Huddersfield Improvement Act 1871 (34 & 35 Vict. c. 151) "The chimneys and flues of every new building shall be constructed in such mode, and of such materials and dimensions as shall from time to time be determined or approved by the corporation. Unless otherwise prescribed or

ordered, every chimney or flue shall be constructed of good brickwork or stone work, and mortar well grouted, and if circular must be formed of earthenware pipes of not less than ten inches diameter set in mortar, and if not circular must be parge-ted with mortar, and not less than fourteen inches by twelve inches clear interior measurement. No chimney or flue shall have angles less obtuse than 120 degrees, except when proper iron or stone doors or openings are left for cleaning purposes. No timber or woodwork shall be placed within nine inches, or wooden plugs driven nearer than six inches of the inside face of any chimney or flue, and no opening shall be made in any chimneys or flues for any purpose nor pipe for conveying smoke, heated air, steam, or hot water, fixed in any new building, except of the materials and in the manner to be submitted to and specially approved by the corporation." The byelaws under this Act merely repeat the provisions of this section upon this subject. The enactments in these two statutes are so inconsistent that the latter must be interpreted to repeal the earlier, so far as the latter applies. The general Act absolutely requires the various proceedings imposed by it, the local Act gives full discretion to the corporation to determine and prescribe rules concerning the matter, and in case of the corporation making no different rules, the things required are by no means the same as in the general Act; for instance, by the general Act a circular chimney must be twelve inches in diameter, by the local Act it may be ten inches; by the former a chimney not circular may be fourteen inches by nine inches, by the latter Act it must be fourteen inches by twelve inches; and there is no provision in the local Act in respect to either of the two matters for which the appellant has been convicted. Moreover, the penalty for breach of section 6 of the general Act must be between 10*l.* and 50*l.*, whilst the penalty for breach of the local Act must by section 150 be under 5*l.* These distinctions all tend to show that the general Act is not meant to apply any longer to the borough of Huddersfield. Special provisions, different from those of the Chimneys Act of 1840, are now in force throughout the Metropolis by section 20 of 18 and 19 Vic. c. 122.

J. F. Clerk, for the respondent.—With respect to the Metropolis, 3 & 4 Vict. c. 85, is expressly repealed by the Metropolis Building Act (7 & 8 Vict. c. 84), Schedule A. The general Chimneys Act 1840, and the Huddersfield Local Act 1871 are quite consistent, and their provisions concerning the construction of chimneys must be read together and jointly applied to all chimneys within the borough of Huddersfield. With the exception of the diameter of a circular chimney, all the provisions of the local Act merely extend the limiting legislation of the general Act. The ten inches apply to earthenware pipes which apparently were not in use in 1840; but even if that single provision be inconsistent with the twelve inches permitted by the general Act, it is not sufficient to impliedly repeal all the other provisions of the general Act on that subject. Lord Hardwicke laid down the law on this subject in *Middleton v. Crofts* (2 Atkins 650, at p. 675), "The rule touching the repeal of laws is *leges posteriores priores contrarias abrogant*; but subsequent Acts of Parliament in the affirmative, giving new

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penalties, and instituting new methods of proceeding, do not repeal former methods and penalties of proceeding, ordained by preceding Acts of Parliament, without negative words." Again, "Besides, a later Act of Parliament hath never been construed to repeal a prior Act, without words of repeal, unless there be a contrariety and repugnancy between them, or at least some notice taken of the former law in the subsequent one, so as to indicate an intention in the law makers to repeal it." It was also held in *Dr. Foster's case* (Co. Reps. P. xi), 56b, that an affirmative statute shall not repeal a precedent affirmative law, unless the subsequent statute is contrary to the precedent law.

Manisty, Q.C. in reply.—The words "Unless otherwise prescribed or ordered," in sect. 111 of the local Act, can only be construed to give the corporation power to abrogate the existing law. Those words are sufficient to make this provision an exception to the ordinary rule of law.

CLEASBY, B.—My mind has fluctuated considerably during the argument of this case, but upon the best consideration I can give the matter I have, like my learned brethren, come to the conclusion that there is not enough in the words of sect. 111 of the Huddersfield Improvement Act 1840 to repeal by implication the provisions of the general Act (3 & 4 Vict.) c. 85, s. 6, on the same subject. The rule of law is well laid down in *Foster's case* (Co. Reps. vol. 6, p. 119), and although it appears that the contrariety sufficient to repeal by implication a previous statute, may be of different kinds, as for instance in quality, in matter, or in respect of the form prescribed, "only it must be known that forasmuch as Acts of Parliament are established with such gravity, wisdom, and universal consent of the whole realm, for the advancement of the commonwealth, they ought not, by any constrained construction out of the general and ambiguous words of a subsequent act, to be abrogated." For myself, I must say I cannot lose sight of the fact that the later Act has but a local application; and when we look at the object of the general legislation as appears by the preamble of the 16th section of the Act for the regulation of chimney sweepers and chimneys, and when we consider that the better security from accidents by fire is of so universal an advantage, we may well take it that the policy of the Legislature was to apply these provisions even to places where further enactments of the same kind are in force. It seems to me to be most essential that chimneys should be at least a brick and a half apart, and that every projecting angle in a chimney should be rounded off four inches at the least; and although neither of these matters is required expressly in the local Act before us, I cannot think their mere omission is conclusive of an intention to repeal the enactments about them in the general Act. I can come to no other conclusion than that the Legislature in passing this local Act meant to adopt the general Act as part of its provisions on this subject. Sect. 111 is not inconsistent with sect. 6 of the Act of 1840, except as to the matters of slight importance mentioned by Mr. Manisty. Sect. 103 and following sections provide the means by which notice is to be given to and consent obtained from the corporation, but they contain nothing further about chimneys and flues. I do not, therefore, consider this local Act contains enough contrariety to repeal the previous

general Act, or to set aside the existing legislation. The two Acts must if possible be read together, and the implication of repeal in the second falls short of any abrogation of the previous law. Our judgment, therefore, will be for the respondent.

GROVE, J.—I am of the same opinion. In considering the question whether one Act of Parliament impliedly repeals another, we must remember it may have that effect by the necessary inconsistency of the provisions, or if they are irreconcilable in their scope or language. Much importance should be attached to the fact of any mention made concerning the previous Act, and all these considerations should be more strictly applied when the alleged repeal is contained in a special Act of only local adaptation. It would be very dangerous if an inconsistency in something unimportant, as for instance a mere matter of measurement, should be enough to imply the repeal of an earlier Act. The question for us is whether there is anything substantially irreconcilable between sect. 6 of 3 & 4 Vict. c. 85, and sect. 111 of 34 & 35 Vict. c. 151. Reliance has been placed upon the early words of the latter, by which it is said power is given to the corporation to make any provisions concerning chimneys in Huddersfield which they may think fit; but it appears to me that this power may well be subject to the previous general Act, and that the corporation can only make bye-laws and give consents within the limits allowed by that Act. Then come the directions which are to be in force with reference to chimneys, if not otherwise prescribed by byelaws. There is no reason that I can see why they should not be read together with the directions contained in sect. 6 of the general Act. There is nothing at all inconsistent in the provisions of the two, unless it be the required diameter of a circular chimney. The old Act seems to contemplate a diameter not less than 12 inches, and the new Act authorises a diameter of 10 inches; but the latter is required, if of that size, to be of earthenware, which is a better material for the purpose than brick or stone, which the old Act refers to. It may be that a circular chimney of the new material need not in the borough of Huddersfield be of more than 10 inches in diameter, but there is no other provision in this sect. (111) which cannot be carried out at the same time as the provisions of the general Act. This slight distinction between the two Acts is not enough to imply a repeal of the earlier general provisions. Such a construction would be contrary to the ordinary canons concerning repeal by implication.

FIELD, J.—There are here in fact two appeals from convictions under the 6th section of 3 & 4 Vict. c. 85, but they both turn on the one point whether the provisions of that section are impliedly repealed by sect. 111 of the Huddersfield Improvement Act, 1871. I think that both Acts are in force within that borough, and that the later does not repeal the earlier Act. To establish an implied repeal there must be a clear contrariety in the provisions. The application of this rule is not always clear, but there seems to me to be no difficulty here. They may well be read together, and it would be most dangerous to hold that the slight inconsistencies between the two Acts was sufficient to abrogate one of them. I think Huddersfield has a protection against accidental fire

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from the construction of its chimneys beyond that which has been created by the general law.

Judgment for respondent.

Leave to appeal was refused to the appellant.

Solicitors for the appellant, *Shum, Crossman and Crossman*, for *Sykes and Son*, Huddersfield.

Solicitors for the respondent, *Learoyd and Learoyd*, for *Learoyd, Learoyd, and Morrison*, Huddersfield.

Saturday, May 27, 1876.

PASHLER (app.) v. STEVENITT (resp.).

Adulteration—Gin—Water—Evidence—38 & 39 Vict. c. 63, s. 6.

Appellant sold, as a bottle of gin, liquid composed of 26 per cent. alcohol, 70 per cent. water, and 4 per cent. sugar. Evidence was adduced that gin was sold by retailers at varying strength from proof to 20 per cent. under proof. This liquid was 44 per cent. under proof, but the analyst said he should call it "gin whose alcoholic strength was exceedingly low." Justices convicted the appellant under the Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63), s. 6.

Held, upon a case stated, that the facts justified the justices' finding that this liquid was not of the quality of gin, but that the excess of water was a fraudulent increase of the measure of the article within the enacting part of the said section.

THIS was a case stated by the two justices of the peace for the parts of Kesteven in the County of Lincoln, under the statute 20 & 21 Vict. c. 43.

On the 24th Jan. 1876, the respondent, who is a superintendent of police, and the proper officer appointed under "The Sale of Food and Drugs Act, 1875" (38 & 39 Vict. c. 63), for carrying into execution the said Act, laid information in due form of law against the appellant, for that he the said Baxter Pashler, on the 2nd Dec. last, at the parish of New Sleaford, in the said parts and county, did unlawfully sell to the prejudice of the said Thomas Stevenitt, the purchaser, a certain article of food, to wit, gin, which was not of the nature, substance, and quality of the article demanded by such purchaser, contrary to the form of the statute in such case made and provided.

The appellant is a licensed victualler carrying on business at Sleaford in the County of Lincoln.

On the 31st Jan. 1876, the said information came to be heard before one of the said justices alone, when both parties appeared; the hearing was adjourned to the 14th Jan. 1876, when both parties again appeared.

The evidence on the part of respondent consisted of that given by the respondent and by George May Lowe, M.D., the public analyst for the County of Lincoln. The respondent proved that he visited the ordinary place of business of the appellant and asked for a bottle of gin, with which he was furnished by the appellant and for which he was charged, and paid 2s. 6d. He did not ask for any particular quality or strength of gin, nor did the appellant give any intimation of the quality or strength of that supplied. No label or descriptive mark was on the bottle.

The respondent notified to the appellant his intention of having the gin analysed by the public analyst, and offered to divide the gin according to the provisions of the 14th section of the Act 38 &

39 Vict. c. 63. The appellant did not accept the offer to divide the sample. The respondent submitted the gin to the public analyst, Dr. Lowe, and received from him a certificate which he produced, and of which the following is a copy:

S. K. 28, gin.

Sale of Food and Drugs Act 1875.—Form of certificate. To Mr. Thos. Stevenitt, of Sleaford.

I, the undersigned public analyst for Lincolnshire, do hereby certify that I received on the 3rd Dec. 1875, from Mr. Thos. Stevenitt a sample of gin labelled S. K. 28, for analysis, and have analysed the same, and declare the result of my analysis to be as follows:

I am of opinion that the same is a sample of gin, water, and sugar in the following proportions. I am of opinion that the said sample contains the parts as under, or the percentage of foreign ingredients as under:

Pure alcohol	26	per cent.
Water	70	"
Extract	4	"

100

Observations.

The extracts consist of sugar only.

The spirit is pure.

The alcoholic strength is exceedingly low.

As witness my hand this 10th Jan. 1876, at Lincoln.

G. M. Lowe.

Dr. Lowe proved his certificate. He stated that spirits known as "proof" contained about one-half part of water and one-half part of pure alcohol. He also said that he found from Professor Atcherley's work on the adulteration of food, that gin as sold by retailers varied in strength from proof to 20 per cent. under proof. The appellant's gin was about 44 per cent. under proof, as tested by Sykes' hydrometer. He did not know that there was any fixed standard for gin, and he did not know from personal experience at what strength it was usually sold in the retail trade. He would not say how low its strength might be reduced without its ceasing to be gin; and when asked how he should describe that which he had analysed, he said he "should call it gin, whose alcoholic strength is exceedingly low."

The appellant tendered no evidence whatever.

The appellant was fined 1s. and costs.

The question for the opinion of the court is whether or not, upon the evidence above stated, the appellant was properly convicted under the 6th section of the Act 38 & 39 Vict. c. 63 P

Graham (with him *Raymond*), argued for the appellant.—The words of this sect. 6 are, "No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding twenty pounds, provided that an offence shall not be deemed to be committed under this section in the following cases, that is to say, (1) where any matter or ingredient not injurious to health has been added to the food or drug because the same is required for the production or preparation thereof as an article of commerce, in a state fit for carriage or consumption, and not fraudulently to increase the bulk, weight, or measure of the food or drug, or conceal the inferior quality thereof; (2) where the drug or food is a proprietary medicine, or is the subject of a patent in force, and is supplied in the strength required by the specification of the patent; (3) where the food or drug is compounded as in this Act mentioned; (4) where the food or drug is unavoidably mixed with some extraneous matter in the process of collection or preparation." By sect. 7 "No person shall sell

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any compound article of food or compounded drug which is not composed of ingredients in accordance with the demand of the purchaser under a penalty not exceeding twenty pounds." "Provided that (by sect. 8) no person shall be guilty of any such offence as aforesaid in respect of the sale of an article of food or a drug mixed with any matter or ingredient not injurious to health, and not intended fraudulently to increase its bulk, weight, or measure, or conceal its inferior quality, if at the time of delivering such article or drug he shall supply to the person receiving the same a notice, by a label, distinctly and legibly written or printed on, or with the article or drug, to the effect that the same is mixed." These sections do not create any offence upon the evidence before the justices. The liquid sold was of the nature, substance, and quality of the substance demanded; no provision is made as to the proportion of the ingredients, nor to the strength of the article. The analyst himself stated, in his evidence, that he should call the liquid "gin," which is what the respondent asked for.

No counsel appeared for the respondent.

CLASBY, B.—I do not think we can interfere with this conviction. This is an article of food which is not of the substance and quality of the article demanded by the purchaser. It does not appear to me to come within either of the exemptions; the first is the only one at all applicable, and it cannot be maintained that this excess of water has been added to the liquid because the same is required for the production or preparation thereof as an article of commerce in a state fit for carriage or consumption; indeed, it may be said, upon the facts proved, that the object was fraudulently to increase the bulk, weight, or measure of the food, or to conceal the inferior quality thereof. The justices have come to the conclusion that a mixture of alcohol and water, so far as 44 per cent. below proof, is not of the quality of gin as known commercially, but a fraudulent increase of the measure of the liquid. It is impossible for us to say they were wrong, and they were therefore justified in convicting the appellant.

GROVE, J.—I am of the same opinion. We cannot decide whether, upon the weight of the evidence, the case comes within the first exception or not; that is a question for the magistrates. The witness certainly said he should call the liquid gin, or rather qualified gin, but the magistrates had to use their discretion upon all the facts and statements before them. If 44 per cent. beyond the ordinary proportion be not adulteration, it must be difficult to discover anything to which the statute could apply. It is really a question of fact, and I think the justices have decided it rightly.

Judgment for the respondent.

Solicitors for appellant, *Varley and Toynbee*, for *Toynbee, Larken, and Toynbee*, Lincoln.

Saturday, May 27, 1876.

WILLIAMS (app.) v. EVANS (resp.)

Highways—Riding furiously—Driver—Offence—Conviction—5 & 6 Will. 4, c. 50, s. 78.

The Highway Act 1835, s. 78, enumerates various acts and omissions by persons on highways having charge of carriages and animals, and also by per-

sons interrupting others; amongst them, if any person, riding any horse or beast, or driving any sort of carriage, shall ride or drive the same furiously, so as to endanger the life or limb of any passenger, then follow the words, "Every person so offending in any of the cases aforesaid, and being convicted of any such offence," shall "for every such offence forfeit any sum not exceeding 5l., in case such driver shall not be the owner of such waggon, cart, or other carriage; and in case the offender be the owner of such waggon, cart, or other carriage, then any sum not exceeding 10l. The appellant was convicted by justices of riding furiously on horseback along a highway, and fined a sum less than 5l.

Held, upon a case stated, that the penalty under 5l. was applicable to all offences mentioned in the section, whether the offenders were drivers of carriages or not; and that the conviction was right.

This was a case stated by justices of Denbigh, under the statute 20 & 21 Vict. c. 43.

An information was preferred by one John Evans, of Llandyrnog, in the parish of Llandyrnog, in the county of Denbigh, police constable (hereinafter called the respondent), against Edwin Williams, of Shopywaen, in the parish of Llandyrnog, aforesaid, labourer (hereinafter called the appellant), under sect. 78 of the Act 5 & 6 Will. 4, c. 50, charging for that he, the said appellant, on the 14th March 1876, at the parish of Llandyrnog, in the county aforesaid, unlawfully did ride a horse furiously on a certain highway there situate, leading from Denbigh to Llandyrnog aforesaid, so as then to endanger the lives and limbs of passengers on the said highway, contrary to the form of the statute in such case made and provided. The justices convicted the appellant and fined him 20s. The justices, on application, stated and signed the following case.

Upon the hearing of the information and complaint it was proved on the part of the respondent, and found as a fact, that the said appellant, on the 14th March 1876, at the parish of Llandyrnog aforesaid, unlawfully did ride a cart horse furiously, he being on the back of such horse without saddle, and urging the same forward on a certain highway there situate, leading from Denbigh to Llandyrnog aforesaid, so as then to endanger the lives and limbs of passengers on the said highway.

It was contended on the part of the appellant that the justices had no power to impose a penalty or convict for riding furiously, as the penal part of sect. 78 of the Act 5 & 6 Will. 4, c. 50, omitted all mention of a rider.

The said justices, however, on reading and considering such section, decided that not only persons driving furiously, but those riding also to the danger of the public and furiously, were intended to be and are included in such section and Act; and for the above reason they adjudged the case to be brought within the operation of the 78th section, and gave their determination against the appellant, in manner hereinbefore stated.

The question of law arising on the above statement for the opinion of this court therefore is:—Whether a person on a horse, and urging the animal furiously forward on the highway, to the danger of passengers, is liable to be convicted and fined under the 78th section of the Act 5 & 6 Will. 4, c. 50? If the court should be of opinion that the said conviction and fine was legally and

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properly made and imposed, and the appellant is liable as aforesaid, then the said conviction is to stand; but if the court should be of opinion otherwise, then the said information and complaint is to be dismissed.

W. C. Yale argued for the appellant.—This 78th section of the Highway Act 1835 provides a penalty for a great number of offences, but it omits any penalty for riding furiously on horseback, although such a proceeding is classed amongst the other offences created by the section. It enacts, among other things, that "if any person riding any horse or beast, or driving any sort of carriage, shall ride or drive the same furiously so as to endanger the life or limb of any passenger; every person so offending in any of the cases aforesaid, and being convicted of any such offence either by his own confession, the view of a justice, or by the oath of one or more credible witnesses, before any two justices of the peace, shall, in addition to any civil action to which he may make himself liable, for every such offence forfeit any sum not exceeding 5*l.* in case such driver shall not be the owner of such waggon, cart, or other carriage; and in case the offender be the owner of such waggon, cart, or other carriage, then any sum not exceeding 10*l.*, and in either of the said cases shall in default of payment be committed to the common gaol or house of correction, there to be kept to hard labour for any time not exceeding six calendar weeks, unless such forfeiture shall be sooner paid." In a trial for perjury alleged to have been committed on a charge of furious riding under this section, *Kelly, C.B.* held, on the Western Circuit, that justices had no jurisdiction to convict on such a charge; and therefore there could be no perjury: *Reg v. Bacon* (11 Cox Cr. Cas. 540), that, so far as it goes, is a direct authority in the appellant's favour. The Chief Baron is reported to have said, "It is quite clear that the Act does not give the justices any power to inflict any punishment for furiously riding. The statute imposes a penalty only on those who furiously drive. This is, no doubt, a *casus omisus*, but it is not for me to supply the omission." Similarly *Cockburn, C.J.* declined to supply an omission in the Coal Mines Regulation Act 1855 (18 & 19 Vict. c. 108); by sect. 9, the owner or agent of a mine or colliery, who in case of loss of life to any person employed in such coal mine or colliery, by reason of any accident, or in case of serious personal injury arising from explosion therein, does not send notice of such accident to the inspector of the district within twenty-four hours next after such loss of life is to be liable to a penalty. The appellants were owners of a coal mine in which serious personal injury arose from explosion. They did not give notice to the inspector, and were convicted for not doing so under this section. It was held that words had been omitted which were necessary to create the offence which the appellants were supposed to have committed, and that as those words could only be supplied by the Legislature, the appellants were not liable to the penalty: (*Underhill v. Longridge*, 29 L. J. 65 M. C.). In other statutes containing enactments of this nature the distinction between riding and driving is recognised and provided for: as in the Act for the more effectual prevention of cruelty to animals (12 & 13 Vict. c. 92), where by sect. 29 "the word *overdrive* shall also signify *override*." So too the

fifth offence in sect. 54 of the Metropolitan Police Act 1840 (2 & 3 Vict. c. 47), is "Every person who shall ride or drive furiously so as to endanger the life or limb of any person, or to the common danger of the passengers in any thoroughfare." [*FIELD, J.*—The 78th section treats of riders, drivers, and persons who are neither.] It cannot be said that driving a carriage means riding on horseback without express words to make it so.

No counsel appeared for the respondent.

CLEASBY, B.—It is impossible to come to any conclusion on this point without some doubt, and I feel great difficulty in agreeing with my learned brothers that this was a right conviction. There are two alternatives which may be adopted in the construction of this section; either the conviction of a person riding on horseback is a *casus omisus*, or we must extend the application of the enactment beyond the words actually used. Both my brothers concur that we ought to interpret the section to include the case before us in its application, and I am not prepared to dissent from their conclusion. The question which arises is, whether the use of the word "driver" only in the part relating to the penalty, excludes its application to a person riding on horseback. If capable of being so read, the remainder of the section supports the decision of the justices, which made "driver" include a "rider." The same word too must be applied in the same way to a person having no carriage or horse of his own, who interrupts the passage of another, or his carriage or animal on the highway; my brothers, however, think we may read this part of the section in a broad sense, and if so, it is certainly not unreasonable to do so. Although it is somewhat a strong step to impose a penalty by implication, and my doubts are not removed, yet I assent to the decision of the rest of the court.

GROVE, J.—I cannot say there is no doubt about the matter, but unless a large portion of this clause be rendered merely nugatory, the justices have adopted the only possible interpretation. The old-established rule is, that you must construe a statute grammatically, except when such construction leads to a manifest absurdity. I think the result would be an absurdity if we were to treat the conviction of a furious rider as a *casus omisus*. The section creates various offences, amongst them, "if any person, riding any horse or beast, or driving any sort of carriage, shall ride or drive the same furiously so as to endanger the life or limb of any passenger." The appellant is found to have committed this offence, but he says, although convicted of riding on horseback furiously, he must go in peace and cannot be fined, because a penalty is imposed only upon persons driving who commit any of these offences. The words immediately following those I have quoted relate to the whole of the previous part of the section, "every person so offending in any of the cases aforesaid, and being convicted of any such offence," shall "for every such offence forfeit any sum not exceeding 5*l.*, in case such driver shall not be the owner of such waggon, cart, or other carriage; and in case the offender be the owner of such waggon, cart, or other carriage, then any sum not exceeding 10*l.*" I cannot think that the word "such" limits the application of penalties only to persons driving their own or other person's carriages. The expression is somewhat elliptical, but I read the words, "in case the

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offender be the owner of such waggon, cart, or other carriage," to be a mere proviso that such an offender shall suffer a heavier penalty. All other offenders, including drivers who are not owners of carriages, are to forfeit sums within the lower limit of 5*l.*, by force of the earlier part of the sentence. Another view which may be adopted is that the word "driver" is used in a wider sense than that generally given to it, and that it includes a person who rides on the back of a horse, and may be said to conduct or drive it. I do not think any very great strain would be necessarily put upon the word if it were made to include every person in charge of a horse or carriage, and upon that interpretation also this conviction might be sustained. I prefer, however, to look at the whole of the section, and to apply the penalty to all offences mentioned in it; 10*l.* being the amount to which a person offending is liable if he is owner of the carriage by which he commits the offence, 5*l.* being the amount in all other cases.

FIELD, J.—I have arrived at the same conclusion, not without great doubt nor some fluctuation of opinion. The object of the section is clearly the protection of persons passing along highways, and all the acts and omissions enumerated are rendered offences against the law, and persons committing them may be convicted. It would be an absurdity if a penalty were to attach only to a part of such convictions, and that would be the result of a strictly grammatical construction of the clause. I think, therefore, that the first interpretation suggested by my brother Grove is the right one; that, notwithstanding the words, "in case such driver shall not be the owner of such waggon, cart, or other carriage," the penalty of 5*l.* or less is imposed for every offence in the section, and if committed by the owner of the carriage which he is at the time driving, he is liable to a penalty of 10*l.* *Ut res magis valeat quam pereat* is a rule of construction better in some cases than to follow the strictly grammatical meaning of the words. The conviction will be affirmed.

Judgment for respondent.

Solicitors for appellant, *Finney and Bruff*, for *Louis and Edwards*, *Ruthin*.

ARCHES COURT OF CANTERBURY.

Reported by A. H. BITTLESTON, Esq., Barrister-at-Law.

(Before the Right Hon. Lord PENZANCE, Dean of Arches.)

PARISHIONERS OF HATCHAM v. TOOTH.

Mode of enforcing order of the Court of Arches—Nature and jurisdiction of that court—Public Worship Regulation Act.

A clergyman, who neglects to obey an order of the Court of Arches, will, upon application, be pronounced by that court to be contumacious and in contempt, and a direction will be given that the same be signified to the Queen in Chancery; whereupon a writ "De Contumace Capiendo" will issue for the arrest and detention in custody of such person, until he shall submit to the order of the court. The Court of Arches explained to be a purely ecclesiastical court.

The Public Worship Regulation Act deals only with matters of procedure, and does not in any respect enlarge the jurisdiction of the Court of Arches.

THE complainants in this case were the promoters of a suit against the Rev. Mr. Tooth, under the Public Worship Regulation Act, which resulted in an inhibition issuing from this court against him, in respect of the irregularities in his conduct of the Church services which his parishioners complained of. Mr. Tooth having disregarded this inhibition, the present application was made to the court to enforce its order.

A. J. Stephens, Q.C. (with him B. Shaw), for the promoters, said that Mr. Tooth was guilty of contempt of court, both by reason of his disobedience to the order of the court, and also by reason of the disrespectful language he had made use of with regard to it.

Mr. Tooth did not appear.

LORD PENZANCE.—The parishioners of St. James's, Hatcham, who have promoted this suit, have at length applied to this court to enforce upon Mr. Tooth obedience to the orders which it has made. It cannot be a matter of surprise that their patience should have been at last exhausted; the only wonder is that it should have endured so long. But from first to last the greatest consideration has been shown to Mr. Tooth in his irregularities and breaches of the law; and even up to the present moment no inhibition has been asked for or issued against him in respect of those matters which, though they have been declared illegal by the Court of Appeal in the *Purkiss* case, are the subject of appeal now pending in the case which arose at Folkestone. On all the points, therefore, in which Mr. Tooth's obedience is sought by the promoters of this suit to be enforced, the law has been already settled—no appeal is pending—and Mr. Tooth has not attempted, either in this court or by way of appeal, to uphold the legality of his proceedings. In this state of things the promoters of the suit require at the hands of the court the exercise of such powers as it possesses to enforce the decrees they have obtained, an application which the court has no discretion to refuse. But some misapprehension appears to exist as to what those powers are. It has been suggested that the 9th section of the Public Worship Act confers upon this court new powers for the enforcement of its decrees. This is an erroneous interpretation of the statute, the new powers given to the court being confined to proper facilities for a due hearing of the case under the new forms of procedure which that Act has introduced. The powers which this court possesses for the enforcement of its decrees are such, and such only, as it possesses as the Provincial Court of the Province of Canterbury. It need hardly be necessary to call to mind that the Provincial Court of the Archbishop is a purely ecclesiastical court; that as such it has no temporal or secular jurisdiction, and no inherent authority over the property or liberties of the Queen's subjects. And accordingly, from the most ancient times, the chief means at its disposal for enforcing obedience to its mandates consisted in a sentence of excommunication. The time, however, came when these sentences of excommunication were further enforced by the civil power by means of the King's writ *De Excommunicato Capiendo*. It is not necessary to refer particularly to the statutes on this subject. As time went on, it was thought desirable by the Legislature that the sentence of excommunication should, except in certain cases, be abolished and discon-

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tinued, and the statute of 53 Geo. 3, c. 127, accordingly provided that the judges of the ecclesiastical courts "whose lawful orders or decrees have not been obeyed" should in future pronounce the person disobeying them "contumacious and in contempt," and signify the same to the King in Chancery, and that thereupon a writ *De Contumace Capiendo* should issue against such persons, and they should be detained in custody until they made submission to the orders of the ecclesiastical court. The civil power has thus been brought in to the aid of ecclesiastical authority, and the declining efficacy of the sentence of excommunication has been supplemented by a power of imprisonment entirely foreign to the original jurisdiction of a purely ecclesiastical court. Applying these powers, as I am bound to do, I have no hesitation in pronouncing Mr. Tooth to be contumacious and in contempt, for disobeying the inhibition issued by this court; and I direct the same to be signified forthwith to the Queen in Chancery, with a view to his imprisonment. Under ordinary circumstances there would, in granting this application, be little more to say. But the circumstances are not ordinary; for the jurisdiction of this court has been openly denied, and mischievous delusions have been propagated as to its functions and authority. In the case of Mr. Ridsdale, the first which occurred since the Public Worship Regulation Act, I made some observations on this subject, and I still think it worth while, for the sake of others (however little Mr. Tooth may regard anything that falls from this court), to point out in what those delusions consist. They consist primarily in the idea that this Court of Arches is a secular and temporal court, and not a spiritual or ecclesiastical one. Those who take part with Mr. Tooth conceive, as I understand it, that the only courts which can properly take cognisance of any irregularities in his ministration, are the ecclesiastical and not the temporal courts and this, they say, is founded on an existing right in the Church of England to govern herself in spiritual matters, including matters of ritual. The Public Worship Act, they say, was an innovation and invasion of this right by referring questions of ritual to a secular tribunal. It would be well if those who maintain these propositions were to read the statutes by which the ritual of the Church of England at the time of the Reformation was prescribed and enforced—I mean the statutes authorising and establishing the two successive Prayer Books of King Edward VI. and the Prayer Book of Queen Elizabeth, which regulated the ritual of the Reformed Church for the first hundred years after its establishment. They would there find that a clergyman departing in the performance of Divine service from the ritual prescribed in the Prayer Book was liable to be tried at the assizes by a judge and jury (the bishop if he pleased assisting the judge), and, if convicted three times, was liable to be imprisoned for life. The interposition therefore of a temporal court, if any such were in question, to enforce obedience in matters of ritual, would at least be no novelty; the novelty, if any, is in the claim to be exempt from it. But suppose this claim, for the sake of argument, be admitted, what, I may ask, are the ecclesiastical courts to whose judgment Mr. Tooth, and they who act and think with him, would be willing to defer? it is not to be presumed that Mr. Tooth proposes

to settle for himself, as the minister of an Established Church, how the Divine services of that Church, which are intended to be uniform throughout the country, should be performed. If he arrogates to himself this right, every beneficed clergyman in the kingdom has it also, and there might be as many forms of worship in the Church as there are parishes in the land. But if he is not to settle the form of worship for himself, and he considers himself bound by the directions of the Prayer Book, who is it that in his opinion ought to determine what it is that the rubrics of the Prayer Book enjoin? What is the court that has the jurisdiction to which he is ready to render obedience? Is it the court of his bishop? If so, he must surely be aware that by the ecclesiastical law of this country, as well before the Reformation as since, an appeal from the bishop's court lies, and has always lain, to the court of the archbishop—this Court of Arches whose jurisdiction he now denies. And not only so, but he must be further aware that for a long series of years it has been the practice of the bishops to transfer suits commenced in the diocesan courts at once to this Court of Arches, by the well-known form of "letters of request," and thus save the expense and delay of two decisions in place of one. To this very court, therefore, any proceedings against Mr. Tooth, had they been commenced in the court of his diocesan, might, and in all probability would, according to the ancient ecclesiastical laws of the realm, have come either by way of transfer or by appeal. If so, what question is there of a secular court, or an invasion of the rights of the Church? Let me make my meaning plain. Before the Public Worship Act passed, suits for restraining irregularity in ritual were commenced in the diocesan courts; they may be so still, though I often see the misstatement that these courts have been abolished. Such were the suits now well known against Mr. Mackonochie and Mr. Purchas. But these suits were no sooner commenced in the bishops' courts, than they were transferred, by the request in each case of the bishop, to this court, the court of the archbishop, to be here heard and determined. So that the jurisdiction of this court in matters of ritual is not only an ancient jurisdiction dating from time immemorial, as well before the Reformation as after it; but it is the jurisdiction, and the only jurisdiction, to which in modern times, and down to the moment when Mr. Tooth has chosen to deny its authority, all questions of ritual have been referred. Has, then, the Public Worship Act robbed this court of its claim to obedience in matters ecclesiastical? All that the Act has done is to arm it with new powers, and these only in the way of procedure. Can any reasonable man argue that the conferring of such powers as these, which did not alter or affect the jurisdiction of this court, annihilated that jurisdiction? The existence of these additional powers cannot secularise a court deriving authority solely from the archbishop of the province, and whose only secular feature is that of being presided over by a layman. But this again is no new thing: a series of distinguished judges who have presided here, in the last as well as the present century (and it needs not to inquire how much further back), testifies to the contrary, for they have without exception been laymen and lawyers. The chancellors or officials who preside in the bishop's

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courts are, with few exceptions, up to the present hour lawyers; and whatever objections may be felt by any to such an arrangement, it at least is no novelty, and has been the act of the ecclesiastical authorities themselves without any interference from the State. Mr. Tooth, therefore, denies the authority of the only existing courts in the kingdom which, subject to appeal, have any power to review and correct his proceedings; and I cannot consequently regard his claim to immunity from the judgments and orders of this court as anything short of a claim to be himself the judge of the ritual which the Prayer Book has prescribed. If so, there is nothing that I know of to prevent him from a still further approach to the ritual of the unreformed Church of Rome, if he can persuade himself that the language of the Prayer Book admits of it. With regard to the supposed libel on the court to which Dr. Stephens has referred, the court would, I think, be hypercritical if it saw in anything that he said a libel upon it. A court should not be over-zealous in vindicating itself against improper language or unjust charges. The true protection of all courts lies in the general estimation and respect in which they are held; and that estimation is not, I think, imperilled by anything which has fallen from Mr. Tooth. I have only to add that Mr. Tooth must pay the costs of this application.

Proctors for complainants, *Moore and Currey*.

CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, Jan. 20, 1877.

(Before KELLY, C.B., DENMAN, J., FIELD, J., HUDLESTON, B., and MANISTY, J.)

REG. v. RYMER.

Innkeeper—Indictment for refusing to serve customer—Refreshment bar—Customer accompanied by a large dog—Traveller—Legal cause for refusing.

A refreshment bar attached to and under the same roof as an hotel, having a separate entrance to the hotel, the hotel being used for the accommodation of sojourners, and the refreshment bar for the refreshment of persons casually passing, is not a common law inn, and the keeper is not liable to the common law regulations of an innkeeper.

Semble, also, that a tavern or shop where liquors are sold by retail merely, and no accommodation is held out for travellers or wayfarers, is not a common law inn.

A person living in the same town, 1200 yards off an inn, and walking about the town with a dog, for his own recreation and amusement, is not a traveller in the sense that he has a right at common law to be provided with refreshment and entertainment by the innkeeper.

A traveller accompanied by a large dog, which had been offensive on a former occasion, and of which timid persons and children may be afraid, has no right to demand entertainment and accommodation at an inn for himself and dog.

CASE reserved for the opinion of this Court by the Chairman of Quarter Sessions for the Western division of the county of Sussex

The defendant was tried at the Michaelmas Sessions for the western division of the county of Sussex, for that he, being a licensed inn-

keeper, refused to supply the prosecutor with refreshments. There were several counts in the indictment varying the charge, some describing the prosecutor as a traveller, and others not; but otherwise nothing turned upon the form of the indictment.

The defendant was the proprietor of the Sea House Hotel, at Worthing, attached to which, and under the same roof and licence, and open to the street by a separate door, was a refreshment bar called the Carlton, along which ran a counter with an open space in front of about ten feet wide. The hotel was used for the accommodation of visitors desirous of sojourning there, and the bar for the refreshment of those casually passing by. The one being divided from the other by the counter in question, the attendants having access from the hotel, and serving from behind the counter.

The prosecutor, who was a householder, lived in the same town within 1200 yards, had been in the habit of coming to the premises of the defendant accompanied by two dogs; he had formerly three. One of the two was a savage dog, and generally wore a muzzle; the other of the two was a quiet animal. They were very large, of the St. Bernard mastiff breed.

On the 3rd March, after a recent visit from the prosecutor, the defendant wrote to him as follows:

Royal Sea House Hotel,

W. Cramer, Esq.

3rd March 1876.

Dear Sir,—I regret to have to request you will be so good as not to bring your dog or dogs into the "Carlton." The slop and mess this evening has been much complained of, and the dogs are as objectionable in the "Carlton" as in the hotel.—I am, yours truly,

JAMES RYMER.

And on the 4th the prosecutor wrote in reply to the defendant as follows:

Worthing, 4th March 1876.

Dear Sir,—In reply to your note of yesterday I will so far comply with your request as not to bring my dogs into the refreshment bar, or as you facetiously call it, the "Carlton," when they are wet or dirty, but otherwise I must be allowed to follow my inclinations as heretofore. The consequence of refusing a person refreshment without reasonable cause I need not point out to you, believing you superior to the general run of publicans; but I may add that hosteleries as well as public houses are placed under special laws, some of which tend to protect the public against the petty tyrannical, whimsical mad freaks or acts of individual landlords.—Yours respectfully,

W. CRAMER.

Mr. James Rymer.

On the 6th March the prosecutor went into the refreshment bar, leading the quiet dog by a chain, and demanded refreshment, asking for a glass of whisky, but was refused by the person attending the bar, by order of the defendant; the same occurred on the 7th and 8th, when he again went to the refreshment bar leading the same dog in leash, and taking it into the passage above described, and demanded refreshment, tendering the money in payment, but was again refused by order of the defendant.

On each occasion the bar was open, the hour was proper, and the order in itself reasonable. It was proved by other hotel keepers that complaints had been made of the prosecutor's dogs by their customers, and some of them had gone elsewhere in consequence, and that the prosecutor had been remonstrated with and himself admitted to one of the witnesses that "no doubt his dogs were a nuisance to the hotel keepers." It was also proved that other tradesmen in the town had complained of the dogs, and also that the dog in question had

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upon one occasion vomited on the door mat of a tradesman's shop in the town. It was not proved that the prosecutor was a traveller in any sense, otherwise than that he was walking about the town with his dog for his own recreation and amusement.

It was contended on the part of the prosecutor that by so refusing to provide him with refreshments the defendant committed an indictable offence. On the other hand, it was urged on the part of the defendant, first, that the prosecutor was a local resident and not a traveller, and therefore there was no obligation on the part of the defendant to serve him; and, secondly, that at all events the defendant was justified under the foregoing circumstances in refusing to do so.

I declined to stop the case, which ultimately went to the jury. I told them that *prima facie* the defendant was bound by law to supply the prosecutor, as one of the public, with refreshment upon his reasonable demand. That he could not select his customers or reject any from caprice or dislike, but that if the prosecutor insisted (as he did) upon being accompanied by his dog, which from its size, breed, nature or habits, was obnoxious to his customers and a nuisance in his business, he was justified (particularly after notice) in refusing to admit or serve the prosecutor.

The jury found the defendant guilty, and in answer to me said they considered the defendant was bound to serve the prosecutor, though accompanied by any dog, even a savage one, but they found as a fact that the dog in question was not a savage one.

The defendant was bound over in his own recognisance in 50*l.* to appear to receive judgment when called upon.

If the Court shall be of opinion that the conviction was right, it is to stand, otherwise to be quashed.

JOHN JAMES JOHNSON, Q.C.,

Vice-Chairman of the Court of Quarter Sessions for the Western Division of the County of Sussex.

No counsel appeared to argue on either side.

KELLY, C.B.—We regret that the case has not been argued by counsel, as the points raised are of very great public and general importance. However, they present no difficulty and no member of the court entertains any reasonable doubt upon any one of them. This was an indictment against the defendant alleging that he was an innkeeper and under a legal obligation to receive travellers and supply them with refreshments for their accommodation, and that he refused to receive the prosecutor into his house and provide him with refreshments, without any lawful and reasonable excuse. The case presents three questions for our consideration: First, was the defendant's house, or that portion of the house into which the prosecutor desired to enter, an inn within the meaning of the old common law, which obliges an innkeeper to receive travellers and wayfarers, and provide them with food, sustenance and accommodation; secondly, was the prosecutor a traveller on the occasion in question; and, thirdly, assuming this part of the house to have been an inn, and the prosecutor a traveller or wayfarer on the occasion, was there any lawful and reasonable excuse for the defendant's refusing to receive him and supply him with the refreshment he asked for? As to the first question, was this part of the house an inn within the meaning of the common law? The

case states "that the defendant was the proprietor of the Sea House Hotel at Worthing," and, if the statement had stopped there, there could have been no doubt on this point; but it proceeds: "attached to which, and under the same roof and licence, and open to the street by a separate door, was a refreshment bar called the Carlton, along which ran a counter with an open space in front of about 10ft. wide. The hotel was used for the accommodation of visitors desirous of sojourning there, and the bar for the refreshment of those casually passing by, the one being divided from the other by the counter in question, the attendants having access from the hotel, and serving behind the counter." [His Lordship also here read the letters set out in the case in order to show that it was not the house or hotel to which the case related, but a mere shop or bar in which spirits were sold.] Upon these facts, I am of opinion that a shop or refreshment bar of the description like this one is not an inn within the meaning of the common law. An inn at common law is defined to be a place for the accommodation of travellers and wayfarers. A tavern or shop, or bar, where only liquors are sold by retail is not within the legal meaning of the word "inn," and the proprietor is not bound to comply with all the obligations of an innkeeper at common law. On this ground alone, viz., that the prosecutor is not an innkeeper within the definition of the term innkeeper at common law, it would be enough for the purposes of the case to say that the conviction could not be sustained. The second question is, Whether the prosecutor was a traveller or wayfarer on the occasion in question? Now the case states that the prosecutor lived in the same town, within 1200 yards of the defendant, and had been in the habit of coming to the premises of the defendant accompanied by two dogs; and on the 3rd March went into the refreshment bar leading the quiet dog by a chain, and demanded refreshment, asking for a glass of whisky, but was refused by order of the defendant. The same thing occurred on the 7th and 8th of March. It thus appears that the defendant lived on the spot, no matter whether a quarter or a half mile off. Now can anyone suppose for a moment that under the circumstances the defendant was a traveller? He clearly was not a traveller or wayfarer, but a mere resident in the town taking a walk and calling at this bar for a glass of whisky. It is scarcely necessary to say that it is essential that the indictment should allege that the prosecutor was a traveller, but there is the case of *The King v. Luellin* (12 Mod. 445), where an indictment against an innkeeper for not receiving a guest was quashed for not alleging that he was a traveller. The third question is one which might be attended with some difficulty in certain cases, but upon the facts stated here there is none. Assuming for the purpose of this question that this refreshment bar was an inn and the prosecutor a traveller or wayfarer, was the refusal to serve the prosecutor made on a lawful and reasonable ground? It appears that the prosecutor had been in the habit of going to the defendant's bar accompanied by two dogs, and had had three. One of the two was a savage dog, and generally wore a muzzle; the other dog was a quiet one; and they were very large dogs of the St. Bernard mastiff breed. On the 3rd of March, after a recent visit from the prosecutor, the defendant

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wrote the letter set out, and on the 4th the prosecutor wrote the letter in reply, also set out in the case; and then on the 6th the prosecutor went to the bar accompanied by a large dog of the St. Bernard breed, and though the jury have found that it was not a savage dog, still it was a very large dog. I do not wish to lay down any general rule upon this point, for there may be a case in which an innkeeper would be bound to supply a traveller or wayfarer with refreshment though he might be accompanied by a dog; but the innkeeper would have a right to say that he would put him into a safe place. I will reserve my opinion as to that till such a case arises. In this case, however, I think the defendant was not bound to admit the prosecutor as a guest. The innkeeper has a right to say that "the men, women, and children who are likewise to be accommodated, and are within this house, are likely to be disturbed and alarmed by a large dog, and I do not think that I ought to subject my guests to such an annoyance." Taking all the facts stated in the case together, I am of opinion that this was not such a dog as entitled the owner to require that the dog should be admitted into the inn as well as himself. I am, therefore, of opinion that the conviction should be quashed.

DENMAN, J.—I also think that the conviction should be quashed. It is desirable to call attention to the definition of an inn, laid down in 4 Stephen's Comm. 271 (7th edit.): "We may remark here an inn, being intended for the lodging and receipt of travellers, may be indicted, suppressed, and the innkeeper fined if a traveller be refused entertainment by him without a very sufficient cause; for thus to frustrate the end of its institution is held to be disorderly behaviour, and therefore punishable as an offence, besides exposing the landlord to be sued for damages." Now three things are required to support the indictment by the common law: first, that the defendant be an innkeeper; secondly, that he refuse entertainment to a traveller; thirdly, that he have no sufficient cause for such refusal. This is an indictable offence, and must be clearly made out, and there must be evidence on which it can be reasonably found that the defendant comes within the three propositions to be established. Do these elements exist in this case? First, as to whether this was an inn; it is clear to me upon the evidence that although the defendant was keeping an inn immediately adjoining the refreshment bar, still, in reference to the refreshment bar, he was not acting as an innkeeper. I think that the refreshment bar was in the nature of a shop and not an inn within the meaning of the innkeeper's liability, as to which the law requires that people when travelling should not be kept out at a time when they require food, lodging, and entertainment by a capricious choice of customers on the part of the innkeeper. There must be a liability to do the act *quod* innkeeper. On that ground I think the conviction ought to be quashed. The second point is correlative to the first point, and flows from the law applicable to that. The prosecutor was not a traveller coming to an inn to obtain hospitality there. He simply came and asked for a glass of spirits at a place where there was no such accommodation as an inn affords. In *Burgess v. Clements* (4 M. & S. 396)—an action against an innkeeper for the loss of goods—Lord Ellenborough, C.J. says "Now the law

obliges an innkeeper to keep the goods of persons coming to his inn, *causa hospitandi*, safely; so that, in the language of the writ, *pro defectu hospitatoris damnum non eveniat ullo modo*;" and in the course of his judgment he says, "Now let us consider whether the plaintiff came to this inn *causa hospitandi*." The facts there were that a traveller took goods to an inn, and had a private room to show his goods to customers, and one of his boxes was lost out of that room. Lord Ellenborough said "An innkeeper is not bound by law to find show rooms for his guests, but only convenient lodging rooms and lodging. The innkeeper not being bound to find any more than lodging and a convenient room for refreshment, this does not satisfy his object, but he inquires for a third room for the purpose of exposing in it his wares to view, and of introducing a number of persons over whom the innkeeper can have no check or control, and this, as it seems to me, for a purpose wholly alien from the ordinary purpose of an inn, which is *ad hospitandos homines*. I therefore think that the prosecutor in this case was not a traveller coming to an inn, *causa hospitandi*, but a mere customer." Besides, the case states that it was not proved that the prosecutor was a traveller in any sense otherwise than that he was walking about the town with his dog for his own recreation and amusement. As to the third point. The finding of the jury that the defendant was bound to serve the prosecutor though accompanied by any dog, even a savage one, is a most unreasonable statement of the law, with which the jury had nothing to do. If a customer enters with a savage dog a landlord must have a right to protect himself and his customers against it. The jury, however, have found that this was not a savage dog, yet it was a large dog calculated to frighten small people, and we cannot leave out of sight what occurred on a former occasion with respect to this dog and its weakness on that occasion. I think, therefore, there was a sufficient legal excuse for refusing to serve the prosecutor.

FIELD, J. and HUDDLESTON, B. concurred.

MANISTY, J.—I am of the same opinion. I only wish to guard against being supposed to admit that a traveller coming to an inn has a right to take his dog with him into a room occupied by several customers. If one may do it all may do it, and as at present advised I think a landlord is justified in refusing to admit a traveller bringing his dog into a room so occupied.

Conviction quashed.

MIDDLESEX SESSIONS.

Monday, Jan. 29, 1877.

(Before P. H. EDLIN, Q.C., Assistant Judge.)

REG. v. SLADE.

Vagrant Act—Conviction.

A conviction under sect. 4 of 5 Geo. 4, c. 83 (*The Vagrant Act*) which stated that the defendant "did use a certain subtle craft, means, and device" with intent, &c., is bad for uncertainty in not showing a conviction for an offence punishable by the statute.

THIS was an appeal against a conviction by a magistrate at Bow-street under the 4th section of 5 Geo. 4, c. 83 (*The Vagrant Act*).

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REG. v. SLADE.

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Ballantine, Serjt., *Besley*, and *O. Mathews*, for the appellant.

Staveley Hill, Q.C. and *Cooper*, for the respondent (the convicting magistrate).

The conviction was as follows :

Metropolitan Police District, to wit,—Be it remembered that on the 31st day of October, in the year of our Lord 1876, at the Bow-street Police-court, in the county of Middlesex, and within the Metropolitan Police district, Henry Slade is convicted before me, the undersigned, one of the magistrates of the police-courts of the metropolis, sitting at the police-court aforesaid, of being a rogue and vagabond within the intent and meaning of the statute made in the fifth year of the reign of his late Majesty King George IV., intituled an "Act for the Punishment of Idle and Disorderly Persons and Rogues and Vagabonds in that part of Great Britain called England"—that is to say, for that the said Henry Slade, on the 15th day of September, in the year of our Lord 1876, at No. 3, Upper Bedford-place, in the county and district aforesaid, did unlawfully use certain subtle craft, means, and device, which subtle craft, means, and device were that the said Henry Slade did then and there write on a certain slate then and there produced by the said Henry Slade, certain words purporting to be, and which he intended to represent to Edwin Ray Lankester and Horatio Bryan Donkin as being, words written on the said slate by the spirit of a certain person then deceased—to wit, Allie, the alleged deceased wife of the said Henry Slade, to deceive and impose on certain of Her Majesty's subjects—to wit, the said Edwin Ray Lankester and Horatio Bryan Donkin, then and there being, and for which said offence the said Henry Slade is ordered to be committed to the House of Correction at Coldbath-fields, in the county of Middlesex, there to be kept to hard labour for the space of three calendar months.

Given under my hand and seal the day and year first above written at the police-court aforesaid.

F. FLOWERS.

Ballantine, Serjt., took a preliminary objection that the conviction was bad upon the face of it. The statute under which it was professed to be made was the 5 Geo. 4, c. 83. The 4th section provided that any person pretending or professing to tell fortunes or using any subtle craft, means, or device by palmistry or otherwise to deceive and impose on any of his Majesty's subjects, should be deemed to be a rogue and vagabond, and punishable with three months' imprisonment with hard labour. The only material words under which the conviction could, under any possibility, have been supported—namely, "by palmistry or otherwise" had been omitted. The defendant was, in fact, now charged in a form in which it had never been suggested that he could be charged and in which no offence was disclosed. If the words "by palmistry or otherwise" were mere surplusage, the section was wide enough to cover every imaginable fraud, including cheating at cards, false pretences, and forgery at common law. In support of the argument that the section had no such operation, it was only necessary to quote the case of *Johnson v. Fenner* (33 Justice of the Peace), in which the Lord Chief Justice Cockburn, Mr. Justice Mellor, and Mr. Justice Hannen held that a conviction of a man for selling packets for a shilling in which he appeared to place a florin or half-crown, and, in fact placed only a halfpenny, could not be supported under the statute, although the defendant might be indicted for obtaining money under false pretences. In the case of *Monck*, which had been partly argued in the Exchequer Division of the High Court of Justice, the words "by palmistry or otherwise" were inserted, which in this conviction were omitted.

Hill.—The words "by palmistry or otherwise,"

after consideration, had been advisedly omitted and he did not, at that stage of the proceedings, ask for any amendment. There were two modes in which a conviction could be correctly drawn, either by following the words of the statute or by setting out the means used to deceive, so that the court could judge whether it was an offence against the statute or not. In this conviction, instead of using the bare words of the statute, that the offence was "by palmistry or otherwise," the appellant was charged with using subtle craft, means, and devices, and it was then set out *in extenso* what the craft, means, and devices were, so that the court might see that the offence was an offence against the statute. The offence was cognate to palmistry. If he had stated it as "by palmistry or otherwise," the conviction would have been had for uncertainty.

The ASSISTANT-JUDGE.—There could be no better illustration than this case of the justice and necessity of the rule that summary convictions must show upon the face of them everything required to give the magistrate jurisdiction, and that, therefore, in reciting the statute under which he acts, care must be taken to state it correctly, and not to omit qualifying words which add an indispensable element to the character of the offence with which the law authorises him to deal, and that, therefore, the facts themselves must be set out so that the court may judge whether they amount in law to the specified offence. The clause in the Vagrant Act upon which this conviction proceeds enacts that "every person, pretending or professing to tell fortunes, or using any subtle craft, means, or device by palmistry or otherwise to deceive and impose on any of his Majesty's subjects, shall be deemed a rogue and a vagabond within the meaning of the Act, and be committed to the House of Correction, and there be kept to hard labour for any term not exceeding three months." The conviction, as the learned serjeant has objected, does not charge the offence in the words of the Act. Contrary to the general rule to be observed in this respect, in its statement of the offence, it follows them in part only, inasmuch as it omits the words "by palmistry or otherwise," which are of vital importance, being descriptive of the character of the craft or device intended by the statute. The reasons for this omission and for framing the conviction in its present form are not far to seek. If the particular description, "by palmistry," were applicable to the case, it was unnecessary to avoid it; and if the facts had been such as to bring the case within the meaning of the general words preceded by the particular description, it would be sufficient to quote the language of the enactment and then proceed to set out the acts and circumstances relied upon to constitute the offence. From either point of view the omission of these qualifying words occurring in the statute is significant of the difficulty felt in placing them in juxtaposition with the actual facts. Mr. Hill, however, contends that the conviction is sufficient on the face of it for this purpose. The court is of the contrary opinion. The word "otherwise" following the particular description or example in a penal statute must, of course, be construed in accordance with the restrictive rule applicable in such cases—that is to say, the means used to deceive and impose must be by palmistry or a craft or device *ejusdem generis*. The judgment of the Court of Queen's Bench in

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Johnson v. Fenner, referred to by the learned Serjeant is conclusive on this point; and, inasmuch as the conviction omits these essential and qualifying words, and then sets out facts which might possibly constitute an offence under the enactment had it contained no such qualifying words, but which might or would amount to no offence had the Act been properly set out, we think it is bad upon the face of it; and, as the learned counsel for the Crown has declined to ask the court to amend it, we must quash this conviction.

Solicitors: *Munton*; Solicitor to the Treasury.

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT WESTMINSTER.

Reported by W. APPLETON, Esq., Barrister-at-Law.

Tuesday, Feb. 22, 1876.

(Before COCKBURN, C.J., MELLISH, L.J., and MELLOR AND GROVE, JJ.)

BROWN v. EVANS.

Municipal Corporations Act 1835 (5 & 6 Will. 4. c. 76), s. 102—*Amendment Act 1861* (24 & 25 Vict. c. 75), s. 5—Clerk of the peace for the county—Clerk to the justices of the borough—Appointment of same person to both offices—Liability of appointing justices to penalty.—*Qui tam* action. By sect. 102 of the 5 & 6 Will. 4. c. 76, the justices of every borough to which a separate commission of the peace is granted, may appoint a fit person to be their clerk. . . . Provided that it shall not be lawful for the said justices to appoint or continue as such clerk to the justices any person filling certain offices named in the Act.

Sect. 5 of the *Municipal Corporations Act Amendment Act 1861* (24 & 25 Vict. c. 75), repeals the disqualifying provisions of sect. 102 of the principal Act, and enacts that, "from and after the passing of this Act, it shall not be lawful for the justices of any borough to appoint or continue as their clerk, any, &c. . . . or the clerk of the peace of such borough, or of the county in which such borough is situate, or the partner of any such clerk of the peace, &c. . . . and any person who shall in anywise offend in the premises, shall, for every such offence, forfeit and pay the sum of 100l. one moiety, &c. . . . Provided that nothing herein contained shall prevent the justices of any borough re-appointing, as their clerk, any clerk of the peace, or partner of such clerk of the peace, of their borough, or of the county in which such borough is situate, who, at the time of the passing of this Act shall be, or who shall not at the time of such re-appointment have ceased to be, the clerk of such justices."

In June 1845, P., who was a partner in the firm of P. and F., solicitors, in the borough of Newport, Monmouthshire, was appointed clerk to the borough justices. In March 1848, P., being still a member of the firm, was appointed, and acted as clerk of the peace of the county of Monmouth, and he filled the appointment until his death in June 1874. P., soon after his appointment, appointed F., his partner, deputy clerk of the peace, and from 1870 until P.'s death F. discharged all the duties

of the office. Upon the passing of the *Municipal Corporations Act Amendment Act 1861*, the borough justices appointed F. their clerk, and he continued to act as such. On P.'s death F. was, on the 24th June 1874, appointed clerk of the peace of the county of Monmouth, and has continued to act in that capacity.

On the 9th Nov. 1874, the justices of the borough held a meeting, and passed the following resolution: "If, and so far as it may be necessary in accordance with the provisions of sect. 5 of the *Statute 24 & 25 Vict. c. 75*, Mr. F. be re-appointed clerk to the said justices of the said borough." F. afterwards continued to fill the offices of clerk of the peace of the county, and clerk to the borough justices.

The defendant, a borough justice, took part in the meeting of the 9th Nov. 1874, and voted for the above resolution. The plaintiff brought a *qui tam* action against the defendant to recover the 100l. penalty under sect. 5 of the 24 & 25 Vict. c. 75, for appointing and continuing F. clerk to the borough justices, he being at the same time clerk of the peace of the county.

Held (affirming the judgment of the *Exchequer Division*), that, on the true construction of the proviso attached to sect. 5 of the 24 & 25 Vict. c. 75, the defendant was not liable.

THIS was an appeal from a decision of the *Exchequer Division* giving judgment for the defendant on a special case stated for the opinion of the court by a judge sitting at Nisi Prius.

The case in the court below is fully reported 33 L. T. Rep. N. S. 737, where the special case and the arguments and judgments are fully set out.

For the purposes of this report the facts sufficiently appear from the head note above.

Sir Henry James, Q.C. (with him *Horace Wright* and *A. T. Lawrence*), for the plaintiff.—The question is whether under the proviso in the 5th section of the 24 & 25 Vict. c. 75, the penalty can be recovered against the defendant for the re-appointment of Mr. Fox as clerk to the justices. The proviso was put in to protect the vested interests of persons employed as clerks to the justices at the time of the passing of the Act, or it was to protect magistrates from incurring the penalties for reappointing such persons as clerks to the justices. The proviso can only protect the vested interests existing at the time of the passing of the Act. Therefore Mr. Fox must have been clerk of the peace of the county, and clerk to the borough justices at the time of the passing of the Act in order to come within the protection of the proviso. "Nothing herein contained shall prevent the justices of any borough reappointing" means that the person who at the passing of the Act is clerk of the peace of the county and clerk to the justices (the latter office being vacated at the passing of the Act by his holding another incompatible) one may be reappointed. The magistrates can only reappoint once so as to be protected by the proviso. The words in the proviso "who at the time of the passing of this Act shall be, or who at the time of such reappointment shall not have ceased to be" must be construed as if the word "or" was "and." If not the proviso practically repeals the enacting part. They cited.

Reg. v. Fox, 29 L. J. 54, M. C.; *Milward v. Thatcher*, 2 T. R. 81.

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Jelf (*Bodham* with him), for the defendant.—The whole question turns on sect. 5. If this case comes within the natural meaning of the proviso, the court will not interpolate words. The section deals with the vested interests of a man *quid* clerk to the justices at the passing of the Act. It provides for the continuity of his office. The word "reappointment" would equally apply to a person who was clerk to the justices at the time of the passing of the Act, and afterwards became the clerk of the peace to the county, provided he always continued clerk to the justices. The proviso contemplates the contingent probability of the clerk to the justices becoming clerk of the peace to the county. The notice of action is not sufficient. It alleges an incorrect date for the re-appointment.

[As the judgment of the court (*post*) was for the defendant upon the construction of the section, it became unnecessary to decide upon the sufficiency or otherwise of the plaintiff's notice of action.]

Sir H. James, Q.C., replied.

COCKBURN, C.J.—I am of opinion that the defendant is entitled to our judgment. Of all the instances of bungling legislation this appears to me to be the most remarkable. The proviso which comes in at the end of sect. 5 of the Municipal Corporations Amendment Act is in direct opposition to the former enacting clause, and entirely frustrates its operation. The only way in which it occurs to me that this contradiction in the Act could have occurred is that the framer of the bill was induced to add the proviso by a clerk of the peace. The words of that proviso are so large, so comprehensive and so positive, that I am unable to see my way out of giving effect to them in this case. If the object of the Legislature is frustrated, it is not the fault of courts that have to construe the section. Our judgment will, therefore, be for the defendant.

MELLISH, L.J.—I am of the same opinion. The object of the proviso is evidently to indemnify clerks to the justices at the time of the passing of the Act who are clerks of the peace of the county, and the question for us to decide is, to what extent has this indemnity gone. Does the proviso mean that the justices may reappoint as their clerk any person who, at the time of the passing of the Act, was clerk of the peace of the borough or county, or does it go further and mean that any person who was clerk to the justices at the passing of the Act, if he afterwards became clerk of the peace of the borough or county, might be reappointed clerk to the justices? In order to decide this we must look at what the Legislature has said, and I think the latter construction of the proviso is the proper one. I have come to that conclusion, because the language of the proviso is that the justices shall or may re-appoint as their clerk any clerk of the peace, "who, at the time of the passing of the Act, shall be" clerk to the justices. But this is not the case with respect to clerks of the peace of the county. The Act does not speak of the clerk of the peace of the county as a person who "shall be" clerk of the peace at the passing of the Act. We are compelled to give one of two constructions to the proviso. We must either construe "or" to mean "and," or we must construe the proviso according to what in my opinion is the true meaning of it, that any person who, at the time of the passing of the Act, was clerk to the justices, might be re-

appointed as such, on his becoming clerk of the peace of the borough or county.

MELLOR, J.—I am of the same opinion. The proviso takes away the whole effect of the enacting clause, and is quite contrary to the policy of the Legislature in passing the Act, but the words of the proviso are so wide and so positive that I cannot escape from the conclusion that the defendant has acted within the meaning of it, and is not liable.

GROVE, J.—I have had considerable doubt in the course of this case, and that doubt is not entirely removed, but I do not feel justified in saying that of the two constructions, the construction given to the proviso by the Court of Exchequer was wrong. The whole section can at least be consistently construed, if the interpretation of Lord Justice Mellish be adopted. The strange result then follows that the proviso qualifies a person to become in the position, which it is the very object of the enacting part of the section to prevent him from occupying.

Judgment for the defendant. Judgment below affirmed.

Solicitors for the plaintiff, *Olennell and Fraser*.

Solicitors for the defendant, *Hunt and Son*.

June 22 and 23, 1876.

(Before JAMES and MELLISH, L.JJ., BAGGALLAY, J.A. and QUAIN, J.).

THE TOTTENHAM LOCAL BOARD OF HEALTH v. ROWELL.

The Public Health Act 1848—11 & 12 Vict., c. 63, ss. 69 and 129—Local Government Act 1858—Amendment Act 1861, 24 & 25 Vict. c. 61, s. 24—11 & 12 Vict. c. 43, s. 11—Paving and sewerage streets—Proceedings by local board in County Court to recover expenses—Limitation of time within which such proceedings may be taken.

The plaintiffs, a local board acting under the provisions of the Public Health Act 1848, on the 25th Oct. 1864, served a notice on R. (amongst others) requiring him to sewer, level, channel, and repair a street upon which property belonging to him abutted. R. not having complied with the notice of the plaintiffs, early in 1865, themselves executed the necessary works, and their surveyor made an apportionment amongst the different owners and occupiers of property abutting on the street of the expenses incurred by the board in completing the works. On the 18th Feb. 1873, a notice of the apportionment was duly served on R., stating that the amount payable by him was 13l. 5s. and interest, and informing him that unless he disputed the apportionment within three months it would be conclusive against him. R. did not dispute the apportionment, and after three months had expired a demand for payment was served upon him for the plaintiffs. R. shortly afterwards died, and on the 8th June 1875, the money not having been paid, the plaintiffs issued a plaint in a County Court to recover it from the defendant, who was R.'s executor.

Held (affirming the decision of the Divisional Court of Appeal), that the plaintiffs were not entitled to sue in the County Court for the recovery of the money, as six months had elapsed after the expiration of the period of three months within

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which B. might have disputed the apportionment, and the limitation provided by sect. 11 of the 11 & 12 Vict., c. 43, applied as well to proceedings taken in the County Court as to those taken before justices.

THIS was an appeal from a decision of the Divisional Court of Appeal. The facts sufficiently appear from the head note to this report. The Divisional Court of Appeal (Cleasby, B., and Field, J.) gave judgment for the defendant, holding, on the authority of the *West Ham Local Board v. Maddams*, (a) that the plaintiffs could not maintain their action, six months having elapsed before the action was brought from the time that their right to sue accrued. The plaintiffs appealed from this judgment.

By the 11 & 12 Vict. c. 43 (Jervis's Act) s. 11, it is enacted "that in all cases where no time is already or shall hereafter be specially limited for making any such complaint (i.e., a complaint upon which an order for the payment of money or otherwise can be made), or laying such information in the Act or Acts of Parliament relating to each particular case, such complaint shall be made, and such information shall be laid, within six calendar months from the time when the matter of such complaint or information respectively arose."

By the Public Health Act 1848 (11 & 12 Vict. c. 63), s. 69, "In case any present or future street, or any part thereof (not being a highway) be not sewered, levelled, paved, flagged, and channelled to the satisfaction of the local board of health, such board may, by notice in writing to the respective owners or occupiers of the premises fronting, adjoining, or abutting upon such part thereof as may be required to be sewered, levelled, paved, flagged, or channelled, require them to sewer, level, pave, flag, or channel the same within a time to be specified in such notice; and if such notice be not complied with, the said local board may, if they shall think fit, execute the works mentioned or referred to therein; and the expenses incurred by them in so doing shall be paid by the owners in default, according to the frontage of their respective premises, and in such proportion as shall be settled by the surveyor, or, in case of dispute, as shall be settled by arbitration (having regard to all the circumstances of the case) in the manner provided by this Act; and such expenses may be recovered from the last mentioned owners in a summary manner, or the same may be declared by order of the said local board to be private improvement expenses, and be recoverable as such in the manner hereinafter provided."

Sect. 129, "In all cases in which the amount of any damages, costs, or expenses is by this Act

(a) *The West Ham Local Board of Health v. Maddams* was heard before the Queen's Bench Division on appeal from the County Court of Middlesex, on 22nd Jan. 1876. The action was brought in the County Court by the Local Board to recover the defendant's proportion of expenses incurred by the board in sewerage, paving, &c. certain streets on which the defendant's land abutted. The defendant's proportion was settled in Sept. 1865, and the action was brought in May 1875.—*Day, Q.C. (W. G. Harrison with him) for plaintiffs.—Grantham for the defendant.*—The Queen's Bench Division (Blackburn and Field, JJ.), held that the limitation of six months within which proceedings could be taken by the local board before two justices (under 11 & 12 Vict. c. 43, s. 11), applied also to proceedings taken at the option of the local board in County Courts (under 24 & 25 Vict. c. 61, s. 24).

directed to be ascertained or recovered in a summary manner, the same may be ascertained by and recovered before two justices."

By the Local Government Act (1858) Amendment Act, 1861 (24 & 25 Vict. c. 61), s. 24, "Proceedings for recovery of demands below 20*l.*, which local boards are now empowered by law to recover in a summary manner, may, at the option of the local board, be taken in the County Court as if such demands were debts within the cognizance of such courts."

11 & 12 Vict., c. 63, and 21 & 22 Vict., c. 89, are repealed by the Public Health Act, 1875 (38 & 39 Vict., c. 55), s. 343; but s. 261 of the last-named statute re-enacts 24 & 25 Vict., c. 61, s. 24, the jurisdiction of County Courts being extended to demands below 50*l.*

J. Brown, Q.C. and B. E. Webster for the plaintiffs.—The action was brought by the plaintiffs when more than six months had expired after notice of the apportionment had been given to the defendant, and after the time had elapsed within which he could dispute that apportionment. The question is whether the general limitation of six months mentioned in sect. 11 of the 11 & 12 Vict., c. 43, applies to proceedings by local boards in a County Court, as well as to proceedings taken in a summary manner before justices. We contend that the limitation does not apply in the former case. Sect. 129 of the 11 & 12 Vict., c. 63, says that in all cases in which the amount of any damages, costs, or expenses is by the Act directed to be ascertained or recovered in a summary manner, the same may be ascertained and recovered before two justices. The six months limit applies there. Sect. 11 of the 11 & 12 Vict., c. 43, applies only to all cases where no time is provided within which proceedings may be taken for the recovery of money before justices, but by sect. 24 of the 24 & 25 Vict. c. 61, demands below 20*l.* may be recovered in the County Court as if such demands were debts within the cognizance of such courts. The proceedings of the local board in the County Court, therefore, become the same as if the action was for debt, and such action can be brought within the time fixed by Act of Parliament—six years. The effect of the acts is that you may go before the justices to recover a demand under 20*l.* within six months, and you may afterwards go before the County Court within six years.

Manisty, Q.C. and Kelly for the defendant.—If the contention for the plaintiffs is right, a claim by a local board under 20*l.* can be recovered in the County Court at any time within six years, whilst a claim above that sum which can be enforced only before two justices, can only be recovered within six months. The true meaning is that, under the 11 & 12 Vict. c. 69, the local board must take proceedings within six months before justices, and under the 24 & 25 Vict. c. 61, s. 24, they may, at their option, take proceedings in the County Court within the same time. [MELLISH, L.J.—I think there would be no option to go before the County Court when the six months had expired. The option ceases when the jurisdiction of the County Court comes to an end.]

J. Brown, Q.C., replied.

JAMES, L.J.—I am of the opinion that the decision of the court below ought to be affirmed. The very point which is now argued before us

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was considered and decided by the Court of Queen's Bench before this case (*The West Ham Local Board v. Maddams (ubi sup.)*). It was there decided that the six months limitation as to proceedings before magistrates applied also to the proceedings in the County Court. I should be loath to overrule that decision unless I was sure it was wrong, but, on the contrary, I am of opinion that the true construction of these sections of the Act fully bears out the view taken by the Court of Queen's Bench. It is the general provision of the Act that sums claimed by Local boards shall be recoverable in a summary manner before two justices within six months, and then there is an option given to the local board by a subsequent Act to proceed before the County Court instead of justices. There seems to me no sufficient reason why the general object aimed at by the Act should not apply as well to proceedings before the County Court as before the justices. The claim may be enforced in the County Court so long only as the remedy exists before the justices, but I am of opinion that when the time has gone by within which the claim would be enforced before the justices, the plaintiffs are also barred from proceeding in the County Court.

MELLISH, L.J.—I am of the same opinion. The question turns on the construction of sect. 24 of the 24 & 25 Vict. c. 61. Before the passing of that Act, the expenses incurred by the local board in paving and sewerage streets were recoverable before two justices within six months and not afterwards. The jurisdiction of the justices was not then confined to claims under 20*l.* This being the state of things the Legislature passed the new enactment enabling local boards to enforce payment of claims under 20*l.* in the County Court. It is quite impossible to suppose that the Legislature meant by sect. 24 that claims under 20*l.* might be recovered at any time within six or twenty years, whilst proceedings to recover sums over 20*l.* must be taken within six months. That would be an absurd construction of the section, and we ought not so to construe it unless obliged to do so by the express words of the Act. What is said is that in order to recover claims below 20*l.* you may, at your option, go before the County Court as well as before the magistrates. I think the meaning is clear that as long as you could take proceedings before the magistrates to recover, so long may you go to the County Court. It follows that inasmuch as the right to go before the justices was gone at the time when these proceedings were taken before the County Court, the plaintiffs had lost their right to proceed at all, and could exercise no option.

BAGGALLAY, J.A., and QUAIN, J., concurred.

Judgment below affirmed. Appeal dismissed.

Solicitors for plaintiffs, *Heath and Parker*.

Solicitors for defendant, *Peckham, Maitland, and Peckham*.

QUEEN'S BENCH DIVISION.

Reported by J. M. LELY, Esq., and M. W. McKELLAR, Esq.,
Barristers-at-Law.

Nov. 17, 1876, and Jan. 16, 1877.

RABBITS v. COX.

Land-tax—Exemption—Site of a hospital—4 W. & M. c. 1, s. 5—38 Geo. 3, c. 5, s. 29—42 Geo. 3, c. 116, s. .

Plaintiff was lessee of land which was the site of a hospital existing before the Land-Tax Acts 1692 and 1798, but removed by decree of the Court of Chancery in 1849, and then discharged from the charitable trust.

The Act of 1692 exempted all sites of hospitals, and by the Act of 1798, s. 29, all lands previously assessed were to be liable to be charged to land-tax, and no other lands, tenements, or hereditaments then belonging to any hospital or almshouse, or settled to any charitable or pious uses as aforesaid, should be charged to land-tax by that Act:

Held that the plaintiff was not exempt from the land-tax.

THIS was a special case stated for the opinion of this Court by consent of the parties, and pursuant to an order made under the 46th section of the Common Law Procedure Act 1852.

This was an action of trespass brought by the late Edward Harris Rabbits, and now continued by Mary Ann Rabbits, his executrix. The said Edward Harris Rabbits was the lessee of certain land and premises hereinafter mentioned, and this action was brought against the defendant who is the collector of land tax employed by the commissioners of land tax for St. George the Martyr, Southwark, for seizing the plaintiff's goods, and the case is stated for the purpose of obtaining the opinion of the court upon the question whether the plaintiff was liable under the circumstances set out in this case to be charged and assessed to land tax under 38 Geo. 3, c. 5, and 42 Geo. 3, c. 116.

1. In the commencement of the 17th century the wardens and commonalty of the mystery of fishmongers of the City of London, being a corporation commonly called "The Fishmongers Company," purchased the freehold of a plot of ground at Newington Butts, in the parishes of Newington and St. George the Martyr, Surrey.

2. On the 28th April 1615, Sir Thomas Hunt by his will of that date, gave to the said company 20*l.* a year to build an hospital containing houses for six poor men free of the company.

3. On the 18th Nov. 1616, the company received a sum of 50*l.* from one Robert Spence towards the erecting of twelve or more almshouses for the poor of the said company.

4. On the 26th May 1617, at a court of the said company, it was decided to lay out 400*l.* upon the erection of dwellings for twelve persons, including the purchase of the ground. Out of this money the plot of ground mentioned in paragraph 1 was purchased.

5. On the 2nd Oct. 1618, letters patent were obtained whereby James I., on the company's petition, granted licence to the then wardens of the company to erect and establish in the parishes of Newington and St. George, in the county of Surrey, or one of them, one hospital or almshouse for the habitation and relief of so many poor

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people, men and women, free of the company, as to the said wardens and assistants of the said company, and their successors, should seem fit, to be called St. Peter's Hospital, founded by the wardens and commonalty of the mystery of fishmongers in the City of London, in the parish of St. George in the county of Surrey; and the wardens and assistants of the said company for the time being were incorporated by the name of "The Governors of St. Peter's Hospital, founded by the wardens and commonalty of this mystery of fishmongers in the City of London, in the parish of St. George in the county of Surrey, and of the lands, possessions, revenues, and goods thereof," with power to use a common seal and to hold lands, &c., and to make laws and statutes for the government of the hospital.

On the 16th Nov. 1618, Wm. Hunt, Esq., son and heir of Sir Thomas, in accomplishment of his father's will, granted to "the governors of St. Peter's Hospital, &c.," an annuity of 20*l.* to be employed as in the said Sir Thomas Hunt's will mentioned. This annuity was granted in lieu of the annuity left by Sir Thomas.

7. The governors of St. Peter's Hospital built on the land bought as aforesaid a hospital containing thirteen almshouses.

8. On the 23rd Nov. 1618, at a court of the company held on that day, it was ordered that there should be placed in the hospital at Christmas then next thirteen poor men and women, six of whom were to receive 2*s.* weekly.

9. Several other gifts have subsequently been made, under which the hospital has been maintained and increased.

10. Richard Edmonds, by his will, dated the 29th Dec. 1620, gave to the company a certain freehold tenement, in order that they might out of the rent, when sufficient had accumulated, build two almshouses to adjoin the almshouses of the said company, called St. Peter's Hospital. The testator afterwards corrected this devise by a codicil, giving the house to the Governors of St. Peter's Hospital, &c.

11. On the 9th Oct. 1626, these two almshouses were finished, and the almspeople were admitted into them and into another almshouse which had been then lately also erected by the Governors of St. Peter's Hospital.

12. Seven more almshouses were afterwards added to the hospital, which were erected by the governors at the expense of the company. The last mentioned ten almshouses were erected by the governors on the land purchased by the company, as mentioned in paragraph 1.

13. In 1636, the old hospital, as it has since been termed, containing the before-mentioned twenty-two almshouses, was completed, but it did not cover all the land purchased by the company as aforesaid.

14. On the 14th Aug. 1719, one James Hulbert by will gave all the residue of his personal estate to the company, to lay out so much thereof as they should think necessary for the erecting almshouses for the maintaining twenty poor men and women for ever, and the other part thereof was to go towards the maintenance of such poor persons and for keeping the said almshouses in repair, and for defraying the charges and expenses of the trust. The said James Hulbert in his lifetime, by a letter addressed to the court of the company, expressed a wish that his intended almshouses

should be erected on a piece of ground belonging to the company lying on the south side of St. Peter's Hospital, and that they should be governed by the same rules as were then in existence for governing such hospital. The piece of ground referred to was the remaining portion of the land purchased by the company as aforesaid, but which was not occupied by the old hospital.

15. From this bequest twenty additional almshouses were accordingly built, making the number forty-two, which were maintained by the governors and company till the removal of the hospital to Wandsworth.

16. In the year 1848 the company purchased the fee simple of a plot of ground at Wandsworth, the land tax of which was and is redeemed.

17. On the 27th July 1849, the Vice-Chancellor of England, by an order made in a suit instituted in the High Court of Chancery, on the information of her Majesty's Attorney-General, on the relation of John Money Wrench against the company, ordered that the company should be at liberty, at their own expense, to take down the said forty-two almshouses, and to erect an equal number of new almshouses in lieu thereof, upon the piece of ground belonging to the company at Wandsworth aforesaid, upon the terms of the company being allowed to appropriate to their own use the materials of the almshouses so to be taken down, and to appropriate and hold the site thereof discharged from the charitable trusts to which they were then subject as aforesaid.

18. The company accordingly took down the said forty-two almshouses, and erected an equal number of new almshouses in their stead upon the said ground at Wandsworth, which new almshouses have ever since been occupied and used for the purposes of the said charities.

19. When the land at Newington had been cleared under the authority of the order mentioned in paragraph 17, the plaintiff having entered into an agreement with the company for a building lease, erected a messuage on a portion thereof, and on the 8th March 1860 the said company demised such portion to the plaintiff with the said messuage erected thereon to him for the term of seventy-two years from the 29th Sept. 1858, at a peppercorn rent for the first year, and at a yearly rent of 125*l.* for the residue of the term.

20. The land included in such lease, situate in the parish of St. George, and now in the possession of the plaintiff, is a portion of the land purchased by the company as mentioned in paragraphs 1 and 4, and which from the year 1618 to 1850 was held for the uses and purposes before mentioned, and such land formed a portion of the site of the old hospital which was erected before 1636.

21. Neither the said land nor the buildings erected thereon were assessed to the land tax until the almshouses were pulled down after the making of the order of the High Court of Chancery as before mentioned.

22. In the year 1852, a building agreement was entered into by the said company with one Robert Davis Rea by which the said company agreed to grant to the said Robert Davis Rea a lease of the whole of the ground purchased by the company as stated in paragraphs 1 and 4 (including the land afterwards occupied by the said Edward Harris Rabbits), and the said land included in such building agreement was in the year 1854

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assessed to the land tax at an annual value of 600*l*.

23. The said Robert Davis Rea paid the land tax upon such valuation for the year 1854, but such payment by the said Robert Davis Rea was not made with the knowledge or by the consent of the said company.

24. The plaintiff was first charged and assessed to the land tax for and in respect of the said land in his possession in the year 1860. He always refused to pay the land tax which has been made yearly since that year. In the month of June 1871, the defendant acting as the agent and collector of the commissioners seized on their behalf the plaintiff's goods for the purpose of enforcing payment of the sum of 22*l*. 5*s*. 10*d*., being the arrears of land tax alleged to be due up to that time. The heading of the land tax assessment is as follows:

"1860-61. In the parish tithing or place of St. George, south division, in the division of Southwark in the County of Surrey.

"An assessment made for granting an aid to Her Majesty by a land tax to be raised in Great Britain for the service of the year 1860, in pursuance of an Act passed in the 38th year of the reign of King George III. intituled 'An Act for granting an aid to His Majesty by a Land Tax to be raised in Great Britain for the service of the year 1798,' and of another Act passed in the 42nd year of the said king's reign, intituled 'An Act for consolidating the provisions of the several Acts passed for the redemption and sale of the land tax into one Act, and for making further provision for the redemption and sale thereof.'

Rentals.	Names of proprietors.	Names of occupiers.	Names or descriptions of estates or property.	Sums assessed and exonerated.	Sums assessed and not exonerated.
600	Fishmonger's Co.	E. Rabbits	Repository	0 0 0	22 10 0
600	Mr. Rabbits	Mr. Rabbits	Houses and warehouses	0 0 0	18 15 0

25. The difference between the sums of 125*l*. and 500*l*. represents the sum at which the commissioners assessed the annual value of the lands and houses now in the possession of the plaintiff over and above the rent reserved to the said company in respect thereof as hereinbefore stated.

26. The Act of 4 Will. & M. c. 1, which was passed in 1692, by sect. 25 provided that nothing therein contained should extend to charge any hospital for or in respect of the sites of the said hospital, and the 38 Geo. 3, c. 5, s. 29, enacted that all such lands belonging to any hospital, or almshouse, or settled to any charitable or pious use as were assessed in the fourth year of the reign of their late majesties King William and Queen Mary should be liable to be charged to land-tax, and that no other lands, tenements, or hereditaments, &c., then belonging to any hospital, or almshouse, or settled to any charitable or pious uses as aforesaid should be charged to land-tax by that Act.

27. Sect. 25 of the said Act 38 Geo. 3, c. 5, provides that nothing in that Act contained shall extend to charge (*inter alia*) any hospital in England, Wales, or Berwick-upon-Tweed for or in respect of the sites of the said hospital, or any of the buildings within the walls or limits of the said hospital, or to charge any hospital or almshouse

in England, Wales, or Berwick-upon-Tweed for or in respect only of any rents or revenues which on or before the said 25th March, 1693, were payable to the said hospital or almshouse, being to be received and disbursed for the immediate support and relief of the poor of the said hospital and almshouse only. And by sect. 26 it is provided that no tenants that hold and enjoy any lands, or houses, or other grant from the said hospitals or almshouses do claim or enjoy any freedom, exemption, or advantage by this Act; but that all the houses and lands which they so hold shall be rated and assessed for so much as they are yearly worth over and above the rents reserved and payable to the said hospitals or almshouses to be received and disbursed for the immediate support and relief of the poor of the said hospitals and almshouses.

The question for the opinion of the court is:

Whether the land in possession of the plaintiff is liable to be charged and assessed by the Land-Tax Commissioners to the land-tax.

If the court shall answer this question in the affirmative, judgment is to be entered for the defendant with costs.

If in the negative their judgment is to be entered for the plaintiff for 22*l*. 5*s*. 10*d*. with costs.

The *Solicitor-General* (Sir H. Giffard, Q.C., with him *Poland*), argued for the plaintiff.—The intention of the Legislature concerning the land-tax seems to have been to give to all existing hospitals the benefit of exemption as to the land they then occupied. Even when removed to other land, that benefit is continued by the improved price which the exemption would cause the land previously occupied to have produced for the proprietors in each case. The words of 38 Geo. 3, c. 5, s. 29, are sufficient to preclude the plaintiff's liability in this case.

E. Clarke (with him *Lyon*), for the defendant.—The case of *Lord Colchester v. Kewney* (L. Rep. 2 Ex. 253), was a decision of the Exchequer Chamber that no exemption attached to land devoted subsequently to the land-tax Acts to new hospitals. This very question was alluded to in the judgment of Willes, J., and the argument for exemption under such circumstances as these was said to be without basis as to its application to the point then before the court. Willes, J. said, at page 257, "First, as to the question of whether land used as a hospital at the time both Acts were passed, but since (as in the case of St. Thomas's Hospital) diverted to another purpose, must in its new use be taxed, it does not now call for decision. When it arises, it will probably be said on the part of the public, insisting upon its liability, that the reason for the exemption ceasing the exemption itself ceases: that it applied only so long as the land continued to be used in the state in which it then was. On the other hand it will be urged that the intention of the Act was to treat hospitals and other exempted institutions as having redeemed the land-tax, not only whilst they themselves used the land, but when they came to dispose of it. These would be the formulas which would have to be adopted as the expression of the two opposed views, but whichever view the court might adopt, it would not affect the present case, for it is obvious that no such considerations here arise."

The *Solicitor-General*, in reply.

Cur. adv. vult.

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Jan. 16.—LUSH, J. delivered the written judgment of the court (Cockburn, C.J. and Lush, J.).—The question in this case is whether the site of an ancient hospital which was in existence before the passing of the Land Tax Act (38 Geo. 3, c. 5), and was, therefore, exempted from assessment to the land tax by the express provisions of that Act, still retains the exemption, although the hospital has been removed to another site, and the land has, by a decree of the Court of Chancery, been discharged from the charitable trusts. The history of the institution is stated in the case. It will be sufficient here to observe that the hospital was erected and chartered before the passing of the 4 Will. & Mary c. 1, that it was considerably enlarged in subsequent years, and that it was maintained until the year 1849, when a decree was made enabling the governors to take down the forty-two almshouses of which the charity then consisted, and to erect an equal number of houses upon another piece of ground which had been obtained for the purpose. This was done and the land, the site of the old foundation, was let to the plaintiff on a building lease. We took time after the argument to look into the Land Tax Acts, and we have come to the conclusion that the defendant's construction of them is the right one, and that the land has become and is chargeable to the land tax. The 38 Geo. 3, c. 5, made perpetual as regards the land tax by c. 60 of the same year, is in substance a re-enactment of the 4 Will. & Mary c. 1. But it is necessary to go back to the older statute in order to make the sections of the later Act intelligible. The 25th section of the Act of William and Mary provides that "nothing therein contained shall extend to charge any college or hall in either of the two universities or the colleges of Windsor, Eton, Winton, or Westminster, or the corporation of the governors of the charity for relief of poor widows and children of clergymen, or the college of Bromley, or any hospital for or in respect of the sites of the said colleges, halls, or hospitals, or to charge any of the houses or lands belonging to Christ's Hospital, St. Bartholomew's, Bridewell, St. Thomas's and Bethlehem Hospital, or the said corporation of the governors for the relief of poor widows and children of clergymen, or the college of Bromley; nor to extend to charge any other hospitals or almshouses for or in respect only of any rents or revenues payable to the said hospitals or almshouses being to be received and disbursed for the immediate use and behoof of the poor in the said hospitals or almshouses only." The subjects of this exemption are, first, the hospitals themselves; secondly, the houses or lands belonging to certain specified hospitals, and thirdly, the rents and revenues payable to any other hospital for the immediate use of the poor in them. By the next clause, sect. 26, the tenants of hospital lands are declared not exempt from chargeability for so much as these lands are worth over and above the rents they pay. The 25th section of the present Act in like manner exempts these three classes of property, but with limitation as to the second and third class. It provides that nothing in the Act shall extend to charge "any hospital for or in respect of the site of the said hospital or any of the buildings within the walls or limits of the same, or to charge any of the houses or lands which on or before the 25th March 1693 (the period when the 4 Will. & Mary was in force), and belong to Christ's Hospital, St. Bartholomew's,

Bridewell, St. Thomas, and Bethlehem Hospitals, or the corporation of governors of the charity for the relief of poor widows and children of clergymen, or the college of Bromley, or shall extend to charge any other hospitals or almshouses for or in respect of any rents or revenues, which on or before the said 25th March 1693, were payable to the said hospitals or almshouses, being to be received and disbursed for the immediate use and relief of the poor of the said hospitals and almshouses only." It will be observed that this Act, while it preserves the immunity of hospitals themselves, without regard to the date of their institution to the same extent as did the Act of Will. & Mary, limits the exemption as regards their sources of income to such lands, rents, and revenues as belonged to them on the 25th March 1693. The consequence is that hospitals erected since that period enjoy exemption from land tax as regards their sites, but not as regards any lands or rent which may belong to them as sources of income apart from the site of the hospitals themselves. And as regards ancient hospitals, viz., such as were in existence in 1693, if they have since acquired any additional lands not occupied as the site of the hospital itself, those lands are chargeable with the land tax. Hence the 42 Geo. 3, c. 116, contains provisions, which expressly enable governors of hospitals to redeem the land tax chargeable on the hospital lands. The 26th section of the Act in question, like the 26th section of the Act of Will. & Mary, makes the tenants chargeable for any excess of value over the rents they pay. The 27th section enacts that tenants who by the terms of their leases are bound to pay all taxes, shall be charged at the full value of their holdings. The 28th provides for settling disputes as to the lands which ought to be assessed, &c. Then comes the 29th, upon which a good deal of the argument was founded. It is in these terms "provided always, and be it further enacted that all such lands, revenues, or rents belonging to any hospital or almshouse, or settled to any charitable or pious use as were assessed in the 4th year of the reign of King William and Queen Mary, shall be and are hereby adjudged to be liable to be charged towards the payment of this present aid, and that no other lands, tenements, revenues, or rents, whatsoever then belonging to any hospital or almshouse, or settled to any charitable or pious uses as aforesaid, shall be charged, taxed, or assessed by virtue of this Act towards the said sum to be raised &c., anything herein contained to the contrary notwithstanding." This section, which it must be admitted is not happily framed, seems to us to be merely a corollary to the 25th section, and to be intended to emphasise the words of limitation we have just observed upon. For whereas that section says, that lands and rents, which were in 1693 exempted as belonging to a hospital, shall be still exempt, the 29th section adds what was necessarily implied, that all lands which were then assessed shall remain chargeable, and that lands which were not then assessed shall not be now assessed. It seems unnecessary to observe that both sections deal with hospital lands, lands belonging to or forming the site of an existing hospital. The land in question was the site of a hospital, and as such it was exempted by the express language of the 25th section until the erection of the new hospital on another site, when it became by virtue of the

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decree mentioned in the case, discharged from the charitable trust. So long as it was the site of a hospital, it was the subject of a special exemption conferred upon it in consideration of its eleemosynary character, but when it ceased to be so, it ceased to be within the 25th section, and fell under the general taxing clause. The act, as we have seen, does not exonerate all hospital lands. Why should it be supposed that the Legislature intended that lands once exempted from charge because they belonged to a hospital, should be for ever exempted though they cease to be hospital lands? There is not a word in the Act which shows an intention to perpetuate the immunity or to continue it longer than the land should be used for the special purpose in consideration of which the privilege was granted, nor can any reason be suggested why it should be. Our judgment is therefore for the defendant.

Judgment for defendant.

Solicitor for plaintiff: *J. O. Humphreys.*

Solicitors for defendant: *Simpson and Palmer.*

Wednesday, Jan. 31, 1877.

COLE v. MANNING.

Bastardy Act 1872, s. 4—Corroboration of evidence of mother—Admissibility of evidence as to circumstances prior to begetting of child.

On the hearing of an affiliation case, evidence in corroboration of the evidence of the mother is admissible, although the particulars to which such evidence testifies happened prior to the begetting of the child.

By the Bastardy Act 1872, s. 4, the justices, on an affiliation summons, "shall hear the evidence of the woman, and such other evidence as she may produce," and also any evidence tendered by the person alleged to be the father, "and if the evidence of the mother be corroborated in some material particular by other evidence to the satisfaction of the justices," they may adjudge the man to be the putative father.

The appellant having been delivered of a bastard child in Oct. 1875, and having applied for an affiliation order against the respondent:

Held, that evidence of the appellant and the respondent having been frequently surprised together in the summer of 1874, was evidence admissible in corroboration of the appellant.

THIS was a case stated, under 20 & 21 Vict. c. 43, by Ralph A. Benson, Esq. stipendiary magistrate, sitting at the Southwark Police-court, in the county of Surrey, and the following are the material parts of such case.

The appellant had preferred a complaint against the respondent under the 3rd section of the Bastardy Laws Amendment Act 1872 (35 & 36 Vict. c. 65), charging that the respondent was the father of a bastard child of the appellant, born within the twelve months next preceding the date of the complaint. The magistrate dismissed the complaint. It was proved at the hearing on the part of the appellant, and found as a fact that the said appellant had been delivered of a bastard child on the 10th Oct. 1875, and the appellant swore that the respondent was the father of such child, the connexion having taken place at the respondent's house where he had taken her on an evening in Jan. 1875. Of that meeting and that intercourse there was no corroborative evidence,

nor was the magistrate satisfied with such evidence as was adduced of subsequent conversations between the friends of the appellant and the respondent. But it was proved to his entire satisfaction that during the summer of 1874 several months before the child could have been begotten, the parents of the appellant, with whom previously to that date the respondent had been on terms of great friendship and intimacy, refused him the house and quarrelled with him owing to their suspicions with regard to his conduct towards the appellant. They deposed that they surprised the appellant and the respondent together on more than one occasion; that the door of the parlour where they were was closed for a minute or two against them; that the appellant sat on the knee of the respondent, and to other circumstances which would have had great effect on the judgment of the magistrate had they occurred at or about the time the child might have been begotten. The appellant was rather of weak intellect, but there was no evidence of any similar misconduct on her part with other men than the respondent. After taking time to consider, the magistrate was of opinion that he was not at liberty so to interpret the words of the statute, "if the evidence of the mother be corroborated in some material particular" (35 & 36 Vict. c. 65, s. 4) as to include evidence of the facts long antecedent, and having no direct relation to the actual begetting of the child, however strong might be the moral conviction that such facts might convey to his mind, but that the word "material" must be taken to imply a closer connection of the "particular" in question than was apparent in the case, with occurrences at or about the time when the child must have been begotten, or with subsequent words or actions of the respondent tending to fix the paternity.

The case concluded as follows: "If the court shall be of opinion that it was within my discretion and legally competent to me according to the requirements of the above section of the statute to hold the evidence above set forth as corroborating "in some material particular" the evidence of the mother, then I pray the court to remit the case for rehearing with their opinion thereon, or otherwise to make such order as to the court shall seem fit."

Spearman and Saffery, for the appellant, referred to

Hodges v. Bennett, 5 H. & N. 625; 2 L. T. Rep. N. S. 190, per Martin, B.;

E. v. Percy, 17 Q. B. 992; 18 L. T. Rep. N. S. 238; 16 Jur 193;

Lawrence v. Ingmire, 20 L. T. Rep. N. S. 391;

as authorities under the Act of 7 & 8 Vict. c. 10 (which does not differ with respect to the provision as to corroboration from the Bastardy Act 1872) that the question was one for the magistrate to determine. They were stopped by the court, who called upon

John Thompson, for the respondent, who argued that the words "material particular" must receive a limited construction. No person would be safe if evidence dating so far back could be held admissible. [MELLORE, J.—That objection goes rather to the weight of the evidence than to its admissibility.]

MELLORE, J.—I am of opinion that the stipendiary magistrate has taken a wrong view of the law. He should have received this evidence, and judged of the weight of it. There is no rule of law to exclude such evidence, which might or

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might not be very material according to the peculiar circumstances of each case. Here it afforded material corroboration as showing an antecedent probability that the respondent was the father of the appellant's child.

FIELD, J.—I am of the same opinion. The case must be remitted to the magistrate for his determination, after hearing the excluded evidence. The object of the Bastardy Acts is to give a single woman the right of having her child maintained by the father. As the paternity is proved by the evidence of the woman, and as there is great danger in admitting the evidence of one single person against another single person in reference to that which is ordinarily secret, the Legislature has thought fit to require that the evidence of the mother shall be "corroborated in some material particular." But no restriction has been imposed with reference to dates. That the evidence would have been material if it had testified to facts happening between the begetting and the birth is not disputed. It is for the magistrate to decide whether evidence testifying to facts happening earlier is material or not.

Judgment for the appellant.

Solicitors for the appellant, *Cordwell and Tasman.*

Solicitors for the respondent, *Hicklin and Washington.*

Wednesday, Jan. 24, 1877.

VERDIN v. WRAY AND ANOTHER.

Voting paper, fabrication of—Prosecution by unsuccessful candidate—"Party aggrieved"—Public Health Act 1875.

By the Public Health Act 1875, s. 253, proceedings for the recovery of any penalties under the Act shall not be taken by any person other than by a party aggrieved. . . . By rule 69 of schedule 2, any person who fabricates any voting paper is liable to a penalty not exceeding 20l.

The appellant and M. were candidates at an election under the Act. A voting paper fabricated by the respondents gave three votes to M., who was elected by a majority of five votes.

Held (on a case stated by justices under 20 & 21 Vict. c. 43), that the appellant was a "party aggrieved."

Per Lush.—A candidate would be a party aggrieved whether the fabricated votes turned the election or not.

THIS was a case stated by justices of the borough of Middlewich, in the county of Chester, and the following are the material parts of such case:

The respondents were charged with fabricating the voting paper of one Anne Dudley, who was entitled to three votes at an election for the office of member for the Wharton Ward of the Local Board District of Winsford. The information was preferred at the petty sessions held at Middlewich in the county of Chester.

There were only two candidates, the appellant and Mr. Moss. Mrs. Dudley's voting paper, to the fabricating of which one of the respondents pleaded guilty, was found when opened by the proper officer to give three votes to Mr. Moss. The result of the election was the return of Mr. Moss by five votes, the appellant receiving eighty-nine, and Mr. Moss ninety-four votes. The appel-

lant having preferred an information against the respondents for fabricating Mrs. Dudley's three votes, the justices dismissed the information, being of opinion that the appellant was not a party aggrieved within the meaning of the 253rd section of the Public Health Act 1875 (38 & 39 Vict. c. 55), which is as follows:

Proceedings for the recovery of any penalty under this Act shall not, except as in this Act is expressly provided, be had or taken by any person other than by a party aggrieved, or by the local authority . . . without the consent of the Attorney-General.

The sanction of the Attorney-General not having been obtained, the question for the court was whether the appellant was a "party aggrieved" within the meaning of the above section.

Gye, for the appellant, cited

Boyce v. Higgins, 14 C. B. 1; 23 L. J. 5, C. P.;

Hollis v. Marshall, 27 L. T. Rep. 235, Ex.; 2 H. & N. 755;

Rochfort v. Atherley, L. Rep. 1 Ex. D. 511;

and argued that as the appellant's election might have been turned by the three fabricated votes being given for him instead of for his opponent, he was clearly a "party aggrieved."

Tickell, for the respondent, relied on *Hollis v. Marshall* (*ubi sup.*), in which case it was held, under the corresponding sect. 133, of the Public Health Act 1848 (repealed by the Public Health Act 1875, and substantially identical with sect. 253 of the latter Act), that where a party disqualified is returned and acts, a defeated candidate is not a "party aggrieved."

The COURT (Mellor, and Lush, JJ.), were clearly of opinion that the appellant was a party aggrieved. And Lush, J. said that he thought that a candidate would be aggrieved by a fabricated vote being given against him, whether the election would have been turned by such fabricated vote or not.

Judgment for the appellant.

Solicitor for the appellant, *C. R. Cuff.*

Solicitors for the respondent, *H. Tyrrell.*

CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, Feb. 3, 1877.

(Before KELLY, C.B., MELLOR, J., DENMAN, J., FIELD, J., and HUDDLESTON, B.)

REG. v. EDWARDS AND STACEY.

Larceny—Diseased cattle buried in the soil.

Three pigs, bitten by a mad dog, were shot and buried on the owner's land three feet below the surface of the soil. There was no intention of digging them up again or of making any use of them, but the same evening the prisoners dug them up, carried them away and afterwards sold them for 9l. 3s. 9d. The jury found that there was no abandonment of the property in the pigs by the owner, and convicted the prisoners of larceny.

Held, that larceny would lie notwithstanding the dead pigs were buried in the land three feet below the surface.

THE prisoners were tried at the West Kent Quarter Sessions, held at Maidstone, on the 5th Jan. 1877, on an indictment charging them with stealing three dead pigs, the property of Sir William Hart Dyke, Bart.

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The evidence was to the following effect: The three pigs in question having been bitten by a mad dog, Sir William Hart Dyke, to whom they belonged, directed his steward to shoot them. The steward thereupon shot them each through the head, and ordered a man named Paylis to bury them behind a barn. The steward stated that he had no intention of digging them up again, or of making any use of them. Paylis buried the pigs pursuant to directions behind the barn on land belonging to Sir William Hart Dyke, in a place where a brakestack is usually placed. The hole, in which the pigs were buried, was three feet or more deep, and the soil was trodden in over them.

The prisoner Edwards was employed to help Paylis to bury the pigs. Edwards was seen to be covering the pigs with brakes, and in answer to Paylis's question why he did so, said that it would keep the water out, and it was as well to bury them "clean and decent."

The two prisoners went the same evening and dug up the pigs, and took them to the railway station, covered up in sacking, with a statement that they were three sheep, and sent them off for sale to a salesman in the London Meat Market, where they were sold for 9l. 3s. 9d., which was paid to the prisoners for them.

The counsel for the prisoners submitted that there was no evidence in support of the charge to go to the jury on the following grounds: Firstly, that the property was not proved as laid in the indictment, as Sir William Hart Dyke had abandoned his property in the pigs; secondly, that under the circumstances the buried pigs were of no value to the prosecutor; and thirdly, that under the circumstances the buried pigs were attached to the soil, and could not be the subject of larceny.

The Chairman, however, thought that the case was one for the jury, and directed them as to the first point that in his opinion there had been no abandonment, as Sir William's intention was to prevent the pigs being made any use of; but that if the jury were of opinion that he had abandoned the property they should acquit the prisoners. He also told the jury that he thought there was nothing in the other two objections.

The jury found the prisoners guilty.

The question for the consideration of the Court is, whether having reference to the objections taken by prisoners' counsel there was evidence on which the jury were justified in convicting the prisoners of larceny?

If the answer to this question be in the negative, then the convictions to be quashed, otherwise affirmed.

No counsel appeared to argue on either side.

By the Court: *Conviction affirmed.*

Saturday, Feb. 10, 1877.

(Before KELLY, C.B., MELLOR, J., LUSH, J., DENMAN, J., and HUDDLESTON, B.)

REG. v. DRANE.

Sentence—Penal servitude—False pretences—Previous conviction—27 & 28 Vict. c. 47, s. 2.

Prisoner pleaded guilty to an indictment for obtaining money by false pretences, and also to a

previous conviction for felony charged in the same indictment.

Held, that the least sentence of penal servitude that could be awarded was the term of seven years (27 & 28 Vict. c. 47, s. 2).

On the 17th Jan. 1877, Mary Jane Patterson Deane pleaded guilty at the Court of General Quarter Sessions of the Peace, held by adjournment at Kirkdale, in and for the county Palatine of Lancaster, to an indictment charging her with obtaining money by false pretences; she also pleaded guilty to a previous conviction of felony (after another previous conviction of felony charged in the same indictment) and was sentenced to seven years' penal servitude.

By sect. 88 of the Act 24 & 25 Vict. c. 96, the misdemeanour of obtaining money by false pretences is punishable by penal servitude for three years.

Sect. 7 of the same Act provides for the punishment of larceny after a previous conviction of felony.

Sect. 8 provides for the punishment of larceny after a previous conviction of an indictable misdemeanour.

But there is no express provision in the Act for the punishment of an indictable misdemeanour after a previous conviction of felony.

Sect. 116 of the same Act, however, which contains provisions for the form in which previous convictions are to be charged, is in these words: "In any indictment for any offence punishable under this Act after a previous conviction for any felony, misdemeanour, or offence, it shall be sufficient, &c. It is, therefore, clear that in this section the insertion of a charge of a previous conviction for felony on an indictment for misdemeanour is contemplated. Whether the words are sufficient to make such an insertion legal is a question for the consideration of the Court.

By the Act of the 27 & 28 Vict. c. 47, s. 2, it is provided that no sentence of penal servitude shall be for less than five years, and that "where any person shall, on indictment, be convicted of any crime or offence punishable with penal servitude, after having been previously convicted of felony, the least sentence of penal servitude that can be awarded shall be seven years."

By the Act of the 34 & 35 Vict. c. 112, ss. 8 & 9, it is provided that where there has been a previous conviction of a crime, police supervision may be added to the sentence, and reference for the form of charging the previous conviction is made to sect. 116 of the Act of 24 & 25 Vict. c. 96, above quoted.

Under these last-mentioned sections, therefore, there is express power to charge a previous conviction for felony in an indictment for misdemeanour, but only for the purpose of sentencing to police supervision.

In the case of *Reg. v. Summers* (reported in L. Rep. 1 C. C. R. p. 182; 11 Cox C. C. 248), it was held that a sentence of penal servitude for five years on a conviction for a misdemeanour was right, a previous felony, though proved, not having been charged in the indictment. It will be observed, however, that in the case stated it is assumed that in an indictment for a misdemeanour under the Larceny Act a previous conviction of felony could be charged.

In the case of *Reg. v. Willis* (L. Rep. 1 C. C. R.

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p. 363; 12 Cox C. C. 192) (a), the case of *Reg. v. Summers* was followed.

The question for the opinion of the Court is whether the sentence of seven years' penal servitude was right, and if not what sentence should be substituted.

No counsel appeared to argue on either side.

KELLY, C.B.—The 27 & 28 Vict. c. 47, s. 2, enacts that "where under any Act now in force a period of less than five years is the utmost sentence of penal servitude that can be awarded, a period of five years shall, in respect to any offence committed after the passing of this Act, in such Act be substituted for the less period: and where under any Act now in force a period of either less or more than five years may be awarded as a sentence of penal servitude, the least sentence of penal servitude that can be awarded under that Act shall, in respect to any offence committed after the passing of this Act, be a period of five years: and where any person shall, on indictment, be convicted of any crime or offence punishable with penal servitude after having been previously convicted of felony, the least sentence of penal servitude that can be awarded in such case shall be a period of seven years." Where, therefore, as in this case, there is a conviction on an indictment for false pretences after a previous conviction for felony charged in the same indictment, the least sentence of penal servitude that can be awarded is a period of seven years.

Conviction affirmed.

Saturday, Feb. 3, 1877.

(Before KELLY, C.B., MELLOR, J., DENMAN, J., FIELD, J., and HUDDLESTON, B.)

REG. v. FLATTERY.

Rape—Consent—Fraud—Pretence of medical treatment.

A person who kept a stall in a public market, and professed to give medical and surgical advice, fraudulently obtained possession of a girl's person, pretending that he was going to perform a surgical operation to cure her of her illness. The girl was nineteen years old, and made a feeble resistance, and only submitted to the act of connection under the belief that the prisoner was treating her medically and performing a surgical operation.

Held, that there was no consent to the act of sexual intercourse, and that the prisoner was guilty of the crime of rape.

CASE stated for the opinion of this Court by Hawkins, J.

The prisoner John Flattery was indicted for a rape upon Lavinia Thompson at Halifax, in the county of York on the 4th Nov. 1876.

He was tried before me at the Winter Assizes at Leeds in Dec. 1876, and was convicted, but I postponed judgment until the next assizes in order to obtain the opinion of the court upon the following case. The prisoner, in the meantime, remains in custody.

Lavinia Thompson, prosecutrix, is nineteen years of age, and she is the daughter of and lives

with Thomas and Hannah Thompson, who are labouring people in the neighbourhood of Halifax.

On and for some time previous to the 4th Nov. last she was in ill health and subject to fits. On the 4th Nov. 1876 (being market day at Halifax) with a view to obtain medical and surgical advice and relief, she went with her mother to Halifax to consult the prisoner, who kept an open stall in the market at which he professed for money consideration to give medical and surgical advice.

They went together to the prisoner's stall and there saw him, and in the presence and hearing of the prosecutrix her mother told the prisoner her condition as aforesaid, and that she was subject to fits, and consulted him as to a remedy.

The prisoner expressed a desire to examine the prosecutrix with a view to giving the advice sought, and requested the prosecutrix, and her mother, to follow him to the Peacock Inn, which was close by, for that purpose, and they did so.

At the Peacock Inn the prisoner put several questions to her mother touching the condition of the prosecutrix, and made some examination of her person. Having done this the prisoner not believing that the advice he was to give would be of any service to prosecutrix, nor intending, nor with any view to perform a medical or surgical operation, but solely with a view to gratify his lust and have that carnal sexual knowledge of her person which he afterwards had as after stated, fraudulently, and knowing that he was speaking falsely, told the mother in the presence and hearing of the prosecutrix that "It was nature's string wanted breaking," and asked if he might break it. The mother replied that she did not know what he meant (as in fact she swore she did not), but that she did not mind if it would do her daughter any good. At that moment the prosecutrix, in the prisoner's presence, had a fit and fainted away. When she came to herself again the prisoner, in the prosecutrix's presence and hearing, fraudulently and falsely repeated that nature's string wanted breaking, and added if that didn't do her good nothing would, and he again then asked if he might break it. Again the mother said she did not mind, if it would do her daughter the prosecutrix any good.

On this the prisoner said to the mother "You stay here and I'll try." He then went into a small adjoining room followed by the prosecutrix solely in order as he represented, and as prosecutrix and her mother believed, that he might perform the operation he had advised, which both prosecutrix and her mother, on prisoner's representations aforesaid, believed would probably effect her cure, and not with any intention on the part of the prosecutrix that the prisoner should have sexual connection.

In that room the prisoner put the prosecutrix on the floor and then and there had carnal sexual connection with her, the prosecutrix making but feeble resistance believing (as she swore) that the prisoner was merely treating her medically and performing a surgical operation, as he had advised, to cure her of her illness and fits, and submitting to his treatment solely because she so believed, such belief having been wilfully and fraudulently induced by the prisoner as aforesaid.

Unless such submission in law constitutes consent there was no consent to the prisoner's having connection with the prosecutrix.

(a) In *Reg. v. Willis* the previous conviction was not charged in the indictment, and therefore the proper term of penal servitude in that case was five years' penal servitude.

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The question is whether under these circumstances the conviction was warranted in law.

H. HAWKINS.

Lockwood, for the prisoner.—The conviction cannot be sustained. The case does not contain any statement as to whether or not the prosecutrix knew the nature of the act of connection. It is not found that she did not know the nature of that act, and that distinguishes this case from *Reg. v. Case* (1 Den. C. C. 580; 4 Cox C. C. 220) where the presiding judge directed the jury, "that if they were satisfied that the girl was ignorant of the nature of the defendant's act, and made no resistance solely from a *bonâ fide* belief that the defendant was (as he represented) treating her medically with a view to her cure, his conduct in point of law amounted to an assault." Here there was no such direction to the jury. In this case the prosecutrix might have been under the impression that the prisoner was treating her medically, and yet have known at the same time the nature of the act.

[Huddleston, B.—In the case of a person having intercourse with a married woman by a fraud which induces her to suppose that he is her husband, the woman consents to the act of connection, but not with the particular man. In *Reg. v. Fletcher* (Bell's C. C. 63; 8 Cox C. C. 131) Lord Campbell, C.J. said, "*Campbell's case* (1 Den. C. C. 89) seems to me to settle what the proper definition of rape is, and the decision in that case rests upon the authority of an Act of Parliament. The statute of West. 2, c. 34, defines the crime to be where "A man do ravish a woman, married, maid, or other, where she did not consent neither before nor after." KELLY, C.B.—Where is there any evidence in this case that the prosecutrix ever consented to the pollution of her person? It may be that she consented to the act, knowing the nature of it, under a false belief, and that the case is a misdemeanor within 24 & 25 Vict. c. 100, s. 49, but it is submitted it is not a rape. In *Reg. v. Clarke* (24 L. J. 25, M. C.; 6 Cox C. C. 412) where the prisoner got into the bed of a married woman intending if he could to have connection with her by passing for her husband but not by force, and the woman, believing him to be her husband, allowed him to have connection with her, it was held not to be a rape. Alderson, B. there said, "There is an actual consent obtained by fraud. If we held that to be a rape, the principle would not be confined to the case of wives and husbands," and Jervis, C.J. said "We cannot get over the decision in *Reg. v. Jackson* (Rus. & Ry. 487), and as far as I gather the opinion of the other judges we all think that decision is right." In *Reg. v. Barrow* (L. Rep. 1 C. C. 156; 11 Cox C. C. R. 191) where a woman lying asleep in bed with her husband was awoken by another man having connection with her, and as soon as she was completely awake she found the man was not her husband and awoke her husband, it was held not to be a rape. Bovill, C.J. said, "What was done was with her consent, though obtained by fraud. This comes within the class of cases in which it has been decided that where under such circumstances consent has been obtained by fraud, the offence does not amount to rape." [Mellor, J.—In those cases the woman consents to the act of sexual intercourse, here she does not. DENMAN, J. referred to *Reg. v. Fletcher* (Bell 63; 8 Cox's Cr. Cas. Res. 131) where having connection with an idiot girl incapable of giving consent from

defect of understanding was held to amount to rape.]

The *Solicitor-General* (*Bowen* with him), for the prosecution, was not called upon to argue.

KELLY, C.B.—I am of opinion that the conviction should be affirmed. The prosecutrix, by the fraud and false representations of the prisoner, was induced and persuaded to allow him to touch and approach her person. There was not only no evidence of consent on the part of the prosecutrix, but the case states that she submitted to his treatment solely because she believed that he was treating her medically and performing a surgical operation, as he had advised, to cure her of her illness, and that unless such submission in law constitutes consent there was no consent to the prisoner having connection with the prosecutrix. We are now asked to say, because the prosecutrix was nineteen years of age, she knew what was going on and consented to a violation of her person. It would be straining the language of the case to hold that there was any consent to what took place under the circumstances. It was contended that it lay on the part of the prosecution to show that the woman did not know what the nature of sexual connection was. I know of no principle of law on which that contention rests and I am not prepared to say that if she did know the nature of sexual intercourse that would have been any evidence of consent; but here it is consistent with her evidence that the prosecutrix may have been under the impression that the prisoner was performing the operation by some instrument or with his fingers. I lament that it has ever been decided to be the law of England that where a man obtains possession of a woman's person by fraud, it does not amount to rape. In this case, however, there is no evidence to show that the prosecutrix knew that the prisoner was about to violate her person, on the contrary she submitted to what was done under the belief that the prisoner was performing a surgical operation to cure her of her illness. I am clearly of opinion that the prisoner was guilty of the crime of rape, and that the conviction should be affirmed.

MELLOR, J.—I am of the same opinion. It appears to me that the language of the statute 13 Ed. 1, West. 2, c. 34 gives the true definition of the crime of rape. "If a man ravish a married woman dame or damsel where she neither consented before or after, *ayt judgment de vy et member*; if she assent after, yet the King shall have the suit." It has been argued that submission is equivalent to assent. Under certain circumstances that may be so. But in this case where is there any evidence of consent to an act of carnal connection? On the contrary it is stated that the prosecutrix made a feeble resistance. That is not consent, but it may be taken that she did not resist as she would have done under other circumstances, if she had not believed that the prisoner was performing a surgical operation. The whole case is summed up in the language of Wilde, C.J. in *Reg. v. Case* "It is said that as she made no resistance she must be viewed as a consenting party. That is a fallacy. Children who go to a dentist make no resistance, but they are not consenting parties. The prisoner disarmed her by fraud. She acquiesced under a misrepresentation that what he was doing was with a view to a cure, and that only, whereas it was done solely to gratify the passion of the prisoner. How

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does this differ from a case of total deception?" She consented to one thing, he did another, materially different, on which she had been prevented by his fraud from exercising her judgment and will." Here the prosecutrix consented to be treated medically and to have a surgical operation performed, and to nothing else, and in no sense did she consent to the prisoner having connection with her. As to the authority of *Reg. v. Barrow*, if a similar case should come before me I should take care to have it reconsidered.

DENMAN, J.—I am of the same opinion. The case concludes "Unless such submission in law constitutes consent, there was no consent to the prisoner having connection with the prosecutrix." We have, therefore, to see whether there are any facts in the case which amount to consent in law. The mother and daughter were persons of extreme simplicity, and the jury have found that they believed the prisoner's representations. The words of the statute (West. 2, c. 34) are "If a man do ravish a woman dame or damsel where she neither consented before or after." There is one case where a woman does not consent to the act of connection, and yet the man may not be guilty of rape, that is where the resistance is so slight and her behaviour such that the man may *bonâ fide* believe that she is consenting; but that does not apply to the present case. Here the prosecutrix was entirely deceived by the prisoner, and he fraudulently obtained possession of her person, and it does not lie in his mouth to say now that she was consenting to the act of connection. I agree in the remarks that have been made upon the decision in *Reg. v. Barrow*, and I should be glad if it were reviewed.

FIELD, J.—I am of the same opinion. I accept the definition of rape as given in the statute of West. 2, and I think the limitation put upon the case of not consenting by my brother Denman worth considering. The circumstances in this case amount neither in law or fact to a consent by the prosecutrix. There must be a consent to the act of sexual connection. I can see no evidence whatever of consent to that.

HUDDLESTON, B.—I am of the same opinion. The definition of rape as given in the statute of 13 Ed. 1, c. 34 was adopted by this court in *Reg. v. Fletcher*. Generally speaking it is ravishing where she does not consent before or after. In this case there was no intention on the part of the prosecutrix that the prisoner should have sexual intercourse, and no consent to that act. The prosecutrix submitted to the act in the belief that she was merely undergoing a surgical operation to cure her of her illness, being wilfully and fraudulently induced so to believe by the prisoner. I also should wish to see the case of *Reg. v. Barrow* reconsidered.

Conviction affirmed.

Saturday, Feb. 3, 1877.

(Before KELLY, C.B., MELLOR, J., DENMAN, J.,
FIELD, J., and HUDDLESTON, B.)

REG. v. J. W. FOSTER.

False pretences—Sale of spurious article as genuine—Simplex commendatio—Direction to jury.

Prisoner sold to prosecutrix packages of what appeared to be tea, stating that he was a tea dealer at L., and that the article was good tea, at the

same time producing a sample of good tea. When opened the packages were found to contain but one-fourth part of tea and three-fourth parts of noxious things. The judge left it to the jury to say whether the prisoner's representations were simple exaggeration in praise of the article or misrepresentation of a fact specific to the contract with intent to defraud.

Held, that it was not misdirection in not leaving the question to the jury whether the article was tea or not.

CASE reserved for the opinion of this Court by the deputy Chairman of the general quarter sessions of the peace for the county of Leicester.

James Williams Foster, otherwise James William Foster, was tried before me at the general quarter sessions of the peace for the county of Leicester, held on the 2nd Jan. 1877, for obtaining money under false pretences from Elizabeth Beckworth, the wife of William Bernard Beckworth.

The indictment contained several counts, but as all these except the first were withdrawn, it will be sufficient to set out that count only.

"The jurors for our lady the Queen, upon their oath present that James Williams Foster otherwise James William Foster, on the 17th Nov. 1876, at the township of Hugglescote, in the county of Leicester, unlawfully, knowingly, and designedly did falsely pretend to one Elizabeth Beckworth that he was a tradesman in the tea trade in Leicester, that he had good tea for sale, and did, then and there, offer for sale, and did sell to the said Elizabeth Beckworth sixteen paper packages, which he the said James Williams Foster, otherwise James William Foster, did falsely pretend were each and every of them composed of good tea, by means of which said false pretences, the said James Williams Foster, otherwise James William Foster, did then unlawfully obtain from the said Elizabeth Beckworth one pound, sixteen shillings in money, the money of William Bernard Beckworth, her husband, with intent to defraud, whereas in truth and in fact the said James Williams Foster otherwise James William Foster was not a tradesman in the tea trade in Leicester, and the said sixteen packages were not each or any of them composed of good tea, but each and every of the said packages contained a mixture composed of tea, sand, quartz, and magnetic oxide of iron which said mixture is unfit for food and injurious to health, as he, the said James Williams Foster, otherwise James William Foster, well knew at the time when he did falsely pretend as aforesaid."

It appeared in evidence as follows:

The prisoner is a hawker, residing at West Bromwich, in the county of Stafford. On the 17th Nov. 1876, he called on the wife of the prosecutor, who is a licensed victualler at Hugglescote, in the county of Leicester, and representing himself to be a tea dealer, residing at Leicester, offered to the said Elizabeth Beckworth tea for sale which he said was good tea. He had with him sixteen packages of what appeared to be each 1lb. packages of tea. He produced a sample of tea which appeared to be good tea, and he then opened one of the packages taking out of it a quantity and stating to Mrs. Beckworth "you see it's like that I showed you." Mrs. Beckworth eventually bought the whole quantity for 1l. 16s., that is at the rate of two shillings and three pence per pound, in the belief that it was good tea as represented by the prisoner.

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When the prisoner had left, Mrs. Beckworth opened the packages and found that in addition to tea they contained a mixture of sand and other stuff unfit to drink. Mrs. Beckworth communicated with the police, and the mixture was submitted to Dr. Emmerson, the analyst, of the county of Leicester, who found that the mixture was composed of tea, sand, quartz, and oxide of iron, and unfit for food or drink.

A week after the sale the prisoner called again at the house of the prosecutor, and being remonstrated with, declared that the substance was tea, and what Mrs. Beckworth took for sand was tea dust. He offered, however, 2lb. of good tea to make it up, which the prosecutor refused to receive.

The prisoner was arrested on a warrant, and while in custody had an interview with the police constable in his cell, to whom he stated that he knew he had done wrong, and that if he got out of this job he would lead a different life.

At the trial Dr. Emmerson, the county analyst, was called as a witness. He deposed that the mixture only contained twenty-five per cent., or one quarter in weight of tea, that the rest was sand, quartz, earth, and oxide of iron, unfit to drink, and injurious to health. He also stated on examination that he believed that the adulteration had taken place in China, and that the mixture was known in the trade as Lye tea.

On this the learned counsel, for the prisoner, appealed to me to stop the case. This, however, I declined to do, and the following witness was called for the defence.

Mr. Simmonds, who stated that he was a wholesale tea dealer at Birmingham, and had sold the packages in question to the prisoner. Mr. Simmonds stated he had purchased the mixture from the bonded warehouses in London; had paid 1s. 2d. per pound for it; and had sold it to the prisoner at 1s. 4d. per lb.; and that in his belief the packages as produced in Court were the same as those made up in his shop and sold to the prisoner. That he should call the mixture tea though not good tea; and though he should not drink it himself, as he could get better, he was not prepared to hear that it was injurious to health. He also said that he did not think that a hawker of tea, not being a scientific analyst, could have discovered the deleterious ingredients mixed with it as the county analyst had done.

On this I charged the jury that if the case were one of simple commendation or praise of an article and an exaggeration of its quality only, it was not a case under which the prisoner could be convicted; and that before they convicted the prisoner they must be satisfied that he knew what the real nature of the packages was, that it was not tea, but a mixture of articles unfit for drink; and that knowing the nature of the mixture he designedly falsely pretended to the prosecutor's wife that it was "good tea" with intent to defraud; that the question was between simple exaggeration and misrepresentation of a fact specific to the contract with intent to defraud.

The jury retired to consider their verdict, and found the prisoner guilty, and I sentenced him to six calendar months' imprisonment with hard labour; a punishment which I inflicted, because as I told him in passing sentence, the prisoner had previously been convicted and had suffered a like term of imprisonment for a similar offence, but the

execution of such sentence was respited, and the prisoner has been discharged on recognizance of bail to render himself in execution.

The question for the Court to consider is whether I was right in my direction to the jury, or whether I should have directed them that there was no offence at law in the case as proved.

HENRY ST. JOHN HALFORD.

Sills, for the prisoner.—The conviction cannot be sustained. There was a misdirection in not leaving the question to the jury whether or not this article was "tea;" and secondly, upon the evidence, the chairman should have ruled that no offence was proved to have been committed. The facts showed that this was tea, although adulterated and was known and sold in the market as Lye tea. In calling it good tea the prisoner was only using a word of commendation or it may be exaggeration. In this case there was no misrepresentation of any specific fact such as existed in the decided cases upon this subject. The following authorities were cited:

Reg. v. Kerrigan, L. & C. 383; 9 Cox C. C. 441;
Reg. v. Ball, Car. & Mar. 249;
Reg. v. Roebuck, Dears & B. 24; 7 Cox C. C. 126;
Reg. v. Goss, Bell 206; 8 Cox C. C. 262;
Reg. v. Abbott, 1 Den. 173; 2 Cox C. C. 430;
Reg. v. Eagleton, Dears 515; 6 Cox C. C. 559;
Reg. v. Ardley, L. Rep. 1 C. C. R. 301; 12 Cox C. C. 23;
Reg. v. Leigh, 8 Cox C. C. 233;
Reg. v. Pratt, 8 Cox C. C. 334;
Reg. v. Bryant, Dears & B. 265; 7 Cox C. C. 313.

Jacques, *contra*, was not called upon to argue.

KELLY, C.B.—There is no reasonable doubt in this case. The prisoner, by falsely representing himself as a tea dealer, and producing samples of good tea, prevailed on the prosecutrix to buy sixteen packages of what appeared to be tea. When the prosecutrix opened the packages she found that only one-fourth part was tea and three-fourth parts consisted of different things of a deleterious and dangerous character. It is said it should have been left to the jury to say whether this composition was tea at all. It was not merely false commendation on the part of the prisoner, but wilful and fraudulent misrepresentation, and the only justification for applying the term tea to it is that it is believed to be an article adulterated in China, and known in the trade as Lye tea, which means the dregs of tea, and if it had been so called no one would buy it. The only question is whether the prisoner's representations were mere commendation of the article or false pretences. It appears that the prisoner represented himself as a tea dealer at Leicester, whereas he was only a hawker; he represented this article as good tea, and showed at the same time samples of good tea, whereas the article when opened was found to contain three-fourth parts of noxious things which rendered the article totally different from tea. The case was left very properly to the jury, with this direction, that if the prisoner's representations were mere simple commendation and exaggeration of the quality of the article, they were not to find him guilty of false pretences, and that before they convicted him they were to be satisfied that he knew what the real nature of the packages was—that it was not tea but a mixture of articles unfit to drink, and that knowing the nature of the mixture, he designedly and falsely pretended to the prosecutor's wife that it was good tea, with intent to defraud; that the question was

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between simple exaggeration and misrepresentation of a fact specific to the contract with intent to defraud. If the mixture had consisted of nine-tenths of tea, and a small portion only of other ingredients, the case might have been different. The prisoner seemed to have been quite aware that it was a fraud, for after his arrest he stated to the constable that he knew he had done wrong, and that if he got out of this job he would lead a different life. The conviction must, therefore, be affirmed.

The rest of the COURT were of the same opinion.
Conviction affirmed.

Saturday, Feb. 10, 1877.

(Before KELLY, C.B., MELLOR, J., LUSH, J., DENMAN, J., and HUDDLESTON, B.)

REG. v. W. E. KENNY.

Stealing and receiving—Husband and wife—Adultery.

The prisoner, while living in adultery with the prosecutor's wife, was found in possession of prosecutor's property, and thereupon indicted and convicted for receiving the property well knowing it to have been stolen. Upon the facts it appeared that no other person than prosecutor's wife could have stolen the property.

Held, that the conviction for receiving could not be sustained, as a wife cannot steal her husband's property.

CASE reserved for the opinion of this Court by the Recorder of Chester.

At the quarter sessions for the city and borough of Chester and county of the same city, held before me, on Monday, the 8th Jan. 1877, William Edward Kenny was tried upon an indictment which charged him in the first count with stealing, on the 26th Aug. 1876, certain money to the amount of 143*l.*, one purse, one silver watch, one child's cloak, one scarf, one American box, one prayer book, two money bags, and other articles of the moneys, goods, and chattels of Edward Gurn; and in the second count with feloniously receiving on the day and year aforesaid the moneys, goods, and chattels aforesaid, well knowing the same to have been feloniously stolen.

The following was the evidence:

Edward Gurn.—I am an innkeeper at Burslem. On the 23rd June 1876, my wife left my house without my knowledge or consent. The same night I missed 143 sovereigns. The money was in a bag. This bag (produced) is it. There was another bag without money in it. This (produced) is it. This watch (produced) is mine. My wife wore it sometimes. I gave her no permission to take it or any of the things. This prayer book (produced) is mine. These three sheets (produced) I believe to be mine. Four were missing after my wife left. This bed cover, baby's cloak, scarf, and this American box (all produced) are mine. The money I saw safe on the morning of the 23rd June. I was saving it to buy horses in Ireland. Three days after my wife left, I saw the prisoner. He came to my house. A week after that he came again, and asked me how much money my wife took. I told him 15*l.* or 20*l.* I told him that because I wanted some information from him. I accused him of being out car driving with my wife on the Sunday before. He denied it. The prisoner left the neighbourhood shortly after and I heard no more of him or my wife till October when I went to Ireland with a police officer. I found them together at Belfast. They were in a back room packing a box. The prisoner was packing it. It was my American box. I saw some of the contents of the box. My prayer book was in it, and the child's cloak. The bed cover was in the prisoner's box. I saw the prisoner searched, he was wearing my watch.

Cross-examined.—I sometimes wore the watch, so did my wife. I had another. I wore both as I liked. My wife deposited over 100*l.* with a Mr. Jackson at Cheadle, eighteen months before. She did not do that when I had a woman Sherlock in the house. Nothing of the sort took place. My wife was in court at Tunstall. She did not give evidence. The gold was looked up in a drawer, I had the key in my pocket, and she must have got another.

Re-examined.—She took the 100*l.* to Jackson against my will. It was my money. I wrote to him for it, and he sent me a cheque, which I cashed, and this was part of the 143*l.*

James Dodd.—I am a sergeant, Staffordshire Police. The prisoner was in that force until the 24th July last, stationed at Burslem. He had not much money. His wages were 22*s.* per week. I heard of him borrowing from his comrades. He was a single man. I went with prosecutor to Belfast in October. We found the prisoner and the prosecutor's wife there together. He was wearing this watch (produced). I found on him in these two bags (produced) 98*l.* 14*s.* 8*d.*

Cross-examined.—There were four Irish 1*l.* notes in the money. The bags were in his pockets. All the other things (except the watch) were in the boxes and in the rooms occupied by the prisoner and Mrs. Gurn.

Re-examined.—The prisoner was packing the box in which I found the bed cover.

Harriet Upton.—[Evidence of inability to travel arising from illness having been duly given, the deposition of this witness before the magistrates was read as follows:]

I am a single woman and live at 10, Paradise-row, Chester. I know the prisoner. I recollect him coming to my house early in the month of August last. It would be about one in the morning. Previously to his coming a lady had been lodging in my house about six weeks. She gave me the name of Mrs. Burslem. The photograph now produced is the photograph of the lady. Mrs. Burslem opened the door for the prisoner when he came. They occupied the same bed room that night and left at ten o'clock the night following. I see the American box produced. The prisoner assisted in moving the box down stairs, and from the house. Since the prisoner and Mrs. Burslem left, I have had a letter asking me to visit them. It came from Belfast. There was only one bed in that room.

Edward Gurn, the prosecutor, recalled.—The photograph now produced to me is the photograph of my wife.

Upon this evidence the counsel for the prosecution relied on the second count of the indictment and contended on the authority of the cases of *Reg. v. Deer* (L. & C. 240; 9 Cox C. C. 225) and *Reg. v. Featherstone* (Deans. C. C. 369; 6 Cox C. C. 376) that the wife by adultery with the prisoner in August at Chester "determined her quality of wife," and in then converting her husband's goods to her own use was guilty of larceny; and that the prisoner consequently could be guilty of receiving.

The prisoner's counsel argued that a wife cannot be guilty of larceny of her husband's goods, and that there is no decided case to that effect, the case of *Reg. v. Deer* being open to the inference that the receiving was from some person other than the wife, and he further contended that there was no sufficient distinct possession of the property by the prisoner (at all events, in the city of Chester, and within the jurisdiction of this court of quarter sessions) to render the prisoner liable to conviction as a receiver. He cited *B. v. Rosenberg* (1 Car. & Kir. 233) and *B. v. Prince* (11 Cox C. C. 145).

Having regard to the statute 24 & 25 Vict. c. 96, s. 96 which renders a receiver liable to be indicted wherever the principal felon might be indicted, I left the case to the jury, adopting the view taken by the counsel for the prosecution.

Under these circumstances the jury found the prisoner guilty of felonious receiving, and I post-

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poned the sentence until the opinion of the Court for the Consideration of Crown Cases could be taken and offered to take bail for the appearance of the prisoner to receive judgment.

I respectfully refer the Court to the cases enumerated in the note to the case of *Reg. v. Musters* (L. & C. 511), and I request the opinion of the court as to whether the conviction is right.

HORATIO LLOYD, Recorder of Chester.

F. C. Marshall, for the prisoner.—The prisoner ought not to have been found guilty of receiving. There is no ground for saying that the goods were stolen by anyone else than the prosecutor's wife, and a wife cannot commit larceny of her husband's goods. The case of *Reg. v. Deer* (L. & C. 240; 9 Cox C. C. 225) seems to support the view that an adulterer may be convicted of feloniously receiving property taken by a wife, when she leaves her husband's house, but there it was consistent with the facts that some other person might have stolen the property, as the wife when she left home had only a small bundle with her, and the prisoner was found in possession of property belonging to the husband of a bulk and weight which could not have been in the bundle. [DENMAN, J. referred to the report of the case in 32 L. J. 33, M. C. where Pollock, C.B. is reported to have said, "It is clear that all these things could not have been taken away by the prosecutor's wife when she left, as the bundle she carried was not sufficiently large to contain them. We think there was evidence which warranted the jury in drawing the inference they have drawn."] *Reg. v. Featherstone* (Dears. 369; 6 Cox C. C. 376) is a decision in which the adulterer was found guilty of stealing money carried off by a wife from her husband's house. Lord Campbell, C.J. is reported to have said in that case, "The general rule of law is that a wife cannot be found guilty of larceny for stealing the goods of her husband, and that is upon the principle that the husband and wife are in the eye of the law one person, but this rule is properly and reasonably qualified when she becomes an adulteress. She thereby determines her quality of wife, and her property in her husband's goods ceases. The prisoner was her accomplice, and the jury found that he assisted her, and took the sovereigns, knowing that she had taken them without her husband's consent." So in *Reg. v. Musters* (L. & C. 511; 10 Cox C. C. 50) it was held that a servant who assisted a wife in taking away the husband's property with the intention of carrying on an adulterous intercourse, is guilty of larceny. If, therefore, the wife could not steal the property, no one else could. The prisoner could not be convicted of receiving the property knowing it to have been stolen. Secondly, the venue is laid in Chester, and there was no evidence to show any receiving by the prisoner in Chester to give jurisdiction: (*Reg. v. Prince*, 11 Cox C. C. 145.) On this ground also the conviction was wrong.

Rose, for the prosecution.—The indictment only charges the prisoner with feloniously receiving the husband's goods; it does not aver that they were stolen by the wife; and the venue is Chester. On Upton's evidence the prisoner was carrying on an adulterous intercourse with the prosecutor's wife, and in possession of his property at Chester. The principle is laid down by Lord Campbell, C.J. in *Reg. v. Featherstone*, "It is said in 1 Russ. on Crimes, 23, that a stranger cannot commit larceny

of the husband's goods by the delivery of the wife, but a distinction is pointed out where he is her adulterer." In Dalton, 353, it is said, "but it should be observed that if the wife should steal the goods of her husband, and deliver them to B., who, knowing it, carries them away, B. being the adulterer of the wife, this, according to a very good opinion, would be felony in B., for in such case no consent of the husband can be presumed." [DENMAN, J.—The report of the case in 23 L. J. 128, M. C. is obviously more correct. Lord Campbell, C.J. is there reported to have said, "The general rule is that a wife cannot be convicted of larceny by stealing the goods of her husband. It is no larceny in her to carry away her husband's goods, as husband and wife are one person in the eye of the law. But the law has properly qualified that rule by saying that if a wife commit adultery, and then steal the goods of her husband with the adulterer, she has determined her quality of wife, and is no longer looked upon as having any property in the goods, and the person who assists her is guilty of larceny. I think the case of the prisoner must be considered as if he had taken the goods himself. This is not the case of a receiving of the goods from the wife, but the prisoner is supposed actually to have assisted her in taking them."] There is evidence from which it may be inferred that the prisoner was an accessory before the fact to the stealing by the wife, and the finding that he was a receiver may be sustained *Reg. v. Hughes* (29 L. J. 17, M. C.; 8 Cox C. C. 278. [LUSH, J.—How can the dictum that the act of adultery changes the status of the wife be maintained? Lord Coke, in 3 Inst. 110, says, "The wife cannot steal the goods of her husband, for they be not the goods of another, for the husband and wife are one person in law, *dux animæ in carne uno*." Does not the unity of person remain until the marriage tie is dissolved. They remain one person, and neither can steal from the other.]

KELLY, C.B.—I am of the opinion that the conviction must be quashed. This is not a case of stealing, but the prisoner has been convicted of receiving the property well knowing it to have been stolen. It may well be that when a wife has taken away the goods of her husband with a view to an ulterior adulterous intercourse, and her adulterer has participated in the act of taking them away, he may be indicted for larceny. This view seems to have passed through the mind of Lord Campbell, C.J. in *Reg. v. Featherstone*, but there is nothing in that case to show that a wife can be indicted for stealing the property of her husband. In the present case the prisoner is not convicted for stealing the property of the husband, and it is possible, if he had been, the question might have arisen whether he could have been convicted upon the evidence. I am far from saying that he could not. That is not the case here; but the prisoner has been convicted of receiving, and the case fails in showing that the property could have been stolen by any other person than the prosecutor's wife. By the law of England a wife cannot steal her husband's property. If the wife has not stolen the property, there was no evidence of the property having been stolen at all, and therefore the conviction of the prisoner, for receiving the property well knowing it to be stolen, cannot be sustained.

MELLOR, J.—I am of the same opinion. I agree

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that it cannot be said that the wife stole the property, and therefore, under the circumstances in this case, there was no evidence that the prisoner received the property well knowing it to have been stolen. With respect to the cases of *Reg. v. Deer* and *Reg. v. Featherstone*, the reports in the Law Journal show that they may be sustained in law on reasonable grounds. But those grounds are against the prosecution in this case.

LUSH, J.—I am of the same opinion. The property if stolen in this case must have been stolen by the wife. It is admitted that the wife did not steal the property when she left Burslem, as a wife cannot steal her husband's property, and they are one person in the eye of the law, and neither can be a witness for or against the other in criminal proceedings. At what time, then, did she become a thief? It is said when she became an adulteress. But how can that be? Adultery affords ground for a divorce, but the mere act of adultery does not make a difference in the status of husband and wife *per se*, and constitute the wife a thief if she afterwards takes away her husband's property. Therefore, if the property was not stolen by the wife in this case, the prisoner could not be guilty of receiving it well knowing it to be stolen.

DENMAN, J.—I am of the same opinion.

HUDDLESTON, B.—I am of the same opinion. Even the finding of the jury in the Divorce Court that a wife has committed adultery does not alter the status of husband and wife; there must be a decree of the court to effect that. In *Needham v. Bremner* (L. Rep. 1 C. P. 583; 35 L. J. 313, C. P.) where in a divorce suit both husband and wife had been found guilty of adultery, and the suit was dismissed, Erle, C.J. said that the judgment in the Divorce Court did not alter the status of the defendant's wife, but she continued to be his wife notwithstanding the jury thought she had done wrong. Therefore, although the verdict in such divorce suit might, as between the same parties be binding and conclusive, it certainly would not as between other parties. That being so, the wife could not steal the property, and therefore the prisoner could not be guilty of receiving the property well knowing it to have been stolen.

Conviction quashed.

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT WESTMINSTER.

Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

Dec. 6 and 7, 1876.

(Before COCKBURN C.J. and BRAMWELL and AMPHLETT, JJ.A.)

GRIFFITH AND WIFE v. TAYLOR; THATCHER v. TAYLOR.

Action for false imprisonment—Notice of action—Immediate arrest—24 & 25 Vict. c. 96, ss. 103, 113.

In an action for false imprisonment for giving a person into custody on a charge of larceny the question whether plaintiff has been "immediately apprehended" within the meaning of

24 & 25 Vict. c. 96, s. 103, so as to entitle defendant to notice of action under s. 113, depends on the circumstances of the particular case, and ought to be left to the jury.

Defendant found a box of his at Reading station, in the railway carriage in which plaintiffs were. He wished to arrest plaintiffs on the charge of stealing the box, but the station-master refused to detain the train. Defendant telegraphed from Reading, and had plaintiffs arrested on their arrival in London. Plaintiffs sued for false imprisonment. No notice of action was given, and the verdict was entered for defendant on the plea of not guilty, by statute 24 & 25 Vict. c. 96, ss. 103, 113.

Held (affirming the judgment of the Common Pleas Division), that the question whether the arrest was immediate or not depended on the particular circumstances, and ought to have been left to the jury, and there must be a new trial.

APPEAL from the decision of the Common Pleas Division.

These were two actions for false imprisonment, and the facts in both cases being the same they were tried together. The plaintiffs in the two actions, Mrs. Griffith and her sister Miss Thatcher, who were public singers, had been singing at a foresters' fête at Haddington Hall, near Oxford, and were returning to London by an evening train, accompanied by four other persons; they got into a third class carriage at Oxford. The defendant, who was travelling from Oxford to Reading by the same train, had with him a small wooden box with a strap round it containing eggs. He left the box on a bookstall on the platform, and were absent a few minutes, and when he came back to get into the train the box was gone. When the train arrived at Reading the persons who were travelling with the plaintiffs got out and went to the refreshment room, leaving the plaintiffs in the carriage. The defendant who was looking for his box came to the carriage in which the plaintiffs were, and the box was found under the seat of the carriage. The defendant accused the plaintiffs of stealing the box, and requested the station-master to detain the train in order that they might be taken into custody. The station-master refused to do so, and the plaintiffs went on in the train. The defendant then communicated with the police at Reading, and caused a telegram to be sent to London, ordering the arrest of the plaintiffs, and stating that the defendant would go on from Reading to London by the fast train. Owing to some error, the telegram received by the police in London stated that he would arrive by the first train. The plaintiffs were taken into custody by the police on their arrival in London, and were detained in custody for several hours, but when it was found that the defendant had not arrived by the first train, they were discharged. Some days afterwards they were again arrested on a warrant obtained by the defendant, and were taken to Oxford, and brought before the magistrates, and charged with stealing the box. The magistrates dismissed the charge. No notice of action was given, and at the trial, which took place before Brett, J., at the Middlesex sitting, after Michaelmas Term 1874, the jury found that the defendant honestly believed in the existence of facts which, if true, would have afforded a justification, that is, honestly believed that the plaintiffs had been found stealing the box, and the verdict

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was entered for the defendant on the issue raised by the plea of not guilty by statute (24 & 25 Vict. c. 96, ss. 103, 113). (a) A rule nisi for a new trial was afterwards obtained on the grounds that there was no evidence of facts which warranted the jury in finding that the defendant was protected by the statute, that the verdict was against the weight of evidence, that the judge did not sufficiently explain to the jury the meaning of the words "found committing," in sect. 103, and for misdirection.

The Common Pleas Division (Lord Coleridge, C.J., and Brett and Archibald, JJ.), made the rule for a new trial absolute, and the defendant appealed.

Jelf and *Bosanquet* for the defendant.—To entitle the defendant to notice of action it is sufficient to show that on some grounds he had a *bond fide* belief in the existence of facts which if they had really existed would have justified the arrest. Supposing there really were a larceny in this case, it would be a continuing act, although there was a complete *asportavit* when the box was taken from the bookstall at the Oxford station. The defendant did all he could do; his whole conduct shows that he was intending to act in pursuance of the statute. He kept up a constant and hot pursuit, which is all the cases say is necessary. The judgment of Jervis, C.J., in *Read v. Coker* (13 C. B. 850; 22 L. J. 201, C. P.), supports the defendant's contention. *Downing v. Capel* (L. Rep. 2 C. P. 461; 36 L. J. 272, C. P. 97, M. C.; 16 L. T. Rep. N. S. 323) shows the principles on which the courts proceed in determining what is hot pursuit. In the present case the defendant is simply using the best practicable means for doing what he is unable to do himself, i.e., arresting the plaintiffs. He used the telegraph, which is the same thing as if he had called to a person at a distance and told him to arrest. He could not have acted more promptly under the circumstances, and there was not time or opportunity to obtain a warrant.

Digby Seymour, Q.C. and *Culpepper*, for the plaintiffs.—The question as to being "found committing" the felony is one which ought to be left to the jury.

Roberts v. Orchard, 33 L. J. 65, Ex.; 2 H. & C. 769; *Horley v. Rogers*, 29 L. J. 140, M. C.; 2 E. & E. 674; *Chamberlain v. King*, L. Rep. 6 C. P. 474; 40 L. J. 273, C. P.; 24 L. T. Rep. N. S. 736.

What is found by the jury is not sufficient to entitle the defendant to a verdict; their attention was not sufficiently called to the question which

by the statute they ought to decide. The plaintiffs ought to have been "forthwith" taken before a magistrate in order to entitle the defendant to the protection afforded by the statute. According to the decision in *Horley v. Rogers* (*ubi sup.*) to bring the case within the provisions of the statute the offence must be one which is patent to the eye. There could not be an immediate arrest at Reading, for the offence which the plaintiffs were charged with, if it really was committed at all by anybody, was completed at Oxford.

Reg. v. Curran, 3 C. & P. 397.

Bosanquet, in reply, referred to

Cann v. Clipperton, 10 A. & E. 583;

Hanway v. Boulton and wife, 1 M. & E. 15.

COCKBURN, C.J.—I am of opinion that the judgment of the Common Pleas Division ought to be affirmed, but I cannot say that I have come to this conclusion on exactly the same grounds as those on which their judgment was based. I think, therefore, that it is right to give my own reasons for the decision. The question turns on the construction of sects. 103 and 113 of 24 & 25 Vict. c. 96. [Reads the sections.] According to the latest authorities on the law as to giving notice of action for an act done in pursuance of this statute, it is laid down that to entitle the defendant to notice of action he must have acted under a *bond fide* belief in the existence of circumstances, which if they had really existed, would have afforded a justification for what he had done. The decision in cases of this kind turns on the two parts of the clause in sect. 103 to which I have referred. The first part relates to the question whether the party arrested is found committing the offence for which he is arrested, as to that part of the section the question of *bond fide* belief is all essential. The second part relates to the immediateness of the arrest, and as to this the questions turn, not on the mind of the person making the arrest, but on his act. When you come to act under a belief in the existence of such a state of facts as would if they existed justify an act done under the statute, there still remains the question whether the act was done in conformity with the statute. If the defendant were acting under a *bond fide* mistake of fact as to the persons arrested having been found committing the offence with which they were charged, he would, so far as that part of the section goes, be within the protection of the statute, but if he were acting under a mistake as to the meaning of the statute on the question whether the arrest was immediate or not, he would not be protected. In the present case the defendant, no doubt, believing *bond fide* that a felony had been committed, and under circumstances which were calculated to make him believe that such was the case, caused the plaintiffs to be arrested. If a felony had really been committed he would have been justified, but the question is whether he is protected by the statute, having acted under a mistaken belief. It was argued for the plaintiffs that they could not have been found committing the offence, because the offence, if any, was committed at Oxford: the box was left on the platform at Oxford, and appears to have been taken by some one; it was afterwards found in the plaintiffs' possession, and, if taken at all, it was taken at Oxford. But if it were taken at Oxford, and removed, the asportation would continue. If

(a) By 24 & 25 Vict. c. 96 (An Act to consolidate and amend the Statute Law of England and Ireland relating to larceny and other similar offences.)

Sect. 103. "Any person found committing any offence punishable either upon indictment or upon summary conviction by virtue of this Act, except only the offence of angling in the daytime, may be immediately apprehended without a warrant by any person, and forthwith taken together with such property, if any, before some neighbouring justice of the peace, to be dealt with according to law."

By sect. 113. "All actions and prosecutions to be commenced against any person for anything done in pursuance of this Act shall be laid and tried in the county where the fact was committed, and shall be commenced within six months after the fact committed, and not otherwise; and notice in writing of such action, and of the cause thereof, shall be given to the defendant one month at least before the commencement of the action; and in any such action the defendant may plead the general issue, and give this Act and the special matter in evidence at any trial to be had thereupon."

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property is taken and carried away, and if, while it is in the course of removal, the person who took it is found in possession of it, the asportation continues. A case was put in the course of the argument of a man who steals property and runs away with it, and, on pursuit, is taken with the property in his possession; in such a case as that he is found committing the offence of stealing the property. I think the statute would be satisfied if the defendant acted under it in the *bonâ fide* belief that the plaintiffs were found committing the offence, and he would have been justified, if they had actually been found committing it. But it is not found by the jury that the plaintiffs did commit any offence, and we must take it that their guilt was negatived. Then there is the question whether the apprehension was immediate. No doubt sects. 103 and 113 of 24 & 25 Vict. c. 98, were meant to meet cases of misdemeanor, but the words of the sections are large enough to comprehend cases of felony, and it is intended that where the offence is committed, and a person is found committing it, anybody, without a warrant, may take him and bring him before a magistrate. But although "immediate" is a strong word, the clause must receive a reasonable construction. If a person is found committing an offence against the statute, and his apprehension on the spot is impracticable, and if, by pursuit he is taken at a distance, this may or may not be an immediate apprehension within the meaning of the statute according to the particular circumstances; in every case it is a question of fact. Here, if on application to the station-master, the defendant could have stopped the train so as to enable him to apprehend the plaintiffs, and he had not done so, but had allowed the plaintiffs to escape, and had afterwards followed or sent after them, and caused them to be apprehended, the statute would not protect him, but if immediate apprehension on the spot were impracticable, but pursuit were made, and the arrest effected on the earliest possible opportunity, that might be within the Act. If he had deputed another person to go and act for him, I think that would be sufficient. If he had sent on by a faster train, so as to make the arrest as soon as it was possible to come up with the train by which the plaintiffs had gone on, I think that would be within the statute, for he would have arrested on instant pursuit, and in the same way if he telegraphed and caused them to be arrested, availing himself of the first opportunity which he had of making the arrest, I think that would do. But it is impossible for us to say what the decision ought to be on the question whether there was an immediate apprehension or not. It is a question of fact and of degree, and, therefore, is a question for the jury. It was not left to them, and we cannot decide it here. We can only say that the statute should receive this or that construction. The rule will, therefore be absolute for a new trial, not on the ground that the circumstances were not such that the defendant may have *bonâ fide* believed that the plaintiffs were found committing the offence, but on the ground that the defendant may or may not have done what the statute requires to bring him within the protection afforded by sect. 113, and the question whether he has or not ought to be decided by the jury.

BRAMWELL, J.A.—I am also of opinion that this appeal ought to be dismissed. I think that on

the evidence in this case if the plaintiffs had been found committing the offence with which they were charged it ought to be held that they were found committing it at Reading; but I do not wish to add anything further on that point, for they were not found committing the offence. As to the other point, it is difficult to lay down any fixed rule to meet all cases, for it is always a question of degree. I am not sure that the judge ought not to have told the jury that the plaintiffs were not found committing the offence, and that there was not an immediate arrest, and I am not sure that it makes any difference whether the arrest was not made at the place where the persons arrested were supposed to have been found committing the offence, because the person who afterwards arrested could not, or because he would not, arrest on the spot. I agree with the Lord Chief Justice that, if this is not a question of law which ought to be ruled in favour of the plaintiffs, it is a question for the jury, because we cannot say that it is a question of law which ought to be ruled in favour of the defendant. I should suggest for the guidance of the judge before whom the trial will take place that he should leave the question to the jury whether there was an immediate arrest, and reserve the point. The case must go down for a new trial.

AMPHLETT, J.A.—I am of the same opinion, on very much the same grounds as those stated by Bramwell, J.A. Although I concur with the rest of the court that the case must go back to be tried again, for the judge ought to leave it to the jury to find the exact circumstances, and the facts are not before us so as to enable us to decide how the verdict ought to be, even if an arrest in London could be held to be immediate, I should think myself that no apprehension in London for an offence supposed to have been committed at Reading, could be within sect. 103. I think the intention of the Legislature was that the offender should be arrested then and there, and if he gets away and is not taken in hot pursuit, it cannot be an immediate arrest under that section. But I think that the case should go back for a new trial, and the facts should be found.

Judgment affirmed.

Solicitor for plaintiffs, E. M. Chubb.

Solicitor for defendant, Charles Mallam

HIGH COURT OF JUSTICE.

COMMON PLEAS DIVISION.

Reported by P. B HUTCHINS, and S. HARR, Esqrs.,
Barristers-at-Law.

Friday, Nov. 17, 1876.

DAWSON (app.) v. ROBINS (resp.)

Parliamentary franchise—County vote—Rent-charge.

The grantee of a freehold rentcharge of the yearly value of 40s. or upwards issuing out of a reversion is entitled to vote at county elections.

APPEAL from the decision of a revising barrister.

The following case was stated for the opinion of the court.

At a court held at Southampton on the 22nd Sept. 1876 by me, the barrister appointed to revise the lists of voters for the Southern Division of the county of Hants, objection was duly made to the claim of Oliver Robert Dawson to

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have his name inserted in the list of voters in the parish of St. Mary for the said Southern Division of the said county.

The qualification stated by the said Oliver Robert Dawson in his claim was a "freehold rentcharge" issuing out of houses and land Itchen Bridge-road and Dock-street, owner Henry Compton.

It appeared that by an indenture bearing date 29th Sept. 1874, the reversion in fee in the said premises was conveyed to the said Henry Compton, subject to certain leases of 1000 years each, created by indenture of demise bearing date 29th July 1864. In each of these leases a ground rent was reserved, and in each was contained a power of re-entry in default. These leases are still subsisting.

By indenture bearing date the 15th Jan. 1875, the said Henry Compton granted to the said Oliver Robert Dawson a yearly freehold rentcharge of 2l. 10s. charged upon the said premises. The said indenture also contained a power of distress in default of payment of the said rentcharge.

Copies of the aforesaid indenture of the 29th Sept. 1874, and of the 15th Jan. 1875, comprised in schedule B. are annexed to this case.

It was not disputed that the reserved groundrent was amply sufficient to meet this and other rentcharges granted about the same time and issuing out of the same premises, and that the amount due to the said Oliver Robert Dawson and the other grantees had been actually paid to each of them respectively by the agent of the said Henry Compton.

The claims of four other persons whose names are set out in the schedule A. hereunto annexed were objected to on the same grounds.

I was of opinion that considering the nature of Henry Compton's interest the power of distress contained in the indenture of the 15th Jan. 1875, was nugatory, and disallowed the claims of the said Oliver Robert Dawson and of the said four other persons to be inserted in the said list.

The cases of the four other persons mentioned in schedule A. depending upon the same decision are consolidated with this case.

If the court be of opinion that my decision was wrong the register is to be amended by inserting the names of O. R. Dawson and of the four other persons in the said list.

Bidley, for the appellant.—The appellant is entitled to have his name placed on the register. A rentcharge is a tenement within the meaning of 10 Hen. 6, c. 2, and its nature is not altered by the abolition of real actions by 3 & 4 Will. 4, c. 27, s. 36.

Thomas v. Sylvester, L. Rep. 8 Q. B. 368; 42 L. J. 237, Q. B.; 29 L. T. Rep. N. S. 290;

Whitaker v. Forbes, L. Rep. 10 C. P. 583; 44 L. J. 332, C. P.; 33 L. T. Rep. N. S. 582.

[He was stopped by the court.]

Chester, for the respondent.—The grantee of such a rentcharge as this has merely a personal remedy against the grantor; he has no remedy against the land itself. [LINDLEY, J.—He might obtain a decree for a sale to raise the arrears *White v. James* (26 Beav. 191). Lord COLERIDGE, C.J. referred to *Dodds v. Thompson*, L. Rep. 1 C. P. 133; 35 L. J. 97, C. P.] *Thomas v. Sylvester* (*ubi sup.*) is distinguishable, because there a good rentcharge was created out of the seisin in fee by

the Statute of Uses. [Lord COLERIDGE, C.J.—Can no one create a valid rentcharge except a yeoman farming his own land?] Not for this purpose. This is merely a payment in gross, and is not a tenement within 10 Hen. 6, c. 2, so as to confer a right to vote. He also referred to Bacon's Abridgment "Rent" B.; *Steele v. Bosworth* (34 L. J. 57, C. P.); Hopwood and Philbrick's Registration Cases 106 s. c.

Lord COLERIDGE, C.J.—In this case I am of opinion that the decision of the revising barrister was wrong, and ought to be reversed. We must look at the words of the statute in order to see whether the person objected to was qualified to vote. The statute 10 Hen. 6, c. 2 says that the persons who are to vote are those who have a "frank tenement" of the value of forty shillings a year. Now has the appellant in this case such a "frank tenement"? By the deeds which accompany the case it appears that Mr. Compton held the land in fee subject to certain leases, that is, he was the reversioner. Then he creates these rentcharges by conveyances each of which is sufficient to give a "frank tenement" of the value of 2l. 10s. a year issuing out of the land, for there is a good conveyance, and the grantee receives the profits of the interest conveyed, which is a rentcharge of 2l. 10s. a year, and the land is sufficient to pay the amount. I am, therefore, of opinion that the appellant was entitled to vote.

LINDLEY, J.—I am of the same opinion. There are two questions to be considered, first, what sort of interest does the appellant take, and secondly, what is the value of that interest? Can any conveyancer say that this is not a freehold interest, being a rentcharge in fee simple charged on the reversion? Then as to the value. The property is of ample value to pay the yearly sum which is charged upon it, the appellant is in receipt of the profits, he has remedies to enforce payment, and to my mind he has a remedy against the land, for I think he could, if it were necessary, get a sale of an aliquot part of the land to raise the value of the interest to which he is entitled. I am therefore of opinion that the decision of the revising barrister ought to be reversed.

Judgment for the appellant.

Solicitors for the appellant, *Roberts and Barlow*; for *Coxwell, Bassett, and Stanton*, Southampton.

Solicitors for the respondent, *Bradby, Robins, and Co.*, Southampton.

Nov. 21, 1876, and Jan. 12, 1877.

HIGGINSON v. SIMPSON.

Gaming and wagering—Contract by way of reward for information—Illegality—8 & 9 Vict. c. 109, s. 18.

A wager under the disguise of a contract to pay a reward for information

Held to be illegal.

Willis shewed cause against a rule nisi to enter a verdict for the defendant.

French, for the rule, cited *Beyer v. Adams* (26 L. J. 841, Ch.), in which case a claim to prove against the estate of a deceased stakeholder for the amount of money deposited with him was disallowed.

The facts of the case and arguments of counsel

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appear in the judgment of the court (Grove and Denman, JJ.), which was delivered by

DENMAN, J.—In this case, heard before my brother Grove and myself, we took time, in order to enable us to look into the cases cited, one of which had been so recently decided, that we had not an opportunity, during the argument, of fully examining the report. A verdict had been entered for the plaintiff in the Court of Passage, at Liverpool, for 50*l.*, with leave to the defendant to move to enter a verdict for him upon the finding of the jury. These findings were as follows: That the plaintiff and defendant agreed together that the plaintiff, a professional betting man, was to lay out 2*l.* in betting on a horse called Regal for a particular steeple chase, taking the odds, or betting 25 to 1 on the horse. If Regal won, it was agreed that the plaintiff was to have 50*l.* from the defendant, to be paid out of the defendant's winnings, if he (the defendant) backed Regal. If Regal lost, the plaintiff was to pay the defendant 2*l.* The defendant did back Regal, who won; and the defendant thereby won in bets, which he had made on Regal, 57*l.* of which the plaintiff claimed 50*l.* It was contended by Mr. French for the defendant that this transaction was "an agreement by way of gaming or wagering," within the 8 & 9 Vict. c. 109, s. 18; and the action one "for recovering money won upon a wager," within that section. On the other side it was argued by Mr. Willis for the plaintiff that the real meaning of such a contract was merely that the defendant undertook to pay the plaintiff so much out of his winnings, in case of Regal's success, by way of remuneration to the plaintiff for giving the defendant the benefit of his skill, experience, and information, in naming a probably successful horse. We can, however, only look at the contract as it appears upon the findings of the jury, and, so looked at, it appears to us to be clear that it is a contract by way of wagering, and nothing else. Even if the object of the defendant in entering into such a bargain was correctly surmised by the plaintiff's counsel, the ultimate effect of the bargain was to be wholly dependent upon the occurring of an event over which neither party had any control; and the action was one founded upon the supposed right to recover money won upon the happening of that event, viz., the winning of a particular race. This being so, we think it matters not that the bargain was complicated by a provision for other contingencies, as, for instance, that the defendant was only liable to pay the 50*l.*, if he backed the particular horse, and won upon him. The substance of the contract is always to be regarded, and we think that a contract such as this, however disguised, is in substance a contract by way of wagering. In *Grizewood v. Blane* (11 C. B. 538), it was held that a contract was within the statute, though on the face of it it appeared to be a contract for the sale of shares, if it was in fact only intended that differences should be paid, and no shares really passed. And on the same principle, in *Rourke v. Short* (5 E. & B. 904), it was held that where a contract mainly depended upon a wager, no action could be maintained upon it, even an action for goods sold, when the parties had agreed that the price of the goods, agreed to be sold by the plaintiff to the defendant, should depend upon the result of a wager. The case of *Hill v. Fox* (4 H. & N. 359), was decided upon the same principle,

and is to the like effect. The cases cited by Mr. Willis on behalf of the plaintiff were none of them inconsistent with this decision. They were not cases of actions brought by one party to a wagering contract against the other for money alleged to be due upon the contract. In the case of *Beeston v. Beeston* (45 L. J. 230, Ex.; 33 L. T. Rep. N. S. 700), which was the most relied upon, the court only held that the plaintiff could recover on a cheque given by the defendant to the plaintiff for the amount of moneys received by the defendant for winnings in bets made by the defendant with third persons as agent for the plaintiff. This was held not to be the case of an action upon a contract by way of wagering, but of one brought upon a cheque given for money received by the defendant for which he was liable to account to the plaintiff. *Johnson v. Langley* (12 C. B. 468) was a similar case, and is no authority for the plaintiff in the present case, who sues upon the contract itself. We are of opinion that the rule must be made absolute to enter judgment for the defendant with costs.

Solicitors for the plaintiff, *Torr and Co.*

Solicitors for the defendant, *Visard, Crowder and Co.*

DIVISIONAL COURT FOR APPEALS FROM INFERIOR COURTS.

Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

Thursday, May 18, 1876.

FULHAM BOARD OF WORKS (apps.) v. GOODWIN (resp.).

Cost of sewer—New street—Previous sewer—Metropolis Local Management Act 1867 (25 & 26 Vict. c. 102, ss. 44), 52, 112.

In 1867, a sewer was built in a street, formed since 1862, of some houses in which the respondent was owner, at his expense, under 25 & 26 Vict. c. 102, s. 44.

In 1875 the appellants removed this sewer, and another in the next street, and constructed a new sewer in connection with the houses in both streets. They apportioned the cost and expenses of the works upon the owners of houses and land in the two streets. The respondent refused to pay his apportionment, and a magistrate dismissed the summons against him.

Held, upon a case stated, that this was not a sewer constructed in or for the drainage of a new street within the meaning of sect. 52 of the said Act, and that the apportionment was bad.

THIS was an appeal from the decision of the magistrate at Hammersmith Police Court.

The appellants herein are the District Board of Works for the Fulham district, and the respondent is a builder owning property in the district.

1. Complaint was made by the clerk to the said board of the non-payment by the respondent of the sum of 64*l.* as owner of certain premises situate and being in Mayland and Cunningham roads, in respect of certain sewer works carried out in the said roads, which said roads were formed and laid out as new streets since the 7th Aug. 1862. A summons was duly issued, and the parties attended, and the following facts were proved before the said magistrate:

2. The respondent is, and at the time of the making of the sewer was, in the year 1867, and

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still is the owner of houses in a road which in the year 1867 was and is now called the Mayland-road, and the tenants thereof had previously to the making of the new sewer paid sewer rates.

3. The respondent is not the owner of any house or land in the Conningham-road, which is a continuation of the said Mayland-road, and is hereinafter referred to and called Conningham-road.

4. On or about the 1st Feb. 1867, the Metropolitan Board of Works, sanctioned the construction of a sewer in the centre of the said Mayland-road by the owners, under the 44th sect. of 25 & 26 Vict. c. 102.

5. Such sewer was built and drainage works were made at the expense of the said John Goodwin, the respondent, according to the plans submitted to and approved by the Metropolitan Board of Works, and extended the entire length of the said Mayland-road, about 1050ft.

6. The construction of a sewer in the Conningham-road by the owners, with an outfall in the Uxbridge-road, was sanctioned by the Metropolitan Board of Works, and constructed in two sections. The first section was in accordance with such sanction; the second section, about 500ft. in length, was not in accordance with such sanction, with its outfall in the sewer in the Mayland-road, instead of into the Uxbridge-road.

7. In April 1875, the Board of Works for the Fulham district determined to have the sewers before mentioned taken up and reconstructed.

8. The provisions of the several Acts of Parliament relating to sewers, in force in 1867, were complied with by the respondent in the construction of the sewer constructed by the respondent in the year 1867, referred to in the 4th and 5th paragraphs of this case.

9. In the month of June 1875, the said district board caused the said sewers to be removed, and constructed a brick main sewer throughout the whole of the Mayland-road, and a large part of the Conningham-road, with manholes and gulleys sufficient to take the sewage of a large and populous neighbourhood, and connected the drainage of the houses in the said Mayland-road, and of several houses in the Conningham-road with the said new sewer.

10. The cost and expenses of the works in the last paragraph mentioned amounted to the sum of 2527l., and the Fulham district board apportioned the same upon the owners of the houses and land in the Mayland and Conningham roads, as shown upon certain plans in the proportions set forth in an apportionment of the 30th June 1875; which said plans and apportionment accompanied, and were to be taken as forming part of this case.

Upon the hearing of the said summons it was contended on the part of the respondent—

(1.) That the apportionment whereby the respondent was sought to be charged, and which amounted to the sum of 646l., was bad in law, because the district board, having removed the old sewer in the Mayland-road, sanctioned and made as stated in the 4th and 5th paragraphs of the case, were bound to substitute one as efficient, but not at the cost of the owners.

(2.) That the sewer in respect of which this present claim is made against the respondent, is a sewer for taking the sewage of the whole neighbourhood, including the side streets, and not of the said Mayland-road and Conningham-road only,

and that, therefore, the owners of houses in Mayland-road ought not to pay the cost.

(3.) That any sewer replacing an old one vested in the district board, ought to be made at the cost of the ratepayers of the parish.

The said magistrate was of opinion that the said summons ought to be dismissed, and dismissed the same accordingly, with costs, against the said district board.

The question for the opinion of the court is whether the respondent, John Goodwin, is liable to pay the said sum of 646l. in respect of the said apportionments.

If the court shall be of opinion that he is so liable, judgment is to be entered for the appellants with costs.

But if the court shall be of opinion that he is not so liable, judgment is to be entered for the respondent, with costs.

Boddam (with him *Philbrick*, Q.C.) argued for the appellants.—The section under which the sewers are alleged to have been made in 1867, is the 44th of the Metropolitan Management Amendment Act 1862 (25 & 26 Vict. c. 102): "It shall be lawful for the owners or occupiers of any land or premises in any parish, district, or part within the limits of the metropolis as defined by the firstly-recited Act, with the consent and subject to the regulations and conditions hereinafter mentioned, to construct sewers at their own expense for the purpose of draining such land or premises, and it shall be lawful for any vestry or district board in whom the sewers in any parish, district, or part are vested, if they shall deem it just and proper so to do, to contribute out of the rates under their control, applicable to the execution of works of sewerage, to the cost of any sewers constructed for the purpose aforesaid." Amongst the regulations and conditions mentioned in the subsequent sections, 45 to 51, is one requiring the sanction of the district board and the approval of the metropolitan board, which in this case had not been obtained. The section, therefore, which is applicable to the sewer charged upon this apportionment is the 52nd of the same Act: "Where any sewer shall, after the passing of this Act be constructed by any vestry or district board in or for the drainage of any new street, or of any house or houses erected since the 1st day of January 1856, the expense of constructing such sewer and the works appertaining thereto, including the cost of gulleys, side entrances, lengths of sewer at the intersection of streets, and other incidental charges and expenses, shall be borne and defrayed by the owners of such streets or houses, and of the land bounding or abutting on such street respectively." By section 112, "the expression new street shall apply to and include all streets hereafter to be formed or laid out, and a part of any such street, and also all streets the maintenance of the paving and roadway whereof had not, previously to the passing of this Act been taken into charge and assumed by the commissioners, trustees, surveyors, or other authorities having control of the pavements or highways in the parish or place in which such streets are situate, and a part of any such street, and also all streets partly formed or laid out." This unsanctioned sewer was the same for the purposes of the Act as if no sewer existed, and the case comes within the authority of *Sawyer v. Puddington* (L. Rep. 6 Q. B.). There the appellants, about 1866, built some houses abutting on the

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Harrow-road, and about the same time the vestry of the parish constructed a sewer along the Harrow-road. Sewer rates had been levied in respect of the land upon which the houses were built for more than five years prior to 1856. Before 1866 no sewer existed in this road, which was and continued to be a turnpike road until the 1st July 1864, on which day the vestry took charge of it for the first time. It was held that the Harrow-road was a new street within the meaning of section 112, and that the appellant was liable to be rated under sect. 52 of this Act.

Day, Q.C. (with him Kemp), for the respondent. —Sect. 68 of Metropolitan Local Management Act 1855 (18 & 19 Vict. c. 120) vests all sewers then vested in the metropolitan commissioners in vestries or district boards; "and all sewers made and to be made within any such parish or district, except sewers and works vested or to be vested in the Metropolitan Board of Works, as hereinafter mentioned, shall be vested in such vestry and board respectively." And by sect. 69 the vestry of every parish and the board of works of every district mentioned "shall (subject to the powers by this Act vested in the Metropolitan Board of Works) from time to time repair and maintain the sewers under this Act vested in them, or such of them as shall not be discontinued, closed up, or destroyed under the powers herein contained, and shall cause to be made, repaired, and maintained such sewers and works, or such diversions or alterations of sewers and works as may be necessary for effectually draining their parish or district." Under those sections of the earlier Act the appellants ought to have charged the repair of this sewer upon the district rates. This was not a sewer constructed under sect. 52 of the Act of 1862, in or for the drainage of a new street. [Stopped by the Court.]

OLMSTEAD, B.—We need hear no further argument for the respondent. We have no doubt this appeal must be dismissed. It has been contended that the respondent and other persons, who are owners of the houses and land bounding or abutting upon the street through which this sewer has been made, should pay for the expenses of the sewer. It was said this is a new street according to the definition contained in the Act, and the sewer was constructed by the appellants in or for the drainage of this street. But it appears that in 1867 a sewer was constructed under the 44th section of the Act of 1862, in the centre of the respondent's street; it was brought into use for the neighbourhood, and became vested in the appellants. The expense was paid by the respondent, and it appears to me that persons who have thus paid for a sewer once cannot under this Act be charged again for the construction of another. In 1875, for some purpose the district board determined to make a fresh sewer to serve the district, not merely for this particular street, but having connections with the houses in Conningham-road, which is a continuation of it. They have, however, attempted to charge the respondent for his apportionment of the expense of this fresh sewer, as if the 52nd section of the Act of 1862 applied to it. That section authorises such an apportionment when any sewer shall be constructed by a "district board in or for the drainage of any new street or of any houses erected since the 1st Jan. 1856." Although the definition of "new street" may

apply to this Mayland-road, it is unreasonable to apply this section under the circumstances here stated, and this is strongly confirmed by the provisions of the following section 53, which relates to streets in which previously to the construction of the sewer there had been no sewer or only an open sewer. The expenses are then to be defrayed in part only by the adjoining owners, the remainder to come from the general rate. It would be an inconsistent conclusion that the owners in this street should be charged entirely for the new sewer, although they had a sewer before; and where there was no sewer or an open sewer before, the adjoining owners should only be charged part of the costs incurred. I am satisfied, too, that this sewer was made for the district generally, and cannot be said to be in or for the drainage of any new street. This sewer could only have been made at the charge of the parish rate-payers, and the apportionment appealed against is bad. The appeal, therefore, from the dismissal of this summons cannot be allowed.

GROVES and FIELD, JJ. concurred.

Judgment for respondent.

Solicitors for appellant, Watson, Sons, and Boom.

Solicitor for respondent, W. A. Downing.

EXCHEQUER DIVISION.

Reported by H. F. DICKENS, Esq., Barrister-at-Law.

Feb. 2 and 6, 1877.

MONCK v. HILTON.

Vagrant Act (5 Geo. 4, c. 83), s. 4.—Using subtle means or devices by palmistry or otherwise to deceive—Rogue and vagabond.

The attempt to deceive and impose upon others by falsely pretending to exercise the peculiar and supernatural power of holding intercourse with the invisible world, and of obtaining answers and manifestations of power from invisible spirits is an attempt to deceive by "using subtle craft, means, or device by palmistry or otherwise," within sect. 4 of the Vagrant Act (5 Geo. 4, c. 83).

CASE stated by justices of Huddersfield, under 20 & 21 Vict., c. 43.

At a petty sessions held in and for the borough of Huddersfield, on the 11th Nov. 1876, the appellant was brought up in custody and a charge was preferred against him by Chief Constable Henry Hilton, the respondent, under sect. 4 of 5 Geo. 4, c. 83, for that he, the appellant, on the 23rd Oct. 1876, at Huddersfield, did unlawfully use certain subtle means or devices by palmistry or otherwise to deceive and impose on certain of Her Majesty's subjects, to wit, George Henry Hepplestone, Henry Bedford Lodge, and others, contrary to the statute; upon the hearing of which charge the appellant was convicted by the justices of the said offence, and they adjudged him, as a rogue and a vagabond, to be committed to the House of Correction at Wakefield, there to be kept to hard labour for the space of three calendar months.

Upon the hearing it was proved on the part of the respondent, and found as a fact that the appellant had agreed with one George Henry Hepplestone at the request of the latter to give two spiritualistic seances, at the residence of Henry

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George Hepplestone, for the sum of 2l. each; but that in the event of there being more than eight persons present at either of such seances then the payment to the appellant to be after the rate of 5s. for each person. It was further proved that in pursuance of this agreement the appellant held two seances at the residence of George Henry Hepplestone, on the 22nd and 23rd Oct. 1876, and that at the latter of such seances in respect of which no money was paid, George Henry Hepplestone, Henry Bedford Lodge, and others were present. It was further proved that the persons present at this seance (other than the appellant) were directed by the appellant to place their hands upon the table around which they were seated and their feet under their chairs. After which he said, "We spiritualists have to be very guarded in consequence of the Slade case, some call it psychic force, some animal magnetism, some legerdemain, some conjuring, some one thing, and some another; I call it spiritualism, but you must judge for yourselves." It was further proved that there was no light in the room except that given by a single gas jet, and that during what were termed the manifestations, the gas was turned almost out. The alleged manifestations were the following:

(a) Raucous were heard under the table, whereupon the appellant said, "They are soon here to night, the conditions are very favourable."

(b) The appellant placed a small tambourine upon a musical instrument called "Fairy Bells," and then put it on the table a little distance from himself. The instrument was then observed to move towards the appellant who inquired whether the company had seen it move, whereupon one of them asked him to request the spirit to move it in the opposite direction, to which the appellant replied, "We had better take the manifestations exactly as they come," and that it "couldn't be done." He was then asked "Why," and he answered "I don't know how it is done."

(c) A small musical box was then handed round the company who examined it. It was then placed by the appellant about half a yard in front of himself on the table. He said the spirits were able to play it. He then placed a wooden box over it, and the appellant then invited the company to ask it questions, and that one sound would signify "no" and three sounds "yes." Some questions were asked and certain sounds were heard, but these sounds were occasionally as many as five or six at a time. One of the company directed the appellant's attention to the fact that the musical box which had been placed under the wooden box was not wound up, whereupon the appellant said that the spirits could not only play but wind it up.

(d.) A hand appeared above the table immediately on the left of the appellant, who put the tambourine to it, and the fingers of the hand tapped it. The fingers did not move separately. The hand was not like a human hand, but like a wax hand which had been rubbed with oil and phosphorus.

After a short time the hand disappeared below the table. One of the witnesses was of opinion that the hand was like one of the kid glove hands found in the appellant's possession.

(e.) Two or three slates were placed by the appellant upon the table. He said they would receive messages from departed spirits. A small piece of pencil was placed by him upon one of the slates. He then took hold of one corner of the slate and a lady took hold of another corner of it. It was then held under the table, and whilst it was there the lady remarked she felt a great pressure upon it. One of the company asked for a message from some departed one. After the slate had been held under the table about a couple of minutes it was brought forth, and was found to contain in a very crabbed, singular writing, the words "Oh, for a lodge in some vast wilderness!" Another message was then asked for, and the appellant and the same lady again held the slate under the table. The lady remarked she

felt a very warm hand, whereupon the appellant said, "Well you're sure it's not my hand." She replied, "No, I am not." When the slate was again produced there was a button upon it and the following message, "Good night Philemon. Samuel." The appellant having previously stated that his spirit guide was Samuel Wheeler. It was proved that a scratching on the slate was heard at the same time that the lady felt a warm hand against her own. The button above mentioned was taken off the lady's dress; she stated that it was pulled from her dress rather violently.

(f.) One of the notes of the piano which was in the room sounded. A lady was then asked by the appellant to sit on the lid of the piano. She did so, and the same note sounded. It was proved that the appellant was close to the piano at the time. Mr. Lodge then asked the appellant if the spirit would play some other note. The appellant stamped, whereupon Mr. Lodge asked, "That's you, doctor isn't it?" and he said "yes." Mr. Lodge then asked, "Will you kindly play a note lower?" Then came another stamp with the appellant's foot, which signified "No." It was proved that whilst these manifestations were being produced there were two boxes in the room belonging to the appellant.

When the manifestations were concluded two of the ladies present left the room, whereupon Mr. Lodge told the appellant that he was obliged to the appellant for the entertainment, but was not satisfied, and that he would himself undertake to produce the same manifestations under the same conditions. Mr. Lodge asked to be allowed to search the appellant, remarking that if he could not find the spirit hand, a duplicate musical box, and other things, he would give 50l. to the cause of spiritualism. The appellant declined to be searched, and appealed to Mr. Hepplestone, at whose house the seance was held, and where the appellant had lodged as his guest, to protect him. When the two ladies returned into the room the appellant seized one of the boxes, struck Mr. Lodge, who stood at the door, and rushed upstairs and locked himself in his bedroom, from which he escaped by fastening a sheet against the waterspout and sliding down. He left certain boxes, which were subsequently examined, and in them were found a great number of articles, amongst which were kid glove hands, stuffed, and having elastic attached to them, linen, with faces faintly sketched upon it, white gauze thread, thin wire, a number of slates and pencils, musical box, musical albums, and a long rod divisible into small lengths.

It was proved on behalf of the appellant that he had had rooms at the house of William Dobbe, 14, Wells-terrace, in the city of Bristol, for the last four years. It was also proved on his behalf that articles similar to some of those found in his possession had been openly used by the appellant in his public lectures, showing how conjurers produced manifestations similar to those of spiritualism.

It was contended on the part of the appellant that the Vagrant Act was intended to apply to gipsies and other homeless and wandering vagabonds, and that this was no offence within the meaning of sect. 4 of the statute 5 Geo. 4, c. 83, and the case of *Johnson (app.) v. Fenner (resp.)* (33 Justice of the Peace, p. 740) was cited in support of this view.

The justices, however, being of opinion that the evidence given before them brought the case within the operation of sect. 4 of 5 Geo. 4, c. 83, gave their determination against the appellant in the manner before stated.

The question of law arising on the above statement for the opinion of the court, therefore, was.

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whether the justices were correct in their view of the law that the appellant was a rogue and vagabond within the meaning of sect. 4 of 5 Geo. 4, c. 83, he having, in their opinion, upon the evidence before them, attempted to deceive and impose upon Her Majesty's subjects by using subtle means and devices.

If the court should be of opinion that the said conviction was legally and properly made, and the appellant was liable as aforesaid, then the said conviction was to stand; but if the court should be of opinion otherwise, then the said conviction was to be quashed.

Henry Matthews, Q.C. (Lockwood with him), for the appellant.—The question is whether the subtle devices set out in the case amount to "palmistry or otherwise," for these words are qualifying words, and point out the statutory offence. That they cannot fall within the word "palmistry" is in the first place clear. The word is thus defined in Cowell's Law Dictionary: "A kind of divination, practised by looking on the lines and marks of the fingers and hands. This was practised by the Egyptians mentioned in the statute: 1 P. & M. c. 4." In *Johnson v. Fenner* (38 J. P. 740), which is the only decided case under the section, it was held that mere sleight of hand was not "palmistry." That being so, the question here arises as to what is the meaning of the words "or otherwise." These words must be read according to the general rule of construction that general words are restricted by the particular words which precede them. They must, therefore, be taken to mean something *ejusdem generis* with palmistry as chiromancy or physiognomy. The section was clearly never intended to include anything which belongs to the supernatural class. There is nothing supernatural in palmistry, chiromancy, or physiognomy. This becomes clear when we look at the statutes *in pari materia*, and from which the section under discussion was in fact derived. There are two distinct and separate and contemporaneous series of statutes both commencing in the reign of Henry 8. The first series, of which the present Act forms one, deals exclusively with the Egyptians, and prohibits them from deceiving people by "subtle crafts, means, or device" by palmistry, chiromancy, physiognomy or the like. The statutes are 22 Hen. 8 c. 10, 1 & 2 P. & M. c. 4, 5 Eliz. c. 20, 17 Geo. 2 c. 5, s. 2, 3 Geo. 4 c. 40, s. 3, and the present Act of 5 Geo. 4 c. 83, by which all previous Acts as to rogues and vagabonds were repealed. The second series of statutes, which comprises 3 Hen. 8, c. 8, 5 Eliz. c. 16, 1 Jac. 1 c. 12, and 9 Geo. 2 c. 5, ss. 3, 4, deal with quite a different offence, viz., that of conjuration or the calling up of evil spirits. By the three first of these Acts it was made criminal to exercise and deal in conjuration, witchcraft, enchantment, and sorcery, but in the reign of George II. the belief in magic having disappeared, prosecutions for such offences were abolished by 9 Geo. 2 c. 5, and the pretence was made criminal. That Act still remains in force, and under that the appellant should have been proceeded against, if he can be proceeded against at all. It is clear that 5 Geo. 4 c. 83 was only intended to apply to the Egyptians, and not to a case like the present.

Poland, contra.—The essence of the offence against which 5 Geo. 4 c. 83, s. 4 was levelled is "using subtle craft, &c.," and the Act was in-

tended to protect credulous people against themselves. Palmistry was one form of deceit which immediately struck the framers of this Act, and, in order to include all manner of deceit, the words "or otherwise" were inserted. Those words must mean "or in any other manner." It must be remembered that this Act was passed in the reign of Geo. 2, and the word palmistry even had a different signification in those days to that which it has now. The case of *Johnson v. Fenner* is altogether distinguishable from the present. All that was decided in that case was that mere legerdemain, or, in other words, a mere trial of skill, between one man's sleight of hand and another man's quickness of eye, is not within the Act. Here the appellant pretended to call up spirits, which is a very different thing. The words "or otherwise" cannot, when the whole section is considered, have the restricted interpretation put upon them as is contended for here.

H. Matthews, Q.C. in reply.

Our adv. vult.

Feb. 6.—The following written judgments were now delivered.

CLEARY, B.—It is first necessary to consider what the exact question for our determination is. This must be clearly understood, as there appeared at first to be a difficulty, though of a technical nature, from the terms in which the magistrates have found the facts; and if they had only found that the defendant used artful devices with intent to deceive, without themselves forming any conclusion as to the means used, there would have been an objection to the case coming before us on appeal. But it is to be taken, and the words properly bear that meaning, that the magistrates have found that the means set forth in the case were the means used and to which their express finding applies. The question, then, before us arises in this way. The magistrates have found as a fact that the appellant used subtle craft, means, and devices by the means stated to deceive and defraud Her Majesty's subjects. They have also found as a conclusion of law that the means used bring the case within the statute, and they then ask our opinion upon the correctness of this conclusion upon the matter of law whether the findings of fact bring the case within the statute. We have nothing to do with the correctness of the conclusions of fact arrived at by the magistrates. They can only ask our opinion upon matters of law, and we must take the conclusions of fact as found by them. It is right to add, in order to prevent misapprehension, that there was overwhelming evidence to warrant their conclusions. Now, as regards the acts of the defendant and the means used by him, we are not called upon to express any opinion upon the subject of spiritualism generally, whether there does exist any real power in a medium (as he is called) of the nature set up, or whether its existence is a mere delusion. Such a subject would be a very improper one for argument and decision in a court of law. But it does not arise in the present case, because we have it found as a fact that the appellant was an impostor in pretending to make use of it. The only question, then, is, whether in this particular case the means used by the appellant are within the words palmistry or otherwise in the Act in question. We must first see what the means used were. There is a séance for which he is to receive 2*l.* He calls himself a spiritualist,

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the room is darkened, raps are heard, and he says, "They are soon here to night, the conditions are very favourable." They then go through the performances described in the case, and it is sufficient to say that he pretends to exercise the peculiar and supernatural powers of obtaining answers and manifestations of power from invisible agents or spirits, as he calls them. We have to determine whether this brings the case within the 4th section of 5 Geo. 4, c. 83. That section enumerates a great number of offences which make a person liable to be punished as a rogue and vagabond. And the second of the enumerations is as follows: "Every person pretending or professing to tell fortunes, or using any subtle craft, means, or device by palmistry or otherwise, to deceive and defraud any of his Majesty's subjects." The appellant could not properly be regarded as a person professing to tell fortunes, and was not so charged, and the argument before us was, that the words "palmistry or otherwise" must be read as pointing to palmistry, which it was said was well known to signify "forming conclusions from the lines of the hands," and other similar pretensions, such as physiognomy, &c. It was first contended, and I think with success, that the Act of Parliament could not be read as if the words, "by palmistry or otherwise," were omitted altogether, so as to make it apply to all subtle devices used to deceive and defraud Her Majesty's subjects; some effect must always be given to all the words in a statute creating an offence. But it was further contended that the words "or otherwise" following a particular word "palmistry" must be read as having reference to arts or pretensions of the same description as palmistry according to a general rule of construction limiting the effect of general words following a particular description. As to the general rule, no authority was necessary, but a case was referred to in which the Court of Queen's Bench, in construing the statute and section in question held that the words "or otherwise" must have a limited signification, and were not applicable to the case of a man waging with people upon tricks of sleight of hand, and so deceiving and defrauding them. The case is *Johnson v. Fenner* (33 Justice of Peace, p. 740). In such a case no peculiar power is pretended like telling fortunes or palmistry to impose upon the credulous, but a great skill of manipulation and sleight of hand, and persons are found confident enough to back their eyesight against the skill and dexterity of the performer. This is so different an act from the acts particularised in the clause that a court would properly hold that you could not apply general words to so very different a thing. But in the present case we are dealing with an impostor exercising a power by a pretended intercourse with the invisible world, a peculiar power belonging to himself. In construing the clause in question we are entitled to consider the whole of it. We are not construing such words as "palmistry and any other act" standing by themselves, a case to which the argument used would more closely apply; the clause includes all persons who pretend to tell fortunes (which imports that deception is practised by doing so), or use subtle devices by palmistry or otherwise to defraud. Now the present case in is clearly brought within the words "by palmistry or otherwise" taken in their natural sense. But the appellant seeks to limit their natural sense by construction, that is, by

applying the rule of construction referred to. It appears to me that it would be going beyond any application of this rule to hold that the words "or otherwise," taken in their natural sense, and in connection with the rest of the clause, only apply to modes of deception of a precise class or genus of which palmistry can be said to be an instance. It may be quite right to hold that, and my reasoning does not apply to anything which in its character is entirely different from fortune telling and palmistry. But I cannot regard the acts and pretences of the appellant as so entirely different. Something besides fortunetelling and palmistry must be held as included, or we must reject the words "or otherwise," which cannot be done, and I could not myself fix upon any crafty devices more properly coupled for punishment with those of fortune telling and palmistry than those set forth in the case as practised by the appellant. The learned counsel for the appellant referred to very early statutes, showing that the offence of palmistry and the pretending to hold intercourse with spirits had formerly been treated as totally different offences with very different punishments, which was no doubt the case. Palmistry was at one time practised by gipsies and persons leading a vagabond life, and the legislation was directed against them. But the idea of leading a wandering and vagabond life is not now at all an ingredient in the description of a rogue and vagabond, as is obvious by reading the enumeration in sect. 4. The stat. 5 Geo. 4, c. 83, repeals all the former statutes relating to rogues and vagabonds, and forms itself the legislation on the subject, and enacts in substance that, by doing certain things or neglecting certain duties, a man shall be in the same predicament as a rogue and vagabond, and dealt with as such. Whatever an offender's position may be under other Acts of Parliament not relating to rogues and vagabonds, if he comes within the enumeration in sect. 4, he is properly punished as a rogue and vagabond. For the reasons above given, I think the appellant was properly dealt with by the magistrates as a rogue and vagabond, and that the conviction must be affirmed, and, of course, with costs.

POLLOCK, B.—In my judgment the justices were correct in the view of the law which they took when they found the appellant in this case to be a rogue and vagabond within the meaning of the statute 5 Geo. 4, c. 83. The first material matter to consider is, what was it that the magistrates found in fact? Taking the evidence which they have set out in the case, coupled with their finding, the only fair conclusion to be drawn is, that they found that the appellant did attempt to deceive and impose upon the persons named in the charge, that the means by which he so attempted was not by mere sleight of hand, dexterous manipulation of instruments, or illusions of the eye or ear, such as is practised by a conjuror or ventriloquist, but that in addition to and accompanied with the exercise of physical dexterity the appellant so conducted himself as to assume the power of communicating with and calling in the aid of unseen spirits, who could do certain acts and produce certain results, such as the winding-up and playing upon a musical box, and the communication of messages from persons who had died. We have, therefore, a craft, means, and device, which is beyond that of physical dexterity, and a professed

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dealing with some spiritual agency which is enacted not for the mere purpose of individual experiment, or so-called scientific pursuit, but to deceive and impose on others. And the only remaining question is, whether this is within the scope of the statute. The words of the Act are: "Every person pretending or professing to tell fortunes; or using any subtle craft, means, or device, by palmistry or otherwise to deceive and impose on any of his Majesty's subjects." And the well-known rule of construction was urged upon us that in giving effect to the words "or otherwise," we must read the statute as if it had used the words by palmistry or other act of a like kind. The principle upon which this rule is founded is thoroughly established, and the only difficulty which arises is in the mode and extent of its application to the provision in question. If the only words were, "Any person pretending by palmistry or otherwise to deceive," the argument would have greater force, but the language whence the scope and intent of the section is to be gathered is much wider, and to get at this we must look back to the words preceding palmistry. These show that the character of the act which is made an offence is assuming a special power beyond the ordinary limit of human agency. This is indicated by the first offence specified "professing to tell fortunes;" those which follow are of a like character, "using any subtle craft, means, or device, by palmistry or otherwise, to deceive," and the general character of the means or device is sufficiently indicated by the earlier words; and to read the word "otherwise" as limiting the means to acts, which must necessarily be similar to palmistry, would, in my judgment, wrest from the statute its spirit and expressed intention. Reading it as a whole, I should take the words "otherwise" not as limiting the earlier words, but as enlarging the word "palmistry," and providing against the professing to tell fortunes, or using craft, means, or devices, to deceive, whether by palmistry or by contrivance to deceive other than palmistry, provided they are of the same general character as is indicated by the earlier words of the section. It is unnecessary now to say what other means or device may come within the statute, but as to this I should guard myself against being supposed to hold that there might not be cases in which the means used were legerdemain or ventriloquism, or the like, and yet that they were included. Whether they would or would not be included must depend upon many circumstances, one very important one being the profession of the performer, and another being the education and means of knowledge possessed by the audience. For instance, persons at the present day hearing an ordinary ventriloquist, would hardly say he intended to deceive or impose upon them; whether this were so or not would be a question of fact for the magistrate. So it would be in the case of a juggler or conjuror; it would be for the tribunal before which the question was tried to say whether the performer merely backed his skill and agility against the quickness or accuracy of the eyes or ears of those present, as was clearly the case in *Johnson v. Fenner*, which was cited before us from 33 Justice of the Peace, 740, or whether he intended to convey the impression that he was dealing with or assisted by any supernatural agency. In the present case, the finding by the magistrates is conclusive, and well supported by the evidence

before them. Our attention was very properly called by Mr. Matthews, on behalf of the appellant, to the fact that the statute in question is only the last of a series, commencing so far back as 22 Hen. 8, c. 10, all of which profess to deal with jugglers and persons pretending to have skill in physiognomy, palmistry, or the like crafty sciences, whereas there has long existed a parallel set of statutes, beginning with 33 Hen. 8, c. 8, and ending with 9 Geo. 2, c. 5, s. 4, the expressed object of which is to deal with persons using, practising, or exercising any invocation or conjuration of an evil spirit. These offences are fully explained by Lord Coke in his treatise on the 1st James 1, c. 12 (3 Inst. 44), and included what in more modern days is commonly called witchcraft, and it is to be observed that by these the dealing with the supernatural is itself made an offence, apart from any deceiving or imposing on others. It may be that the appellant, by doing what he did, brought himself within these Acts, but it is unnecessary to decide this, and one would pause before seeking to put in force criminal statutes pointing to an offence practically obsolete, but even were his acts within the existing statute against witchcraft, it by no means follows that when he used devices to deceive and impose upon others, he was not liable under the Act in question. I think, therefore, that the conclusion at which the magistrates arrived is within the statute, and that there is no ground for disturbing the conviction.

Judgment for the respondent.

Solicitor for the appellant, *Miller*.

Solicitors for the respondent, *Edwards, Layton, and Jaques*.

QUEEN'S BENCH DIVISION.

Reported by M. W. McKELLAR Esq., Barrister-at-Law.

Saturday, Jan. 27, 1877.

PETERS v. COWIE.

Rogue and vagabond—Person—Married woman—Desertion of children—5 Geo. 4, c. 83, s. 4.

5 Geo. 4, c. 83, s. 4 renders every person committing any offence therein enumerated liable to be deemed a rogue and vagabond, and to suffer three months' imprisonment with hard labour; amongst others every person running away and leaving his wife, or his or her child or children, chargeable, or whereby she or they, or any of them, shall become chargeable to any parish, township, or place.

Held, that this clause did not apply to a married woman without separate property whose husband had previously deserted her and could not be found, although she ran away and left her children chargeable to the parish in which they were living.

THIS was a case stated by two justices of the peace for the city and county of Bristol.

Upon the hearing of a certain information, dated the 2nd May 1874, taken upon the oath of and preferred by the appellant, a relieving officer duly authorised by the governor, deputy-governor, assistants, and guardians of the poor of the city of Bristol (hereinafter called "the Incorporation of the Poor of Bristol") in that behalf against the respondent, for that she, Mary Anne Cowie, late of the parish of St. James, in the said city and county, charwoman (herein called "the respondent,") had run away and left her two children,

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whereby they had become chargeable to the said parish; whereupon the appellant prayed that the respondent might be punished as a rogue and vagabond, and the said justices dismissed the same.

It was proved before the said justices, or admitted as facts by consent, that the respondent was married to a man named Cowie at St. Augustine's Church, in the said city and county, on the 4th November 1868; that there were two children, issue of such marriage, viz., Frederick and William, aged respectively eight and five years, and that such children became chargeable as aforesaid in April 1874, and have so continued chargeable until now; that the respondent's husband left her in July 1870, and has never since been heard of; that no steps have been taken by the Incorporation of the Poor of Bristol against him for deserting his wife and children, as the respondent did not come to reside in the district of the said incorporation until nearly four years after her husband left her; that about April 1874, a woman (not the respondent) took the two children to the appellant, whereby they became chargeable; that upon the information aforesaid a warrant was on the 2nd May 1874 granted for the respondent's apprehension, but, as her place of residence was not known, she was not taken thereupon until the 31st May 1876, when she was found living with her father at Liverpool; that the respondent is entirely without property, and has no lawful means of maintaining her children but by her labour as a servant or charwoman.

The respondent in defence stated that the youngest of the two children was born five months after her husband deserted her; that after she had been so left her father sent for her to keep house for him, but that he was not able to maintain the children; and that she, having no means to keep the children, went to live with her father, believing the guardians would proceed against her husband.

The words of the Vagrancy Act (5 Geo. 4, c. 83), s. 4, under which the information was laid, are as follows: "Every person running away and leaving his wife, or his or her child or children, chargeable, or whereby she or they, or any of them, shall become chargeable to any parish, township, or place, shall be deemed to be a rogue and vagabond within the true intent and meaning of the Act, and it shall be lawful for any justice of the peace to commit such offender (being thereof convicted before him by the confession of such offender, or by evidence on oath of one or more credible witness or witnesses) to the House of Correction, there to be kept to hard labour for any time not exceeding three calendar months."

It was contended on behalf of the appellant that the word "person" coupled with the pronoun "her" in that section would include a married woman, and that the respondent, having run away and left her children, whereby they became chargeable, ought to be punished.

The said justices, however, declined to convict, for the following among other reasons: They considered that if civil proceedings had been taken against the respondent to recover the cost of maintaining her children, she might have pleaded coverture; that she could only be made liable under sect. 14 of the Married Woman's Property Act 1870, if she could be shown to have "separate property," and even then her husband's liability

would continue; but that, as this present charge was penal, *a fortiori* it would be wrong to convict her. Moreover, the Legislature has deemed it necessary by express enactment (7 & 8 Vict. c. 101, s. 6) to extend the provisions of the Vagrancy Act in order to make women who desert their bastard children, whereby they become chargeable to any parish or union, punishable as rogues and vagabonds, while both Acts are silent as to married women.

Bowen argued for the relieving officer, the appellant.—Of this Act 5 Geo. 4, c. 83, s. 3 enumerates various offences which render a person liable to be "deemed an idle and disorderly person within the true intent and meaning of this Act." Amongst them is a wilful refusal or neglect to maintain his or her family, if able wholly or in part to do so. This may perhaps have no application to a married woman, who, except under the Married Women's Property Act, 1870, could never maintain a family; but the gist of the offence in the next section, for which this information was laid, is the desertion of the family. *Prima facie*, the word "person" includes a woman either married, unmarried, or widow, and, as a matter of morality, the desertion of young children by a mother is even a greater crime than by a father. Further, all the other offences created by this section 4 are equally applicable to married women as to any one else. Moreover, it was a mistake of the magistrates to imagine that the provisions of recent legislation concerning the civil remedies by or against married women in any way affected their penal liabilities. (See *Oxford Guardians v. Barton*, 33 L. T. Rep. 375.) The justices certainly found some authority for their decision in Oke's Synopsis, title "Vagrant," where it is said, in a note at page 739 of the 12th edition, "neither can a married woman whose husband is transported or absent from any other cause be safely convicted of neglecting to maintain or deserting the children." In this, however, it is submitted Mr. Oke was wrong. As to the justices' last ground for refusing to convict, the case of *Reg. v. Maude* (11 L. J. 120, M. C.), which decided that a woman was not liable for deserting her bastard, was expressly based on the meaning of the word "child," which of itself is limited in its application to legitimate offspring. The result of that case was the passing of the 6th section of 7 & 8 Vict. c. 101, which assumed the liability of a married mother for deserting her legitimate children. There can be no doubt this woman might have been convicted if her husband were dead, or under the Bastardy Act if her children had been illegitimate; the *prima facie* meaning of the word "person" ought in the same way to apply to the respondent under the circumstances of this case.

The respondent did not appear.

MELLOR, J.—I confess I have considerable difficulty in reconciling the various arguments which apply to this question, and I am clear that we must look at the section without any consideration of the effect of the Married Women's Property Act 1870. It would be a harsh construction to include a married woman in the liability for this offence, and I do not think it could have been intended to make the words relate to a woman whose husband was alive, but had deserted her. The first words of the clause admittedly cannot apply to a married woman; the words would not

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bear it, and it is not suggested that it is a crime for a wife to leave her husband chargeable. It appears to me to be a too stringent use of the words afterwards employed to make a married woman a criminal for escaping from the duties which her husband has deserted, and left her powerless to fulfil. I feel considerable hesitation, but I think the true construction of the words is to omit from their application such a case as this. My opinion therefore is that the magistrates were right.

MANISTY, J.—I am of the same opinion, and I entirely agree in construing this section to consider only the state of the law at the time it was passed. I think, however, we may refer to a subsequent Act, in order to see the meaning which the Legislature has put upon the existing law. Mr. Bowen has rightly distinguished between the 3rd and 4th sections of this Act, but it would be a hard construction to impose a severe penalty, even for desertion of her children, upon a woman who was herself deserted by her husband, when it is admitted she could not be criminally liable if her husband had not deserted her. Therefore I should entertain no doubt, without any subsequent legislation, unless the words were very clear and precise. But until the Married Women's Property Act 1870, no married woman could be liable for the support of her children during the life of her husband; and this was so whether the children were her husband's or not, for I find that by 4 & 5 Will. 4, c. 76, s. 57, every man who shall marry any woman having a child or children at the time of such marriage (whether legitimate or illegitimate), is liable to maintain such child or children as part of his family until the age of sixteen or the death of the mother. Sect. 14 of the Married Women's Property Act 1870 (33 & 34 Vict. c. 93) would render this woman liable for the maintenance of her children if she had separate property, and she might then well be subject to the 4th section for deserting them; but I cannot think that it was intended at the time of the passing of 5 Geo. 4, c. 83, to make the word person in the 4th section include a married woman whose husband had deserted her, for the purpose of this offence.

Judgment for respondent.

Leave to appeal was granted, if an appeal in this case could be brought.

Solicitors for appellant, *Merediths, Roberts, and Mills.*

Saturday, Jan. 27, 1877.

EARL OF WESTMORELAND (app.) v. SOUTHWICK AND OUNDLE (resps.)

Poor rate—Woods—Natural unimproved state—Rateable value—The Rating Act (37 & 38 Vict. c. 54), s. 4.

The appellant's woodlands were assessed by quarter sessions at their rateable value if occupied in their natural and unimproved state, but it was found as a fact that they might be rendered worth a much larger sum to a tenant from year to year if a certain expenditure were incurred for grubbing up woods, draining, and road making.

Held, upon a case stated, that the quarter sessions were right, and that under the Rating Act 1874, sect. 4, woods were not to be rated on any assumption of their improved value upon alteration into land of a different description.

THIS was an appeal against the rating of woodlands in the parish of Southwick, and on the hearing thereof the Court of Quarter Sessions for the County of Northampton reduced the rate subject to the following case:

1. The appellant is the owner and occupier of certain woodlands situate in the above parish, which are part of the ancient forest of Rockingham, hereinafter called "the said woodlands."

2. The said woodlands are kept in their natural and unimproved state as woods, and have timber growing upon them. There is no saleable underwood of any appreciable value upon the said woodlands.

3. By a poor rate made on the 25th Jan. 1876, the said woodlands were assessed at a rateable value of 14s. 3d. per acre, being at the rate of 13s. 3d. per annum as land in its natural and unimproved state, and 1s. per acre for sporting rights.

4. On the hearing of the said appeal the appellant's witnesses proved that if the said woodlands were occupied in their natural and unimproved state, and were treated without reference to capacity of improvement, the rateable value of them would be only 6s. per acre for purposes of occupation, and 1s. per acre for sporting purposes. It was elicited in cross-examination that the said woodlands in their natural and unimproved state only grow coarse grasses, fern, blackthorn, and other natural products of little value for purposes of occupation, and that they might be rendered worth such a sum to a tenant from year to year as would produce a rateable value of 24s. 6d. per acre if the following average sums per acre were expended upon improvement, that is to say: Grubbing up woods, 10l. per acre; draining, 7l. per acre; building, fencing, and making roads, 7l. per acre.

5. It was contended thereupon, by the respondents, that in assessing the rateable value of the said woodlands, the court of quarter sessions were not bound to assume that the said woodlands would always be occupied in their natural and unimproved state, but ought to consider what they would be worth if treated in this way, and that a prudent owner of land would so treat them that nothing could be deducted for grubbing up wood; and that, reckoning the interest on the other outlay of 14l. an acre at 4 per cent, the rateable value of the said woodlands would be 13s. an acre, plus 1s. per acre for sporting rights.

6. The appellant contended that in construing the Rating Act 1874, the court could not consider what might be the case if certain improvements were effected at a certain outlay, and that they were bound to assess the rateable value of the said woodlands on the supposition that they were let and occupied in their natural and unimproved state. The court decided in favour of the appellant, and reduced the rateable value from 14s. 3d. per acre to 7s. per acre.

If the court of quarter sessions were right in construing the Act as contended for by the appellant, the rate is to stand at 7s. per acre. If the court of quarter sessions were wrong in so construing it, then the rate is to be altered to 14s. per acre.

Sills and Jaques argued for the respondents, the Overseers of Southwick and the Guardians of Oundle Union.—The Rating Act 1874 (37 & 38 Vict. c. 54) provides by sect. 4 that "The gross and rateable value of any land used for a plantation or

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a wood, or for the growth of saleable underwood, shall be estimated as follows: (a) If the land is used only for a plantation or a wood, the value shall be estimated as if the land, instead of being a plantation or a wood, were let and occupied in its natural and unimproved state; (b) If the land is used for the growth of saleable underwood, the value shall be estimated as if the land were let for that purpose; (c) If the land is used both for a plantation or a wood, and for the growth of saleable underwood, the value shall be estimated either as if the land were used only for a plantation or a wood, or as if the land were used only for the growth of the saleable underwood growing thereon, as the assessment committee may determine." Assuming the occupation to be on a renewable lease from year to year, we must find out what a hypothetical tenant can afford to pay as rent, if he makes the best use a prudent man can of his land, in order to obtain a profitable return. In the first place, by the statute, we must assume that the wood has been removed, and, therefore, the deduction of 10*l.* an acre for grubbing up woods cannot be allowed. In the next place the Legislature assumes that the landlord and tenant between them will lay out upon the land sufficient for the production of the utmost possible profit. [MELLOR, J.—The words are, "as if the land were let and occupied in its natural and unimproved state."] It is impossible to assume that anybody becoming a tenant would leave this land in the state described in paragraph 4. The effect of the statute is to rate an owner who keeps an unprofitable wood in the same way as if he indulged in no such luxury, and made the most prudent use of the land instead.

Mercwether and Ewins Bennett appeared for the appellant.

MELLOR, J.—We need not trouble the counsel for the appellant, for we are clearly of opinion that the sessions have come to a right conclusion. The statute says a wood is to be rated "as if the land instead of being a wood, were let and occupied in its natural and unimproved state." I quite agree that there may be a difficulty in fixing the quantum in accordance with this principle; but it is entirely a matter of fact, and a matter upon which the magistrates are better able to decide than the court. In this case we ought not to interfere with the judgment of the quarter sessions.

MANISTY, J.—I am of the same opinion, and I think this is a very clear case. For once the Legislature has spoken in unmistakable language, and the application of the words by the quarter sessions to the circumstances of this case is in my opinion perfectly right.

Judgment for appellant.

Solicitors for appellant, *Ware and Hawes*, for *G. and H. Lamb*, Kettering.

Solicitors for respondents, *Books, Kenrick, and Co.*, for *Richardson and Son*, Oundle.

Jan. 17 and 20, 1877.

BRECON MARKETS COMPANY (apps.) v. ST. MARY'S, BRECON (resps.)

Poor rate—Market tolls—First charge—Rateable value.

By a local Act, the appellants were incorporated and authorised to regulate the market places belonging to the Corporation of Brecon, and to receive all tolls payable therefrom, which were

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thereby vested in them. They were, however, by another section, to pay to the corporation 210*l.* a year, to be charged on the scheduled tolls, markets, and market places, by the Act vested in the appellants, and to be a first charge on those tolls next after the expense of recovering them. This annual sum was to be devoted by the corporation to the payment of incumbrances incurred by the building of the old market place. The appellants, under the authority of the Act, constructed new market places on land vested in them, and collected tolls from the old and new markets.

Held, upon a case stated, that the appellants were not entitled to a deduction of this 210*l.* from the net annual value of their tolls in their assessment to the poor rate.

This was a case stated pursuant to the provisions of 12 & 13 Vict. c. 45, s. 11, on appeal by the Brecon Markets Company against the churchwardens and overseers of the poor of the parish of St. Mary, in the borough of Brecon, in the county of Brecon, and the Assessment Committee of the Brecknock Union.

An Act was passed in 1 Vict. c. xii. (local and personal), for providing market places and regulating the markets within the borough of Brecon, and which is hereinafter called the Act of 1838.

By sect. 34 of that Act, the corporation were empowered to take tolls, rent, and stallage in respect of the market place to be erected by them under the provisions thereof, and to apply the moneys so taken, first, in defraying the cost of obtaining the Act; secondly, the costs, charges, and expenses of erecting the said market place; thirdly, "in retaining and setting apart such sums of money as, with the rents, tolls, and dues which shall be received by the corporation from any property belonging to them other than the tolls, rents, and stallage authorised to be taken by the above-mentioned Act, should be necessary to make up the annual sum of 210*l.*, being the net annual income of the corporation from the whole of the tolls of the said borough and other property of or belonging to them," which said sum of 210*l.* was to be applied by the corporation, first, in defraying the interest of any incumbrance affecting their property, and the remainder to such purposes as the said corporation were then authorised and empowered to apply their net annual income.

At the time of the passing of the above mentioned Act the corporation owned in fee simple the Guildhall and Police Station, with other lands, and also the drift tolls and tolls of fairs in the borough. Under the provisions of the above mentioned Act, the corporation erected a new market house on the west side of the town (hereinafter called the General Market Place) for the sale of meat, butter, eggs, poultry, and general commodities, and removed their general market from the streets where it had been held from time immemorial to such new market house, and the sum of 210*l.* was regularly retained and set apart by them for the purposes mentioned in the last-mentioned Act.

By an Act passed 25 & 26 Vict. c. lxxvi. (local and personal), for incorporating the Brecon Markets Company and for vesting in them and authorising them to maintain and regulate the markets and fairs in Brecon and other property of the mayor, aldermen, and burgesses of the borough of Brecon, and for the providing for discharge of liabilities of the mayor, aldermen, and

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burgesses, and for other purposes (hereinafter called the Act of 1862), the appellants were incorporated.

By sect. 20 of the Act of 1862 the Act of 1838 was repealed, but subject to the provisions of the Act of 1862.

By sect. 21 of the Act of 1862 the markets and fairs in the borough of Brecon and the market house, market places and places for holding fairs in the borough, and the works and conveniences connected therewith, and all tolls, rents, stallages, dues, and other moneys payable in respect of the markets and fairs, market houses and market places, works and conveniences, and the drift tolls payable on the goods of persons passing through the borough and the manor or reputed manor, and all messuages, lands, chief rents, tenements, and hereditaments of the corporation, and all other the real, personal, or mixed estates of the corporation were vested in the company, subject, nevertheless, to the charges and incumbrances affecting the same.

By sect. 22 it was provided that the Guildhall and Police Station should be expressly excepted and reserved to the corporation as their own property.

By sect. 27, all chief rents, tolls, rents, stallages, and other dues and payments immediately before that Act due and payable to the corporation were to be payable to the Brecon Markets Company.

By sect. 42 the company were to pay to the corporation "the yearly sum of 210*l.* by equal half-yearly payments;" and by sect. 43, the said sum of 210*l.* so payable to the corporation was "by this Act charged on the scheduled tolls, markets, and market places by this Act vested in the company, and shall be the first charge on those scheduled tolls next after the costs, charges, and expenses of and incident to the collection and recovery thereof, and shall be the first charge on the said markets and market places."

By sect. 44, the sum of 210*l.* so payable to the corporation was substituted for the 210*l.* by sect. 34 of the recited Act, and the corporation were directed to apply a part thereof towards defraying the interest of any incumbrance which at the time of the passing of the Act of 1838 affected any of their property other than the scheduled tolls, and which at the time of the passing of the Act of 1862 remained undischarged, and the remainder was to be applied to such purposes and in such manner as they were by law at the time of the passing of the recited Act authorised and empowered to apply their net annual income referred to in that section.

By sect. 81, the several tolls, rents, and stallages by the Act of 1862 authorised to be taken, were vested in the company as their own proper moneys.

Under the provisions of the Act of 1862 the company acquired new land on the east side of the town, and erected thereon a new cattle markets place, in which the cattle markets are now held.

991*l.* 14*s.* 6*d.* was raised under the Act of 1838; 3750*l.* (that is 3000*l.* shares and 750*l.* loan), under the Act of 1862; by the operation of the last Act, and sales of land under it, the amount raised under the Act of 1838 has been reduced to 841*l.* 14*s.*, and this amount ranks after the 750*l.* borrowed under the Act of 1862, and after the 3000*l.* raised by shares under it. No dividend has been earned or paid on the shares.

The company owns the soil on which the general market was erected under the provisions of the Act of 1838, and also the soil on which the cattle market was erected under the Act of 1862.

The receipts of the company arise from (1) the tolls, rents, and stallage of the general market, house and adjoining buildings erected under the Act of 1838; (2) the tolls of the cattle market erected under the Act of 1862; (3) the tolls of the corn market; (4) the tolls of the weighing machine; (5) the tolls of cattle and horses sold in the streets at fairs; (6) tolls for pitching shows at fairs; and (7) the drift tolls or tolls for passing under the 4th schedule of the Act of 1862.

It is admitted that Nos. 3, 5, and 7 are not liable to rate, and as No. 4 is rated separately, it need not be further considered for the purposes of this case. The gross receipts from these various sources are agreed, and it is also agreed that the net receipts from Nos. 3, 5, and 7, fixed at 40*l.* per annum, shall for the purposes of this case be primarily applied in part discharge of the sum of 210*l.*, payable to the corporation, reducing that sum accordingly, and which reduced sum is hereinafter referred to as the 170*l.* per annum. The amount proper to be deducted from the gross receipts of Nos. 1, 2, and 6, for rates and taxes, and other payments necessary to maintain the property in a state to command a rent (irrespective of the 170*l.* per annum), has also been agreed between the parties. But it is maintained by the appellants that such deduction should be increased by the 170*l.* per annum, payable to the corporation under the circumstances before named, while it is contended by the respondents that no further reduction ought to be made.

It is agreed that the Act of 1838, so far as the same is not repealed, and the Act of 1862, shall form part of this case.

The question for the opinion of the High Court of Justice is: Whether the appellants are entitled to have the 170*l.* per annum, so payable to the corporation, or any part thereof, deducted from the gross rateable value of the property within named.

H. Matthews, Q. C. and *Warry*, argued for the appellants, that the sum of 210*l.*, which was paid by way of annuity to the corporation, was a deduction which ought to be allowed them from the gross receipts of the tolls before arriving at the rateable value; that, supposing a tenant tendered for a lease of the tolls and market places, he would put out of his calculation the sum of 210*l.*, as being money appropriated to the corporation, and would offer a sum of money as rent, under the Parochial Assessment Act, putting aside all consideration of the sum. It was also contended that the Brecon Markets Act of 1862, which created the company, reserved this sum of money to the corporation, and thus enacted how the income of the corporation was to be spent, showing that it was intended by that Act that the tenant of the company would be a mere conduit pipe, by which the above sum was conveyed to the corporation; that the company was only allowed to come into existence upon payment of this sum, and that no act of theirs created the charge upon the tolls and markets, and that upon the proper construction of the Act this sum was payable even before taxes. The following cases were referred to:

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Mayor of Worcester v. Droitwich, 45 L. J. 81 M. C.;
Reg. v. Rhymney Railway Company, 38 L. J. 75,
 M. C.

B. T. Williams, Q.C., for the respondents, contended that, inasmuch as the sum of 210l. was received out of the tolls of the market, it was immaterial what the company did with it; the parish were entitled to include it in their gross rateable value, and that, supposing instead of paying this sum by way of annuity, they had bought the property of the corporation and raised the money by mortgage, they would not have been allowed to deduct the sum paid by way of interest upon the mortgage. This case is distinguishable from *Mayor of Worcester v. Droitwich*, because there the company were limited by Act of Parliament in the beneficial enjoyment of their property.

MELLOR, J.—I think we can have no doubt about our judgment in this case, although the contention on the appellants' behalf has been most ingeniously argued. The market company are by themselves or their lessees to receive the whole of the tolls, which are the profits derived from the land. There is an appropriation of money from the tolls for certain purposes, but nothing in the Act of Parliament affects this question as to the rateable amount. Here all the appellants' property is liable to contribute to this rate; the parish cannot be deprived of that portion of the assessment of the profits of the land, which, by an arrangement between the market company and the corporation, is appropriated as a first charge to the corporation. It is not provided that the company are to receive certain specific tolls, nor are such tolls vested in them by the Act. Any other mode of rating than that which has been adopted would be contrary to the established principles, and unfair to the other rateable property in the parish.

LUSH, J.—I am of the same opinion. The question for us is what should be the rateable value of these premises. By the Parochial Assessment Act 1836 (6 & 7 Will. 4, c. 99) the rate is to be made "upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenants' rates and taxes, and tithe commutation rentcharge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent." It is not so difficult to suppose a letting in this case as it is in some others where the same principles must be made to apply. All the tolls paid for the use of the market are to go first into the hands of the appellants, and the deductions allowed by the statute must, therefore, be made from that amount. The whole of the tolls are vested in the appellants, and no part is specifically, as has been contended, vested in the corporation. There is an arrangement in the nature of rent between the appellants and the corporation, but, even although it is rightly called a first charge upon the appellants' receipts, it cannot come within the authorised deductions for the computation of the rateable value.

Judgment for respondents.

Solicitors for the appellants, *Wilkins and Blythe*, for *Cobb and Tudor*, Brecon.

Solicitor for the respondents, *O. E. Abbott*, for *W. T. Bonnell Bishop* and *David W. J. Thomas*, Brecon.

Saturday, Jan. 27, 1877.

HOOPER (app.) v. KENSHOLE (resp.)

Market tolls—Shop—Open places—Licensed hawkers
 —Previous claim—10 Vict. c. 14, s. 13; 30
 Vict. c. 19, s. 20.

The respondent was selling manufactured goods of various kinds in the skittle ground of an inn situated within the limits of the Exmouth Market, as constituted by a local Act, without licence from the undertakers, as he had often done before, without any toll being claimed.

The respondent was an auctioneer, acting for the owner of the goods, who was a licensed hawker; and the place of sale was under cover, but open to the public, and let for the purpose of the sale by the landlord of the inn.

By sect. 20 of the local Act, any person, except a hawker, not having a licence, is liable to a penalty on conviction for selling or exposing for sale in any open place within the limits of the market, not being the new market place, or his own dwelling house or shop, any article for the sale of which tolls are thereby granted.

The justices refused to convict the respondent on the grounds that tolls had not been demanded before, that the place was a shop, and not open, and that the respondent was the agent of a licensed hawker.

Held, upon a case stated, that the justices were wrong on each and every of these grounds, and that the respondent ought to have been convicted.

THIS was a case stated by two justices of the peace for the county of Devon.

At a petty sessions holden at the court house, Woodbury, in and for the division of Woodbury, in the county of Devon, on 24th Jan. 1876, an information preferred by Henry Horn Hooper, hereinafter called the appellant, against Robert Kenshole, hereinafter called the respondent, under the 13th and 14th sections of The Markets and Fairs Clauses Act 1847 (10 Vict. c. 14), and the 20th section of The Exmouth Market Act 1867 (30 Vict. c. 19), in which Act the Markets and Fairs Clauses Act 1847 is incorporated, charging for that, he the said respondent did, on the 27th Oct. 1875, sell or expose for sale, within the limits of the Exmouth market, not being in the new market place, nor his own dwelling house or shop, certain manufactured goods or merchandise without a licence from the undertakers so to do, and without having paid the market toll, was heard and determined by the said justices, the said appellant and respondent both being then present, and upon such hearing, as before mentioned, they dismissed the same information. Thereupon the following case was stated:

The appellant's solicitors, in opening the case for the appellant, relied upon the decision of the Court of Queen's Bench, in the case of *Fearon v. Mitchell* (27 L. T. Rep. N. S. 33; L. Rep. 7 Q. B. 690), and *McHole v. Davies* (33 L. T. Rep. N. S. 502; L. Rep. 1 Q. B. D. p. 60), *Carter v. Parkhouse* on appeal before the Queen's Bench on the 11th Jan. 1870, and *Pope v. Whalley* (34 L. J. 76, M. C.). He also put in a public notice which was admitted was published by order of the trustees under the will

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of the late Lord Rolle, who are the undertakers under the Exmouth Market Act 1867, of which the following is a copy:

PUBLIC NOTICE.

Exmouth Market Act 1867.

The trustees of Lord Rolle's will hereby give you notice that on and after Monday the 19th April 1869, the present market house in the Strand will be closed, and the market will be removed and will henceforth be held at the new market place in Chapel-street, where the weekly market will be held as heretofore on Saturdays.

The limits of the new market are the limits for the time being of the district of the Local Board of Health for Exmouth. Within those limits it will, after the 19th April 1869, be lawful for any person not duly licensed to sell or expose goods for sale in any open place, not being the new market place, or his or her own dwelling house or shop, or to cry for sale or sell from door to door, any fish, poultry, eggs, butter, fruit, herbs, vegetables, or any other commodity, without having first paid the tolls granted by the Market Act. Offenders will, for every such offence, be liable to a penalty of 40s.

For stalls or places in the new market place, and for licences to sell in open places within the limits of the market, apply to Mr. E. J. Carter, Exmouth. Dated this 30th March 1869. By order of the trustees.

R. H. LIPSCOMB, Steward.

By sect. 18 of the Exmouth Market Act 1867, the several tolls specified in the first and second schedules to the Act from time to time may be demanded and taken by the officers of the undertakers and by the lessees of the undertakers and their officers respectively.

Henry Horn Hooper sworn.—I am lessee of the market tolls at Exmouth. I have not got the lease yet, but I am to have it for seven years. On the 27th Oct. last, I saw Mr. Kenshole in the Dolphin Inn skittle ground, about seven or eight o'clock in the evening. He was selling various manufactured goods, watches, sheets, &c. I said to him that he was selling manufactured goods within the limits of the local board district not being the new market place, for which he was liable to pay toll. He said, "I don't come under your Act," or something to that effect; "and if you'll stop till after the sale is over I'll go and have a glass of grog with you." I went away. Mr. Kenshole would have had to pay me 1s. if he had occupied a stall in the market for the sale of manufactured goods, and in order to sell the goods out of the market place he ought to have got a licence to do so under the 19th section of the Exmouth Market Act. The next day I went to the Dolphin skittle alley at the same time, and I saw Mr. Kenshole selling again.

Cross-examined.—I don't know how many years Mr. Kenshole has done the same thing, but I believe he has; but this is the first time he had done so since I have been the lessee as far as I know. I don't recollect inviting him to leave the Dolphin, and come up to my inn. Since October last I saw Mr. Kenshole in Exeter, and said if he would give me his word that he would come and sell in the market place when he came to Exmouth again, I would not take any proceedings against him for what he had done. He said, "I cannot say that I will come and sell there. You must get that from Mr. Bannister." I said I would go and see him if I had time, but I had not. I did not tell him I had a good room in my house where he could have a look and key. I said there was plenty of room in the market, and he could have a place there with a look and key. There is a doorway to go into a skittle alley from the yard and another from the house. It is part and parcel of the Dolphin inn. It is under cover. Mr. Kenshole was selling at the end of the alley, and the goods were exposed for sale on a platform. I have never known it let, but twice since I have the tolls. Mr. Kenshole denied his liability to pay toll. I knew the goods were Mr. Bannister's.

The respondent's solicitor took the following points, firstly, that the 20th section says "No person shall sell in an open place within the limits of the market, not being his own dwelling house or shop," and contended that the place where the goods were sold was a shop. Secondly, that Mr.

Bannister, being a licensed hawker, had a right to send his goods to Exmouth for sale, and quoted *Manson v. Hope* (31 L. J. 191, M.C.), and that he had a right to employ Mr. Kenshole, as a licensed auctioneer, as his agent.

Appellant admitted that the place where the goods were sold was let for the sale of the goods on the 27th and 28th Oct. last.

For the defence:

Henry John Bannister sworn.—My father is a pawnbroker in Exeter; he sent a lot of unredeemed pledges of the value of 400l. 500l. consisting of watches, chains, &c. to Exmouth to be sold. Mr. Kenshole was employed to sell them. Two sales of that sort took place last year at the same place, one before October. Several sales of a like nature have taken place for years at the same place. My father is a licensed hawker. I produce his licence. The place where the sale took place is covered with a roof. The licence was taken out on the 27th Oct. A table was put up and the things put on it. My father was not present. No toll was asked for on former occasions.

Cross-examined.—My father did not go to the sales on the 27th or 28th Oct. I assisted in making up the parcels of goods. There were eight or nine. They went to Exmouth by carrier. Some had my father's name on the packages painted, and the word "Exeter." The words "licensed hawker" were not put upon the packages. They were separate packages, and all put into the carrier's cart. My father's name was not painted with his address, and the words "licensed hawker" on the carrier's cart. The sale was advertised by bills. I have not got one. My father's name and address, together with his trade, and the fact of his being a licensed hawker, were not put in the bills, nor were they upon the skittle alley inside or outside.

Re-examined.—My father has been present on former occasions, but he was not this time as he was ill.

Henry Hawkins sworn.—I am the landlord of the Dolphin. The place let to Mr. Bannister is an inclosed place with a roof over it; there was a table erected for the goods, and where the auctioneer stood. The place has been let to the same people before. I never heard of any toll being asked for.

Cross-examined.—The place is my skittle alley. It is not open at the sides or ends. It is lighted with gas at night. There are several windows in it. There is a door at the side leading into the street.

Re-examined.—During the time Mr. Bannister rented it no one had a right to go into it. I have generally let it to Mr. Bannister for two days.

The said justices, being of opinion that the place had been let before for the same purpose without any toll being demanded, and also that it was not an open place, but a shop, gave their determination against the appellant as before stated, and dismissed the information.

The questions of law arising on the above statement for the opinion of this court, therefore, are firstly, whether any toll could be demanded, as none had heretofore been asked under similar circumstances. Secondly, whether the place where the goods were sold was an open place within the limits of the Exmouth Market Act within the meaning of that Act, or whether it could be considered as the respondent's own dwelling house or shop within the meaning of the 10 & 11 Vict. c. 14, and the Exmouth Market Act. Thirdly, whether the respondent, being an auctioneer, had any right to sell as such or as agent for Mr. Bannister, a licensed hawker, who was not present himself at the time of the sale, and who had not complied with the requirements and provisions of the Hawkers' Act in having his name, address, and calling painted on the different packages and cart, and also inside or outside of the skittle alley.

Bowen argued for complainant, the appellant.—As to the first point, even if the present lessee had

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allowed sales of this kind without taking tolls, he could not be estopped from claiming them now; but it appears that this was the first occasion of the respondent's sale of which the lessee was aware. On the second point, which arises under the 20th section of the Exmouth Market Act 1867, the word "open" must mean with reference to the public, not uncovered to the sky. The cases cited before the justices have no application; *Pope v. Whalley* (34 L. J. 76, M. C.) merely defines a shop, and only to that extent touches this question. Both that case and *Fearon v. Mitchell* (L. Rep. 7 Q. B. 690) were decided upon the Markets and Fairs Clauses Act 1847. So also was the case of *McHole v. Davies* (L. Rep. 1 Q. B. Div. 59). By the 13th section of that Act (10 Vict. c. 14), "After the market place is open for public use every person other than a licensed hawk, who shall sell or expose for sale in any place within the prescribed limits, except in his own dwelling place or shop, any articles in respect of which tolls are by the special Act authorised to be taken in the market, shall, for every such offence, be liable to a penalty not exceeding forty shillings." The words of the 20th section of the Exmouth Market Act 1867 (30 Vict. c. 19) are, "If any person, not having a licence from the undertakers so to do, sell, or expose for sale, in any open place within the limits of the market, not being the new market place or his own dwelling house or shop, any article in respect of the sale or exposure for sale whereof in the new market place any toll is by this Act granted, every person so offending shall, for every such offence, forfeit not exceeding forty shillings: Provided that nothing in this Act shall prejudice or interfere with the lawful exercise by licensed hawkers of the calling for which they are so licensed, or restrain or prohibit any person who shall have first paid the tolls by this Act granted from carrying or crying for sale, or selling from door to door, within the said limits, any fish, poultry, eggs, butter, fruit, herbs, or vegetables, or any other commodity usually so carried or cried."

The respondent did not appear.

MELLOR, J.—I am clearly of opinion that the justices in this case ought to have convicted the respondent. This was not a shop of the respondent within the meaning of the Markets and Fairs Clauses Act 1847, as defined by the cases cited, nor could it possibly be a shop within the meaning of the Exmouth Market Act 1867. The place was thrown open to the public by the respondent for the purpose of selling his wares, and he became, therefore, liable to a conviction. It is not necessary even to consider the previous payment of tolls, the only material question being as to whether this was a shop or open place, the case must be remitted to the magistrates to sentence the respondent to a penalty.

MANISTY, J.—I am of the same opinion. No question of previous tolls can possibly arise, and I am clearly of opinion this was an open place within the Exmouth Act, and not the respondent's shop.

Judgment for appellant.

Solicitors for the appellant, *Frere, Foster, and Frere*.

COMMON PLEAS DIVISION.

Reported by P. B. HUTCHINS Esq., Barrister-at-Law.

Nov. 10 and 15, 1876, and Jan. 12, 1877.

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Escape of sewage—Damage to adjoining premises—Occupier's liability.

An occupier of land can recover against an adjoining occupier for damage caused by noxious substances coming on to his premises, in a way in which he is not bound to receive them, from any artificial structure on the adjoining premises, although the adjoining occupier is ignorant of the facts which cause the injury, and there is no negligence.

Plaintiff and defendant occupied adjoining premises. An old drain commenced on defendant's premises, passed under other houses, came back through defendant's premises, and then passed under plaintiff's. The drain got out of repair under defendant's premises, whereby sewage and water escaped into plaintiff's premises, and caused damage. Defendant did not know that the drain turned back through his premises and under plaintiff's, or that it was out of repair, and was not guilty of negligence.

Held, on motion for judgment, that plaintiff was entitled to recover.

THIS was an action brought by the plaintiff, the occupier of the Old Red Lion publichouse, number 339, Strand, against the defendant, who was the occupier of the adjoining premises, number 6 Helmet-court, to recover damages for injury caused to the plaintiff's premises and stock-in-trade by water and sewage coming into his cellar from the defendant's premises. The case was tried at Westminster before Blackburn, J., who reserved leave to enter judgment for the plaintiff for 30*l.*, the amount of damages assessed by the jury.

Nov. 10 and 15, 1876.—The case came before the court on motion for judgment, and was argued by *Talfourd Salter*, Q.C. and *O. C. Scott* (Glyn with them), for the plaintiff, and by *Robinson, Serjt.* and *Shortt*, for the defendant. The facts, the findings of the jury, and the arguments are sufficiently stated in the judgment of the court. In addition to the authorities noticed in the judgment, the following were referred to:

Thorpe v. Brumfit, L. Rep. 8 Ch. 650;
Pomfret v. Riccroft, 1 Wms. Saunders, 557 (Edition of 1871);
Gale on Easements, 487, 633 (5th edition);
Chadwick v. Trower 6 Bing. N. C. 1;
Colebeck v. Girdlers' Company, L. Rep. 1 Q. B. D. 234; 45 L. J. 225, Q. B.; 34 L. T. Rep. N. S. 350;
Lord Egremont v. Pulman, 1 M. & M. 404.

Our. adv. vult.

Jan. 12, 1877.—The judgment of the court (Denman and Lindley, J.J.) was delivered by Denman, J. The plaintiff and the defendant in this case are tenants and occupiers of adjoining houses; and the plaintiff, upon the facts and findings of the jury, now complains of injuries caused to his premises and stock in trade by water and sewage coming into his cellar from the defendant's premises. The jury have found in effect that the injuries complained of are so caused, and have assessed the damages sustained by the plaintiff at 30*l.* The plaintiff has moved for judgment for the amount of the damages so assessed. The facts relied on as a defence to the action are in substance as follows. The water and sewage in question

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came from an old drain, which commenced on the defendant's premises, and received his sewage, ran under and received the sewage of several other houses, turned back through the defendant's premises, ran under the plaintiff's cellar, and then away to a public sewer. This drain was not known to the defendant to turn back and run through his premises under those of the plaintiff, and was not known to be out of repair. It was, however, in fact, out of repair by reason of age and wear and tear, and its defective state under the defendant's premises was the real cause of the mischief. The jury found that the defective state of the drain was not attributable to any negligence of the defendant. Upon these facts it is to be observed at the outset that the water and sewage which injured the plaintiff came on to the defendant's land by an artificial drain made for the convenience of the defendant and the other persons whose houses were higher up. We have not, therefore, to deal as the court had in *Smith v. Kenrick* (7 C. B. 515) with the case of water or other matter coming naturally from or through the defendant's land on to the plaintiff's. Bearing this in mind, it appears to us that it is incumbent on the defendant to show what right he had to allow the filth brought artificially on his land to escape on to the land of the plaintiff. The *prima facie* right of every occupier of a piece of land is to enjoy that land free from all invasion of filth or other matter coming from any artificial structure on land adjoining. He may be bound by prescription or otherwise to receive such matter, but the burden of showing that he is so bound rests on those who seek to impose an easement upon him. Moreover, this right of every occupier of land is an incident of possession, and does not depend on the acts or omissions of other people; it is independent of what they may know or not know of the state of their own property, and independent of the care or want of care which they may take of it. That these are the rights of an occupier of land appears to us to be established by the cases of *Smith v. Kenrick* (7 C. B. 515); *Baird v. Williamson* (15 C. B., N. S., 376); *Fletcher v. Rylands* (3 H. & C. 774; L. Rep. 1 Ex. 265; L. Rep. 3 H. L. 330), and the older authorities there referred to, and the recent decision of *Broder v. Saillard* (L. Rep. 2 Ch. D. 692). In the present case the plaintiff was bound to receive sewage from the defendant's land through the old drain, but not otherwise; he was not bound to receive it through the surrounding earth or the party wall, through which, in fact, it came. Further, as the plaintiff was the occupier of a servient tenement, he was clearly not bound to repair the drain or any of the dominant tenements. The plaintiff's rights, therefore, have been infringed, and the loss he has sustained cannot be said to be *damnum absque injuria*. (See the note to *Ashby v. White* (1 Sm. L. C. 263, 6th edit.) But the question still remains, has the defendant infringed those rights, and is he the person liable for the infringement? It is said this case is not like *Tenant v. Goldwin* (1 Salk. 360) or *Fletcher v. Rylands* because in both of those cases the defendant himself brought on his land that which occasioned the mischief, whereas in this case the defendant received the sewage, and was bound so to do. So far, however, as we can judge some of the sewage must, in fact, have come from the

defendant's own premises in the first instance; but even if this is not to be taken as proved, we are of opinion that as between the plaintiff and the defendant, it was the defendant's duty to keep the sewage which he was himself bound to receive, from passing from his own premises to the plaintiff's premises otherwise than along the old accustomed channel. This duty is incidental to the defendant's possession of land (See *Russell v. Shenton*, 3 Q. B. 449), and is the necessary consequence of the right of the plaintiff. That duty, like its correlative right, is independent of negligence on the part of the defendant, and independent of his knowledge or ignorance of the existence of the drain. The duty of the defendant himself to receive the sewage evidently did not depend on such knowledge, and the fact that he unknowingly receives it affords no justification for allowing it to escape in a manner in which he had no right to let it pass. *Fletcher v. Rylands* is a strong authority to show that this conclusion is correct, for although in that case the defendant knew of the existence of his reservoir, he did not know that the ground underneath it was in such a state as to render its existence dangerous. It was strenuously but ineffectually urged that he could not be liable in respect of damage caused by a state of things of which he knew nothing. *Bell v. Twentymen* (1 Q. B. 766) is a strong authority to the like effect. Indeed, if it be once established that the plaintiff's rights have been infringed by the defendant, and that the plaintiff has been thereby damaged, the fact that the defendant infringed them unknowingly, and without negligence, cannot avail him as a defence to an action by the plaintiff: (See *Lambert v. Bessey*, Sir T. Raym. 421.) In short we think that the true doctrine is contained in the following passage of the judgment of Blackburn, J. in the case of *Hodgkinson v. Ennor* (4 B. & S. 241). "I take the law to be as stated in *Tenant v. Goldwin* (2 Ld. Raym. 1089; Salk. 21, 360; 6 Mod. 311; Holt. 500) that you must not injure the property of your neighbour, and consequently if filth is created on any man's land, then, in the quaint language of the report in Salk. 361, 'he, whose dirt it is, must keep it that it may not trespass.'" The case of *Hammond v. Vestry of St. Pancras* (30 L. T. Rep., N. S., 296; L. Rep. 9 C. P. 316) which was relied upon by the counsel for the defendant, appears to us to have no real bearing upon the present case, inasmuch as the whole argument and decision of that case turned upon the effect of the clauses of a particular Act of Parliament imposing certain duties upon a public body, and no question arose as to the common law liability of the occupier of adjoining premises (see the judgment of Brett, J. at p. 322). It was, however, contended that the present case was governed by *Ross v. Fedden* (26 L. T. Rep. N. S. 966; L. Rep. 7 Q. B. 661), but that was a case in which the plaintiff and the defendant occupied separate stories in the same house, and it was expressly distinguished from a case like the present, which depends simply on those principles of law which regulate the rights and duties of the occupiers of adjacent pieces of land. The case of *Carstairs v. Taylor* (L. Rep. 6 Ex. 217) is also clearly distinguishable on the same ground. The question whether the defendant was bound as between himself and the plaintiff to repair the drain, or so much of it as ran under the

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defendant's land, was much discussed, but does not really arise, for the plaintiff's cause of action, as originally relied upon, is not that the defendant omitted to repair the drain, but that he omitted to prevent the sewage on his land from coming on the plaintiff's land otherwise than as the plaintiff was bound to receive it. If the defendant had prevented the sewage from so coming the plaintiff would have had no cause of action whether the drain was repaired or not. The defendant may perhaps be entitled as between himself and the owners and occupiers of the other dominant tenements to call upon them to contribute to the expenses of keeping his and their common drain in repair, and it may be, that the plaintiff might have sued all those owners or occupiers, including the defendant, for the damage which he has sustained by reason of such non-repair. But, even if the plaintiff could have sued them all he was not, in our opinion, bound to do so; he was not bound to rest his case on his ability to establish a duty on them to repair the drain, and a breach of such duty by all who used it. Lastly, it was contended that as the defendant was only a tenant and not an owner he was not responsible; but he was in point of law tenant, and as such responsible to the plaintiff (see *Russell v. Shenton*, *ubi sup.*), and he could himself have maintained an action for any invasion of such possession. For these reasons our judgment is for the plaintiff.

Judgment for the plaintiff.

Solicitors for the plaintiff, T. Beard and Son; for the defendant, Hulse, Trustram, and Co.

EXCHEQUER DIVISION.

Reported by H. LEMON and H. F. DICKENS, Esqrs., Barristers-at-Law.

Tuesday, Jan. 16, 1877.

(Before KELLY C.B., and CLEASBY B.)

STRINGER (app.) v. SYKES (resp.)

APPEAL FROM INFERIOR COURT.

Highway—Locomotive Act 1861 (24 & 25 Vict. c. 70), sect. 3—Steam locomotive—Construction of wheels of—"Shoes or other bearing surface of a width not less than 9in."—Width of shoes—Continuous "bearing surface."

By sect. 3 of the Locomotive Act 1861 (24 & 25 Vict. c. 70) "every locomotive drawing any waggon or carriage shall have the tires of the wheels thereof not less than 9in. in width . . . and the wheels of every locomotive shall be cylindrical and smooth soled, or used with shoes or other bearing surface of a width not less than 9in.;" and a penalty not exceeding 5l. is imposed on the owner of any locomotive used contrary to the foregoing provisions for every such offence on summary conviction.

The appellant was the owner of and used a steam locomotive, the tires of the hind wheels of which were 18in. in width, and upon and across the outer circumference of the tires, extending from one edge of them to the other, in a diagonal or oblique direction, were fastened bars or "shoes" of iron, 4½in. broad and about 20in. in length, an interval or space of 3in. being left between each shoe. A bearing surface of 10½in. in width, taking two shoes together, was thereby always obtained at any point on the road, although, owing to the interval between the "shoes," it was not continuous.

On an information against the appellant for using a locomotive, the wheels of which were not constructed in accordance with the above section of the statute, the magistrates convicted and fined him, being of opinion that the bearing surface should be continuous, and that these "shoes" were not such as were contemplated by the Act, and upon appeal, therefrom, it was

Held by the Exchequer Division (Kelly C.B., and Cleasby B., the latter concurring with much doubt), that the conviction was right, and that the "bearing surface" of each "shoe" on the road should be of a width not less than 9in. in itself.

CASE stated for the opinion of the court by two justices of the peace for the West Riding of Yorkshire, under the 20 & 21 Vict. c. 43 on the application of the appellant George Edward Stringer, who was dissatisfied with the determination of the justices under the following circumstances:

1. On the 21st Oct. 1876, George Sykes (the respondent) a superintendent of police, duly laid an information before a justice of the peace under the 24 & 25 Vict. c. 70, s. 3, against the said appellant, for that the appellant on the 20th Oct. inst. at Kilman Thorpe, in the said West Riding, being the owner of a certain locomotive engine propelled by steam power, did use the said locomotive engine upon a certain highway there situate, the wheels of the said locomotive engine not being constructed in conformity with the statute in such case made and provided.

2. On the 15th Nov. inst., the said information came on to be heard before us, two justices of the peace, at a petty sessions at Barnsley aforesaid, when the said Geo. Edwd. Stringer, and also the said Geo. Sykes, appeared before the said justices.

3. Upon the hearing of the information the said Geo. Sykes called the following witness in support of the said information.

William Eagland, of Clayton West, police constable, who said as follows:

On Friday, the 20th Oct. inst., I was on duty near Park Hill, when I saw an engine leave with two trucks. The engine belonged to the defendant. It went on the Wakefield-road, through Sasset, into High Bridge Lane. When it got to a steep part the engine stopped. I then measured the wheels in the presence of the engine driver and stoker. The hind wheels were 18in. broad; bars, across, 4½in. broad, and ½in. thick. The distance between the bars 3in. I then measured the front wheels, and they were 9in. broad. The engine was registered 10 tons, No. 3001. The front wheels were smooth.

Cross-examined by Mr. Ferns, solicitor, on behalf of the defendant:

It appeared that the front wheels were in accordance with the Act, and I did not think the hind wheels had a bearing surface of 9in.; not a continuous bearing surface, I mean. I found spaces between the bars of the hind wheels which are commonly called "shoes," and which were laid 8in. apart. They might vary the eighth or the sixteenth of an inch. The model produced is a true representation of the hind wheel. I did not think it in accordance with the Act, in consequence of the spaces being left between each shoe. I had been specially directed towards this engine the day before. I reported it to Sergeant Batty. I cannot fix a date when my attention was first called to it; perhaps it was three weeks ago. Sergeant Batty called my attention. No one higher than a police officer called my attention to the engine. I have reports of cases tried in this court. I read a case tried at Pontefract some time ago; that called my attention to this engine. I did not think the wheels were in accordance with the Act of Parliament on account of the space between the shoes and the weight not being continuous, and the smooth surface of the wheel not being continuous.

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This being the respondent's case, Mr. Ferns addressed the Court on behalf of the appellant, and called the following witness:

David Greigg, of the firm of Messrs. Fowler and Co., steam plough manufacturers, of Leeds, who said as follows:

Traction engines are made at our place. I know the engine the property of Mr. Stringer. The model produced is a correct one of the wheels. There is a 9in. bearing surface or more on the hind wheels of that engine. If no shoes were on the wheels it would have a very injurious effect upon the roads from the slipping of the smooth wheels, and the difficulty in a progressive movement. The bars across are known by the name of "shoes" throughout England, Ireland, and Scotland. They move over the road much more easily, and consolidate the road, acting as a roller upon it.

Cross-examined by Mr. Sykes, the respondent:

I mean a continuous bearing surface, with a smooth—perfectly smooth—sole—measure two soles together, and you will get over 9in. of width of continued smooth surface at any point. The bars upon the wheels are for the protection of the main frame of the wheels. The bars have a tendency to bite the roads. If the bars were off the hind wheels the engine could work only half a load, and would injure the roads much more than it does now. The engine could not work without the shoes with the weight it had on that day. If it did not go at all it would deteriorate the road much by making holes in it. I consider that in soft weather a wheel of that description would go better than one of a smooth surface and do less damage. I have seen a hundred engines at work with smooth tires.

Re-examined by Mr. Ferns:

I am now speaking from practical knowledge. Supposing the engine was shod with smooth hind bars, the wheels would slip, tear up, and make a hole in the road. I consider the shoes a necessity.

7. The respondent contended that the Act required that the wheels of such engine should be smooth soled, or used with "shoes," or "other bearing surface" of a continuous bearing width of nine inches, and not that interstices of three inches, more or less, should intervene between each of the so-called "shoes."

8. Mr. Ferns contended, on behalf of the appellant, that the wheels were in accordance with the statute, and were "cylindrical," and had a bearing surface of more than nine inches, taking the measurement across the wheels, by which a width of a little more than four and a half inches was gained upon each of the two shoes that would bear upon the ground at one time.

9. We, the said justices, after hearing the whole of the evidence, fined the appellant 3*l.*, and costs 12*s.* 6*d.*, together 3*l.* 12*s.* 6*d.*, for the said offence, we being of opinion that the hind wheels attached to such engine are not constructed in accordance with the statute, and that the so-called "shoes" are not such as are contemplated by the Act.

10. The question of law arising is, Have the hind wheels a smooth soled bearing surface of 9in. as required by the 24 & 25 Vict. c. 70, sect. 3, and are the so-called "shoes" in accordance with the statute? And the opinion of the court is therefore asked upon this point.

The 3rd section of the stat. 24 & 25 Vict. c. 70, upon which the case turned, is as follows:

Sect. 3: Every locomotive propelled by steam, or any other than animal power, not drawing any carriage, and not exceeding in weight three tons, shall have the tires of the wheels thereof not less than 3in. in width, and for every ton or fractional part thereof additional weight, the tires of the wheels thereof shall be increased 1in. in width; and every locomotive drawing any waggon or carriage shall have the tires of the wheels thereof not less than 9in. wide, but no locomotive shall exceed 7*ft.* in width or 12 tons in weight, except as hereinafter pro-

vided. And the wheels of every locomotive shall be cylindrical and smooth soled, or used with shoes or other bearing surface of a width not less than 9in. And the owner or owners of any locomotive used contrary to the foregoing provisions shall for every such offence, on conviction, forfeit any sum not exceeding 5*l.*

It appeared from the model of the wheel referred to in the case, and which was produced at the hearing before the magistrates below, and in the court during the argument of the appeal, that the outer surface of the tires of the hind wheels in question were 18in. broad, and that the bars or "shoes" of iron were each of them 4½in. broad and about 20in. in length from end to end, and that they were bolted on upon and across the outer surface of the tires transversely from one edge of the tire to the other in an oblique or diagonal direction, and that there was an interval of space of 3in. between each shoe.

Appellant's points.—That the conviction is bad on the grounds that the hind wheels of the locomotive engine at the date in the information mentioned were used with shoes having a bearing surface of a width of not less than 9in. within the meaning of sect. 3 of the 24 & 25 Vict. c. 70.

Respondent's points.—First. That the conviction was right; secondly, that the wheels of the engine were not used with "shoes or other bearing surface of a width not less than 9in." within the meaning of 24 & 25 Vict. c. 70, s. 3; thirdly, that the engine or locomotive constructed as described in the case was used contrary to the provisions of 24 & 25 Vict. c. 70.

Forbes (with him was *Day*, Q.C.), for the appellant, contended that the appellant had complied with the provisions of the statute (24 & 25 Vict. c. 70), which it must be remembered was a penal one, and so should receive the strictest interpretation. The 3rd section, which was the section in question, directed that the wheels of these locomotive engines should be "cylindrical and smooth soled, or used with shoes or other bearing surface of a width not less than 9in." Now the wheels here were "cylindrical," and though not "smooth soled," they yet fulfilled the alternative requirement of the section by "being used with shoes or other bearing surface of a width not less than 9in." [KELLY, C.B.—Which do you call the width?] Across the rim or tire of the wheel from one side to the other. The hind wheels were 18in. broad, and these iron bars or "shoes," as they were technically and universally called, were about 20in. in length from end to end one way, and 4½in. in breadth from side to side the other way. They were fastened or bolted on upon the surface of the rims or outer circumference of the wheels, being placed transversely in an oblique or diagonal position across the circumference of the wheel, and there was a space of about 3in. between each bar. The evidence of an engineer called on the part of the appellant proved conclusively that, taking two shoes together, there was always a bearing surface or pressure upon the road of not less than 10½in. The question is whether the Act requires the "width" to be continuous, or whether it is sufficient that the "bearing surface" should be of that width, though it might not be "continuous." [KELLY, C.B.—What is the object of the 3in. interval between the shoes, and why, if without the shoes there would be a "smooth soled" wheel, are the shoes used?] The interval is in order the better to bite the road, and give leverage to draw the

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load. Without the shoes the road would be seriously damaged, as explained by the appellant's witness, David Greigg. To maintain the respondent's construction, the word "continuous" must be imported into the section, which would then read as "shoes, or other bearing surface of a continuous width of not less than 9in." The Legislature, however, has not so said, and the court will not so construe the section. These "shoes" are perfectly well known things, and have long been in constant use, and the Legislature would not have used the word had a continuous bearing been intended, for without the 3in. interval the wheels would be smooth, and more injury be done to the road.

Oave, Q.C. (with S. Tennant) for the respondent *contra*, supported the conviction.—By the section the wheels must "be cylindrical and smooth soled, or used with shoes or other bearing surface of a width not less than 9in." Now these wheels were used with "shoes," and not any "other bearing surface," and the shoes were of a width less than 9in., being, in fact, only 4½in. wide. There are two measures here, the length of the shoe from end to end of it as it lies transversely across the tire of the wheel, and its breadth from side to side, which is 4½in. Its "width" is that latter measure, and the "width" required by the Act is across the "shoe," and not across the tire of the wheel. What is wanted is not the transverse width across the wheel, for if so the shoe might be 18in. to 20in. wide or long in that direction, and only 1in. wide the other way, and so would cut into the road like a knife, which it was the Legislature's especial object to prevent. If the respondent's construction is right a cog wheel might be used. The very thing which the appellant's witness, Greigg, said, this biting surface of the wheel enables to be done, namely, the dragging along twice the weight than could otherwise be hauled by the engine, is what was expressly meant to be prevented. Here there is an uninterrupted pressure of not less than 9in. [KELLY, C.B.—You say they have no right to borrow a portion of the width of one shoe and add it to that of another?] Exactly so. If the "width" is not as the respondent contends for where is it to stop? It might be reduced to even half an inch, and a mere line cannot be called a "bearing surface." The conviction was right, and should be affirmed.

Forbes, in reply.—Under this section the "width" is to be measured across the wheel. In three or four places the word "width," as applied to the "tires" of wheels, is used in a way plainly showing that that is so, and that the Legislature contemplated a "width" across the wheel. "Cogs" are not "shoes," and "shoes" are well and universally known things. The Act requires a bearing surface of 9in. at least, and here it was proved and admitted there was a bearing of 10½in. The word "continuous" is not in the Act, and it would not be better for the road if it were. If shoes are to be used at all there must be an interval, and the question is whether the shoes are to be put on straight across or diagonally.

KELLY, C.B.—It appears to me that this conviction must be affirmed. The words of the Act of Parliament, by which of course we are bound, are not, when looked at, ambiguous in themselves, and they can admit of but one meaning, though, undoubtedly, when applied to the portions of a wheel of an engine, as in the present case, a doubt

may be raised upon their true construction. Now, the words of the 3rd section of the Act of Parliament are "No locomotive shall exceed 7ft. in width." No doubt there the word "width" means the entire width of the locomotive across and throughout, from the outer edge of one wheel to the outer edge of the opposite wheel. The section then goes on—"or twelve tons in weight except as hereinafter provided, and the wheels of every locomotive shall be cylindrical and smooth soled." There is there a certainty of an equal uniform pressure from one side of the wheel to the other throughout both the entire width and the entire circumference, or the portion of the circumference of the wheel which passes over the road, and no question could arise upon that. But as the object is that there should be a certain degree of pressure upon the road under what is called the "bearing surface," we must look to see how the Legislature expresses itself when it deals with the case not of a cylindrical and smooth soled wheel, but of a wheel with "shoes or other bearing surface." Now the words are "or used with shoes or other bearing surface of a width of not less than 9in." I think that means that whatever may be the portion of the circumference of the wheel which it is supposed presses the road at any one instant of time as the wheel moves along over the surface of it, there must be one uniform and one uninterrupted pressure from side to side of the wheel, whatever may be the amount of weight, and that such pressure or "bearing surface" should be of the uninterrupted and unbroken width of 9in. at least. Whether practically it really has any different effect upon the road itself which is thus pressed upon, if there is an interruption or interval between each of these shoes, when, although there may be a pressure upon the whole surface of the road of 9in. width between one side of the wheel and the other, it is still an interrupted pressure, or whether it has any different effect upon the motion of the engine or carriage, I cannot undertake to say. But if there were to be a pressure at three or four different points, or over three or four different spaces or portions of the spaces of the wheel, amounting altogether to not less than 9in., it by no means follows that that would cause the same degree of pressure on the road as if the pressure were an uninterrupted one. I care not whether the distance or space across from one side of the rim or outer circumference of the wheel is called "breadth" or "width." The "width," as the term is used in the Act of Parliament, means here the measurement from one side of the shoe to the other across its narrower space of 4½in. parallel with the circumference of the wheel, and not across or from one end to the other of the longer space of about 20in. of the shoe. But however that may be, I think that the "width" required by the Act cannot be made up of separated and interrupted portions of pressure, or by adding the 4½in. of one shoe to the 4½in. of the other, but that it must be the pressure of one uniform and uninterrupted "bearing surface" from one side of the tire of the wheel to the other, of a width not less than 9in. in itself, such width being a portion of the circumference of the wheel. Now, that is not the case here, and I cannot think that the statute has been complied with. I think it would be speculating upon mere possibilities and as to matter upon which nothing is demonstrated, and as to which nothing could be

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taken for granted, to say that the pressure may be divided into two or more parts; and if divided into two parts, it could be divided as well into a dozen. It is safer, therefore, in my opinion, to adhere strictly to the Act of Parliament, and to take the words of it in their ordinary sense, namely, as meaning that the pressure from one side of the wheel to the other must be not merely that of the 18in., the width between one edge of the tire or circumference of the wheel and the other, but also the pressure on the road at every moment of time of an uninterrupted and unbroken width of "bearing surface," of not less than 9in. Under these circumstances, and for these reasons, therefore, I am of opinion that this conviction must be affirmed, and that our judgment must be in favour of the respondent.

CLEASBY, B.—If I formally differed from my Lord Chief Baron, I should give my reasons fully for doing so; but, as I cannot bring my mind to give a different judgment from that which he has just pronounced, I do not think that it would be proper for me to give reasons for a conclusion which I do not think I can make the foundation of a judgment. I can only say that certainly, in the course of the argument, I felt disposed to think that the decision arrived at by the magistrates was wrong, and, indeed, at present, perhaps, if I were dealing with this case without the assistance of my lord, I might still think that there had been such a sufficient and substantial compliance with the Act of Parliament as to place the defendant (appellant) out of the reach of the penalty by the engine always having a bearing surface of at least 9in. But in a case where it is doubtful, and upon which I should always feel some doubt myself, inasmuch as the Act of Parliament contains no precise description of the way in which the required bearing surface of not less than 9in. in width is to be procured, and as my Lord entertains a tolerably clear opinion upon the subject, I agree with his decision, that there should be judgment for the respondent, affirming the conviction, and with costs.

Judgment for the respondent, affirming the conviction, with costs.

NOTE.—Forbes, at the conclusion of the case, asked for leave to appeal, the case being, he said, of great importance, especially in the North of England, where numerous engines of a similar construction were in use.

The Court expressed an opinion that they thought he ought to have such leave. But on a subsequent day (7th Feb.)

CLEASBY, B., said he had looked into the Appellate Jurisdiction Act of 1876 (39 & 40 Vict. c. 58), and found that by sect. 20 of that Act the power to grant an appeal in such a case was taken away.

Forbes said he had also consulted the Act, and had come to the same conclusion, and had advised the appellant not to continue the appeal.

Solicitors for the appellant, *Pitman and Lane*, agents for *Francis Ferns*, Leeds.

Solicitor for the respondent, *George Badham*, agent for *Marsden, Williams, and Co.*, Wakefield.

Wednesday, Jan. 24, 1877.

KENNE V. DASHWOOD.

Inhabited house duty—Exemption—House occupied for professional purposes with caretaker at night—57 Geo. 3, c. 25, s. 1, 5 Geo. 4, c. 44, s. 4; 32 & 33 Vict. c. 14, s. 11.

By 57 Geo. 3, c. 25, s. 1, houses occupied for the purposes of trade, and in which no caretaker

sleeps at night, are made exempt from assessment to inhabited house duty.

By 5 Geo. 4, c. 44, s. 4, this exemption is extended to houses occupied for professional purposes in which no caretaker sleeps at night.

By 32 & 33 Vict. c. 14, s. 11, any tenement or part of a tenement occupied as a house for the purposes of trade only is made exempt, even though a servant or other person may dwell therein for the protection thereof.

Held that the further exemption given by 32 & 33 Vict. c. 14, s. 11, does not extend to houses occupied for professional purposes; and that, therefore, a house partly occupied for professional purposes and in which a caretaker sleeps at night, is liable to assessment.

CASE stated for the opinion of the Exchequer Division under 37 Vict. c. 16, s. 9.

At a meeting of the commissioners for the general purposes of the Income Tax Acts and for the Acts relating to the inhabited house duties for the city of London, held for the purpose of hearing appeals, Mr Peyton Dashwood appealed against an assessment to the inhabited house duties of 2000*l.* at ninepence in the pound, in respect of the premises 74 and 75, Mark-lane, for the years 1874 and 1875.

The premises were occupied by Mr. Dashwood, who is a land speculator, as well as a land agent, and also by fourteen traders, as well as by two solicitors, one engineer and a naval architect, and by a caretaker at night.

The appellant claimed exemption under sect. 11 of 32 & 33 Vict. c. 14, contending that the entire premises were occupied solely for the purposes of trade within the meaning of the above statute. The surveyor objected that, as Mr. Dashwood, the owner, and the other professional men above referred to, occupied the premises, they could not be considered to be used for the purposes of trade only.

The commissioners, however, granted relief on the grounds that the sect. 11 of 32 & 33 Vict. c. 14 must be read with and construed in harmony with 5 Geo. 4, c. 44, s. 4.

Whereupon the surveyor declared his dissatisfaction with their decision, and duly required the commissioners to state and sign a case for the opinion of the Exchequer Division of the High Court of Justice, and this case was stated accordingly.

The material statutes are as follows:

57 Geo. 3, c. 25, s. 1, after reciting that duties on inhabited houses were granted by 48 Geo. 3, c. 55, sch. B., continues:

And whereas it is become usual in cities and large towns and other places for one and the same person, or for each person where two or more persons are in partnership, to occupy a dwelling-house or dwelling-houses for their residence, and at the same time one or more separate and distinct tenements or buildings, or parts of tenements or buildings, for the purposes of trade, or as warehouses for lodging goods, wares, or merchandise therein, or as shops or counting-houses, and to abide therein in the daytime only for the purposes of such trades respectively which have been charged with the said recited duties, although no person shall inhabit or dwell therein in the night time. And it is expedient in such cases to exempt from the said duties such tenements or buildings, or parts of tenements or buildings, as are or shall be solely employed for the purposes herein-mentioned. Be it therefore enacted . . . that from and after the 5th day of April 1817, on due proof made in the manner herein directed, to the satisfaction of the respective commissioners acting in the execu-

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tion of the said recited Act, that any person or any number of persons in partnership together respectively occupy a tenement or building or part of a tenement or part of a building, which shall have previously been occupied for the purpose of residence only, as a house for the purpose of trade only, or as a warehouse for the sole purpose of lodging goods, wares, or merchandise therein, or as a shop or counting-house, no person inhabiting, dwelling, or abiding therein, except in the daytime only, for the purpose of such trade, such person or each of such persons in partnership respectively residing in a separate and distinct dwelling-house, or part of a dwelling-house charged to the duties under the said Act, it shall be lawful for the said commissioners, according to the provisions of this Act, to discharge the assessment made for that year in respect of such tenement or building which shall be so used for the purpose of trade, or so employed as a warehouse for the sole purpose of lodging goods, wares, or merchandise therein, or as a shop or counting-house, anything in this said Act to the contrary notwithstanding.

Sect. 4 of 5 Geo. 4, c. 44, after reciting the exemption by 57 Geo. 3, c. 55, sect. 1, to persons occupying houses for the purposes of trade, proceeds as follows:

And whereas it is expedient to extend the said exemptions to the cases herein mentioned, be it further enacted that upon all assessments to be made for any year commencing from and after the 5th day of April, 1824, the provisions in the said Act contained for granting exemptions from the said duties to persons in trade, in respect of houses, tenements, or buildings in the said Act described, shall and may be extended and applied by the respective commissioners and officers acting in the execution of the said Act, and of this Act, on due proof, to all and every person, or any number of persons in partnership together, for and in respect of any house, tenement, or building, or part of a tenement or building, in the said Act described, which shall be used by such person or persons as offices or counting houses for the purposes of exercising or carrying on any profession, vocation, business or calling, by which such person or persons shall seek a livelihood or profit, no person inhabiting, dwelling, or abiding therein, except in the day time only, for the purpose of such profession, vocation, business or calling, such person or each such person in partnership respectively residing in a distinct and separate dwelling house or part of the dwelling house charged with such duties.

32 & 33 Vict. c. 14, sect. 11 enacts that—

From and after the 5th day of April, 1869, any tenement or part of a tenement occupied as a house for the purposes of trade only, or as a warehouse for the sole purpose of lodging goods, wares, or merchandise therein, or as a shop or counting house, or being used as a shop or counting house, shall be exempt from inhabited house duties, although a servant or other person may dwell in such tenement or part of a tenement for the protection thereof.

The Solicitor-General (Sir Hardinge Giffard, Q.C.), (*The Attorney-General*, Sir J. Holker, and *Dicey* with him) for the appellant, contended that the decision of the magistrates was clearly erroneous, the case being, in fact, concluded by that of *Busby v. Newton*, L.Rep. 10 Ex. 322.

Herschell, Q.C. (*Phillips* with him).—I am not going to argue the point which was decided in that case, viz., that in assessing the premises no abatement can be made under 32 & 33 Vict. c. 14, s. 11, in respect of those parts of a house which are occupied for the purposes of trade only. The point here to be argued is the one which was conceded by the counsel for the respondent in that case, and probably conceded because they were not aware of an Act which was not cited in the argument, viz., 5 Geo. 4, c. 44, s. 4. The argument of the respondent in this case is that the whole house is exempt from assessment. Sect. 11 of 32 & 33 Vict. c. 14, must be construed by the light of the statutes which preceded it. The first is that of 57 Geo. 3,

c. 25, sect. 1. That Act only exempted houses occupied for the purposes of trade, and in which there was no care-taker at night. The Legislature then thought it advisable to extend this exemption to houses occupied for professional purposes, and the Act of 5 Geo. 4, c. 44, was accordingly passed for that purpose. By this provision, supposing there was no care-taker at night, the house in question would clearly be exempt from assessment. I must concede, however, that here a care-taker did sleep in the house at night, but I contend that the house is exempt notwithstanding. The legislature deemed it expedient and right that these provisions should be extended to cases where the houses were occupied for the purpose above mentioned, and where persons may dwell for the purpose of protection only, and in consequence 32 & 33 Vict. c. 14, s. 11, was passed. That clearly must be taken to include both houses occupied for the purposes of trade, and those occupied for professional purposes. It is true the words used are, "occupied for the purposes of trade only," but by that expression the legislature must be taken to have intended to include houses occupied for professional purposes also. In this case the house was used partly for trade, partly for professional purposes. It is clearly exempt, therefore, under the first two Acts; and 32 & 33 Vict. c. 14, s. 11, which extends the exemption in the first case to cases where there is a care-taker at night, extends it also in a similar case to the second exemption.

The Solicitor-General in reply.—The sole question is this: Is 5 Geo. 4, c. 44, incorporated in the provisions of 32 & 33 Vict. c. 14, s. 11? Clearly not. The words of the Act are clear and precise, that the extended exemption as to care-takers shall apply only to houses occupied for the purposes of trade. He cited

Appeal of Scottish Widows' Fund and Life Assurance Company, reported by the Commissioners of the Inland Revenue, from the shorthand writer's notes. *Exchequer Cases of Great Britain*, part 2, p. 8.

CLEASBY, B.—We have, in this case, to construe the 11th section of 32 & 33 Vict. c. 14, and we are called upon, in giving a construction to it, not to be guided by the words it contains. But I do not think they will bear such extension. The language of the Act is clear, and I should say precise, and free from all ambiguity. It makes use of the words "for the purpose of trade only." There is no ambiguity there. It is right to encourage trade, and it is satisfactory to be able to say that one can see a reason for using these words. But then the section goes on to enumerate other particular exemptions showing that there are premises exempted which are occupied for purposes not coming strictly within the expression "trade," but connected with it, as warehouse, &c. We are asked, then, to depart from this clear language on the ground that by a previous statute the exemption has been granted to a limited extent to houses occupied for professional purposes. Mr. Herschell, in fact, says that because by 5 Geo. 4, c. 44, the limited exemption given to houses occupied for the purposes of trade is extended to those occupied for professional purposes, therefore the further exemption granted by 32 & 33 Vict. c. 14, s. 11, to houses occupied for the purposes of trade only must as a necessary consequence be supposed to be likewise extended to those also which are occupied for professional

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purposes. I think there is no ground for that argument, nor can I see any reason why the Legislature should so have enacted.

POLLOCK, B.—I am quite of the same opinion, and will only say a few words with regard to Mr. Herschell's argument. He spoke of this as being either a *casus omissus* or a use of language which amounts to elision of a part of the section; and he urges upon us to import words into the statute which are not to be found there. I do not think that the Legislature can be charged with that omission. The whole of the difficulty arises from the fact that it is not usual now to commence an Act of Parliament with a preamble. It seems to me that the Legislature may well have intended in sect. 11 to limit the extra exemption to houses occupied for the purpose of trade. In the case of a professional man it may well be that he may have a dwelling in the country as well as professional chambers which are substantially like a second residence, in which case one can understand why the Legislature should not wish to extend the exemption.

Judgment for the appellant without costs.

Solicitors for the appellant, *Solicitor of Inland Revenue.*

Solicitor for the respondent, *E. B. Phillips.*

Friday, Feb. 2, 1877.

HINDS v. THRING.

Tolls—Exemption from—Carriage employed in Her Majesty's service under the provisions of the Mutiny Act (39 Vict. c. 8), sects. 68, 86.

By sect. 86 of the Mutiny Act (39 Vict. c. 8) a toll collector is made liable to a penalty if he shall demand and receive toll (inter alia) "for any carriages or horses belonging to Her Majesty, or employed in her service, under the provisions of this Act." By sect. 68, for the regular provision of carriages for Her Majesty's forces and their baggage in their marches, power is given to constables, upon warrants issued by justices within their several jurisdictions, to provide carriages and horses for employment in Her Majesty's service; and the section proceeds to enact how and under what circumstances this can be done. The respondent, an officer in Her Majesty's service, in pursuance of an order to proceed from his official residence at one place to another in the Isle of Wight, made a part of the journey in uniform in his own dogcart, drawn by his own horse, and upon arrival at the appellant's toll bar was charged a toll in respect of his carriage, which he paid under protest. It was necessary that the respondent should have a carriage to take several official books and things he was directed by order to take to his destination, and if he had hired a carriage the cost of hiring would have been allowed to him.

The appellant having been convicted by justices under sect. 86 of 39 Vict. c. 8, for taking this toll: Held, on appeal that sect. 86 only exempted carriages employed under and by virtue of sect. 68 of the Act; that the carriage in question was therefore not employed in Her Majesty's service under the provisions of the Act, and that the conviction was accordingly wrong.

CASE stated by Justices for the County of Southampton for the division of the Isle of Wight, on appeal from their decision convicting the appellant

on an information charging for that he, being a tollgate keeper and collector of tolls, did on 30th May 1876, at Hunnyhill, unlawfully and illegally demand and receive a certain toll, to wit 3d., from the respondent, in respect of a certain carriage employed in the service of Her Majesty, the respondent being an officer and on duty and in uniform, contrary to sect. 86 of 39 Vict. c. 8. Upon the hearing of the information it was found as a fact that the respondent was a lieutenant-colonel in the Royal Artillery and a colonel in the army. That on the 26th May 1876 he received an order to proceed from his official residence at Wimbourne, in Dorsetshire, to Yaverland Fort in the Isle of Wight. In pursuance of that order, and on the journey from Wimbourne to Yaverland, the respondent, on the 31st of May, left Yarmouth in uniform in his own dogcart, drawn by his own horse, and proceeded to the tollbar at Hunnyhill, where the sum of 3d. was demanded of him by the appellant and paid under protest. It was also proved that it was necessary that the respondent should have a carriage to take the several books and things he was directed to take to Yaverland Fort, and that if he had hired a carriage, the cost of hiring would have been paid and allowed to him; but that on the occasion in question the respondent drove his own carriage because it was necessary that he should have his horse to appear the following morning on parade. It was also sworn by the respondent that the carriage was employed in Her Majesty's service.

It was contended on the part of the appellant that the toll was legally demanded and taken under the provisions of sect. 22 of 53 Geo. 3, c. 9 (local Act). That the exemption from toll conferred by sects. 73 and 86 of 39 Vict. c. 8 only applied to carriages belonging to Her Majesty or employed in her service under the provisions of that Act; and inasmuch as the carriage in question was the property of the respondent, and did not even under the circumstances mentioned belong to Her Majesty, and had not been supplied under sects. 68, 69 of 39 Vict. c. 8, it could not be said to be employed on Her Majesty's service under the provisions of that Act.

The justices were of opinion that the evidence given brought the case within the operation of sect. 86 of the Act, and convicted the appellant.

The question of law for the opinion of the court was whether under the circumstances the carriage in question was either the property of Her Majesty or employed in her service under the provisions of the said Act of 39 Vict. c. 8, and therefore not liable to toll.

By sect. 86 of 39 Vict. c. 8, if any toll collector shall demand and receive toll from (inter alios) any carriages or horses belonging to Her Majesty or employed in her service under the provisions of this Act, every such toll keeper shall forfeit for every such offence any sum not exceeding 5l. nor less than 40s.

By sect. 68 of the same Act it is enacted for the regular provision of carriages for Her Majesty's forces and their baggage in their marches in Great Britain and Ireland, all justices of the peace within their several jurisdictions being duly required thereto, by an order from Her Majesty or the general of her forces, or other person, &c., may issue a warrant to any constable having authority to act, &c., requiring him to provide the carriages, horses, and oxen and drivers therein mentioned, &c.

The section then proceeds to set out the manner

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in which and the circumstances under which this is to be done.

Sutton, for the appellant, contended that the conviction was wrong. The toll was legally taken under 53 Geo. 3, c. 9, sect. 22 (local Act); and in order to be exempt the carriage must not only be employed in Her Majesty's service but it must be so employed under the provisions of the Mutiny Act, that is under the provisions of sect. 68.

The respondent did not appear.

OLESBY, B.—It is quite clear that the conviction in this case was wrong in point of law. The toll for which the appellant was convicted was taken in respect of a carriage, and the only question is whether sect. 86 of 39 Vict. c. 8, which imposes this penalty, is applicable to this case. Now the case evidently does not come within the words "or for any carriage or horses belonging to Her Majesty," for here the carriage was the officer's own carriage, which he was using for his own convenience. Nor can it come within any of the preceding words of the section. Then follows the words "or employed in her service under the provisions of this Act." Now, suppose the words had simply been "or employed in her service," and had stopped there, a nice question might then have arisen as to whether this carriage was in fact so employed. But the section goes on, "under the provisions of this Act." The case then must be brought strictly within the meaning of these words if they have any meaning, and the carriage must have been employed in the service of Her Majesty under the provisions of this Act. When we look at the Act we find that the latter words have a distinct and definite meaning. They apply to sect. 68, in which power is given to have carriages provided for the employment of her Majesty under particular circumstances. If the carriage had been provided in the way directed by that section it would have been a carriage employed under the provisions of this Act. But the facts found in this case show that the carriage employed was not employed under the provisions of that section. That being so, sect. 86 does not apply; the toll-keeper was only doing his duty in taking the toll, and the conviction must be quashed.

POLLOCK, B.—I am of the same opinion, and quite agree with what has fallen from my brother Olesby. If any further argument were necessary it might be furnished by this fact, that when the legislature were dealing with volunteers very different words were used. There the Legislature expressly say that volunteers ought to be exempt, and, to encourage them, larger exemption is given them than to an ordinary officer. Sect. 45 of 26 & 27 Vict. was passed for that purpose, and that section clearly exempts all carriages, public and private, employed in carrying volunteers.

Judgment for appellant with costs.

Solicitors for appellant, *Cunliffe, and Beaumont*, for *Blake*, Isle of Wight.

CHANCERY DIVISION.

Reported by J. EYRE THOMPSON, Esq., Barrister-at-Law.

(Before the MASTER OF THE ROLLS.

Friday, Jan. 17, 1877.

RODERICKS v. ASTON LOCAL BOARD OF HEALTH.
Sewers—Powers of local authority—Public Health Act 1875 (38 & 39 Vict. c. 55), ss. 16, 19, 32, 144—150, 303.

An urban or rural sanitary authority has power by the Public Health Act 1875, to make a sewer in private property, even though the sewer may be raised above the level of the ground and may necessitate an embankment of considerable height being built over it. In such case, ample compensation is provided by the Act.

THE plaintiffs are owners in fee of certain hereditaments, situate in the district of the Manor of Aston, in the county of Warwick, called Yew Tree House, with the grounds attached, which are laid out as ornamental gardens or pleasure grounds, in which are growing many ornamental timber trees, and a large rhododendron plantation and other valuable shrubs and plants. The grounds slope down in a natural hollow or dell to the river Tame.

The defendants are the Urban Sanitary Authority for Aston and the surrounding districts, and they proposed to run a sewer on, over, and across the plaintiff's property, across the hollow, and for the purpose of supporting the sewer, to make an embankment of earth on each side of the sewer, and more than one foot above it. The embankment was to be more than seven feet above the surface of the ground, and in some places sixty feet broad, and as the plaintiff alleged, completely surrounding his bar or taproom, and making it inaccessible and useless.

The plaintiff moved for an injunction against the defendants to restrain them from so making the sewer.

The question for the consideration of the court was whether under the Public Health Act of 1875, the defendants had power to make this sewer in the manner proposed, without actually buying the land.

Chitty, Q.C. and *Alexander Glen*, for the plaintiffs.

Davey, Q.C. and *Woodroffe*, for the defendants.
The sections of the Act (38 & 39 Vict. c. 55) upon which the question turned, are the 16th, 19th, 144th, and following ss. to 150, the 32nd and the 308th. (a)

(a) Sect. 16. Any local authority may carry any sewer through, across, or under any turnpike road, or any street, or place laid out as or intended for a street, or under any cellar or vault which may be under the pavement or carriageway of any street, and after giving reasonable notice in writing to the owner or occupier (if in the report of the surveyor it appears necessary), into, through, or under any lands whatsoever, within their districts.

They may also (subject to the provisions of this Act relating to sewage works, without the district of the local authority), exercise all or any of the powers given by this section without their district for the purpose of outfall or distribution of sewage.

Sect. 19. Every local authority shall cause the sewers belonging to them to be constructed, covered, ventilated, and kept so as not to be a nuisance or injurious to health, and to be properly cleansed and emptied.

Sect. 32. A local authority shall three months at least before commencing the construction or extension of

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The 144th section gives to the urban authority of a district exclusive power, so far as consistent with the provisions of the act, to execute the office of surveyors of highways, and to exercise the powers, and to be subject to the liabilities which by the Highway Act of 1835, or any Act amending the same, were vested in the vestry of any parish.

The 145th section provides that the inhabitants of urban districts are not to be liable to rates for roads, &c., without the district, and for the powers and duties of retiring surveyors.

The 146th, 147th, and 148th sections refer to the powers of urban authorities to agree as to the making of new public roads, and constructing or adopting public bridges, and to enter into agreements with turnpike trustees as to the repairs, &c., of roads.

The 149th section vests all streets which are highways repairable by the inhabitants at large in the urban authority, and provides for the repair of the same, and the penalties to be imposed in case of injury to the pavement, stones or other materials of such streets.

The 150th section gives power to compel the paving, lighting, &c., of private streets.

JESSEL, M.R.—The question being one of pure law I am bound to give an opinion upon it. As I understand the practice of the court on motion for injunction, the only question that I consider I am deciding, or that I have to decide, is whether under the powers of the Public Health Act, the defendants, the Aston Local Board, have a right to carry a sewer partly under and partly above ground. That is the question before me. Now the words are these: "Any local authority"—the defendants are a local authority—"may carry any sewer"—this is a sewer—"through, across, or under any turnpike road, or any street or place laid out, or intended for a street, or under any cellar or vault which may be under the pavement or carriage way of any street, and after giving reasonable notice in writing," which has been given, "to the owner or occupier, if on the report of the surveyor it appears necessary," and it does appear necessary, "into, through, or under any lands whatever within the district." They may also, subject to the provisions of this Act regulating such works, exercise all or any of the powers given by this section without their district, for the purpose of outfall or distribution of sewage. That is the whole of the section. The word "lands" by the definition includes buildings—that is the interpretation clause in the Act. Now, I am asked to say that the words "into, through, or under," mean "under." That is what I am asked to say. I decline to say so. Why

any sewer or other work for sewage purposes without their district, give notice of the intended work by advertisement in one or more of the local newspapers circulated within the district where the work is to be made.

Such notice shall describe the nature of the intended work, and shall state the intended terminus thereof, and the names of the parishes, and turnpike roads, and streets, any other lands (if any), through, across, under, or on which the work is to be made, and shall name a place where a plan of the intended work is open for inspection at all reasonable hours, and a copy of such notice shall be served on the owners or reputed owners, lessees, or reputed lessees and occupiers of the said lands, and on the overseers of such parishes, and on the trustees, surveyors of highways, or other persons having the care of such roads or streets.

they should ask me to make three words into one I do not know. The word "under" is distinguished by the word "or" from "into" or "through." They are not only to carry it under, but "into, through, or under." It is said that that means that they must make the sewer by means of a tunnel, or if by a cutting that they must cover over the cutting so that the sewer shall be always carried under. As I said before, taking the ordinary meaning of the English language, if I am to carry anything "into, through, or under" land, it does not mean that that is to be wholly under; it may mean that it is to be something which is not "under" but "into" or "through." Standing alone I have no doubt whatever that this sewer, being partly under and partly above the surface, is carried "into, through, or under" the lands in question. If the argument stopped there, or if the distinction stopped there, I should have nothing more to add, but it does not stop there. It is first of all said that there is a context to show that whatever the ordinary meaning of the words "into" and "through" lands may be, or whatever their ordinary meaning may be, when contrasted with the word "under," under this particular Act of Parliament "through" is intended to mean under and nothing else; and for that purpose I will refer first to "through lands." Any local authority may carry any sewer through, across, or under, any turnpike road, or any street or place laid out, or intended for a street, or under any cellar or vault. Now, it is said that if you read the word "through" there, to authorise you to make a sewer above a turnpike road you may make it very unpleasant to walk or drive on the turnpike road; and it is not likely that the Legislature would have conferred any such powers. I do not think the argument from probability is sufficient; because the Legislature conferring powers of this kind on a public authority like a local authority, for the public benefit, will not impute to them the desire or the intention of using them, so as to obstruct the necessary traffic on the turnpike road. They leave it to their discretion whether they will carry the sewer above the turnpike road, but they must only carry it in such a manner as not to interfere with the traffic. For instance, the turnpike road at that point may be below the level of the turnpike road on each side, so that by carrying the sewer on the turnpike road they may make the turnpike road level, which before was in a valley, and benefit it, or they may make it to such an extent as will not interfere, with the level of the road. Where bodies like this have only the public benefit in view, you must impute to them a reasonable mode of carrying out the objects which they are empowered to carry out, more especially when you find there is a section in the Act, I think the 308th, giving compensation to everybody in the widest terms. What the result would be under this section of their interfering with the traffic of a turnpike road I need hardly say, for it is provided that "where any person sustains any damage by reason of the exercise of any of the powers of this Act, in relation to any matter as to which he is not himself in default, full compensation shall be made." [Davy, Q.C.—Besides they are prohibited from committing a nuisance.] I was going to say so. So that in the first place they would be very careful not to interfere with the turnpike road,

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and in the next place, as Mr. Davey has said, they must not, in any of their works commit a nuisance at all, except, of course, that they may interfere.—What section is that? [Ohitty, Q.C.—The 19th. It has nothing to do with the roads—it is about keeping the sewers constructed, covered, and ventilated so as not to be a nuisance and injurious to health.] However, I think the 308th section without going into that is a check, but I think the general principle is wider, that the Legislature conferring these powers trusts to the public body exercising them, to exercise them discreetly; but really the matter does not stop there, for I think they have a power even as to the turnpike road, and I think that is shown pretty clearly. These bodies are divided into two classes, rural authorities and urban authorities; the urban authorities have special powers of altering the levels of the roads. By the 144th section the highways in the towns are vested in the urban authorities, and by the subsequent sections especially the 149th and 150th sections of the Act, the urban authorities have positive rights to alter the roads, and to alter their levels, make them higher or lower, and do pretty well what they like with them. Therefore, that the Legislature should give them this power to carry the sewers, is not only not inconsistent with the Act, but perfectly consistent with it, for they have, in fact, in express terms, vested in these urban authorities all the powers that may be necessary to deal with the roads. Therefore, there is nothing unlikely as far as they are concerned. But did they intend the rural authorities not being expressly empowered by this Act to interfere with the roads, to do it? I see no reason as I have said before to think that they did not, but I think that they did, from the 32nd section, which is this, that before commencing any sewage works without the district, the local authority is to give notice. What is the local authority to do? (the local authority includes the rural authority). "Such notices shall describe the nature and extent of the work, and shall state the intended termini thereof, and the names of the parishes, and the turnpike roads, and streets, and other lands, if any, through, across, under, or on which the work is to be made." Now, there it is not "through, across, or under," but "through, across, under, or on." There cannot be the slightest doubt, therefore, that the Act contemplated that there should be some work done on a turnpike road by local authorities, and if confirmation were wanted for the general meaning, I should say that that does afford confirmation to show that even as regards the road they have the right to construct works if reasonably necessary for the purpose they have in view. As I said before, it does not by any means follow that by so doing they will injure the turnpike road in the least. They may benefit it very much. I am, therefore, not pressed with the argument as to the meaning of the word "through," as to the turnpike road. But, again, even supposing the argument were valid, it would only amount to this, that the context of "turnpike road" would restrain the meaning of the word "through" to something less than the context of "any other lands." Because it by no means follows that because the court should think that the word "through," in the prior part of the clause, was restrained by its

use in connection with "turnpike road," to something not far above the surface, or not above the surface at all, it should be so restrained by another part of the section, consequently it is not conclusive in any way as restricting the meaning of the words. But then we have got this in the next line. It is not "any street or place laid out or intended for a street" as to which the same observations do not apply, but it goes on, "or under any cellar or vault," leaving out the words "through or across," and restricting it to "under" as regards the vault, showing that in using the word "under" alone, they purposely left out that which would enable you to carry it over a cellar or vault, or through a cellar or vault. That being so it appears to me to be clear from reading the section that there is nothing to prevent them from doing what they are asked to do. But then it is said independently of the section they have power to purchase land, and that what they are doing is injuring the plaintiff to such an extent that it is equivalent to taking the whole of the land. In what way the plaintiff is damaged or injured I cannot see. He is only entitled to be paid for what he loses, that is to be paid for the whole of the value of the land minus the value of what he keeps, and he can sell the remainder. With an Act of Parliament so framed, giving full compensation, I do not see what he comes here for an injunction for. It is at the outside a mere money demand. If he is right he is only entitled to be paid the value of his land. Then I am referred to some cases; and, as usual with authorities on a question of this kind, they have very little bearing on the question of construction. Of course I am bound by authorities on the construction of a public Act of Parliament; but the authorities to which I have been referred not only have no direct bearing on the matter before me, but in themselves, if I may say so, with great respect for the learned judges who have decided them, seem to me to bear further and considerable discussion, which I refrain from going into. I may say that the principal authority to which I was referred was a case decided in the court below by a majority of judges against the opinion of a minority, affirmed by the Exchequer Chamber again by a majority. Of course, a case of that kind is not the less an authority because it was the decision of the majority, but still it would make the judge who applied it very careful to see that a case which gave rise to such a diversity of opinion between the learned judges really governed the case before him. But when I come to look at it it does not apply at all. The case is the *Metropolitan Board of Works v. The Metropolitan Railway Company*, reported in the L. Rep. 4 C. P. 192. The simple point decided there was this: The board had made a sewer (I am stating it in my own language) through somebody's land, and then the owner of the neighbouring lands dug under his own land, and the consequence of his digging under his own land was that the sewer, not being constructed with sufficient strength to do without the lateral support of the neighbour's land, bulged and burst, and was, no doubt, seriously injured. It was said that the man's digging under his own land, or rather that the railway company's digging, was the cause of the bulging and bursting of the sewer, and that it was a wrongful act. The answer was: "I have only dug under my own land, which I have a right

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to deal with in any way I think proper; you have no right to a lateral support as an easement unless twenty years have elapsed," which answer was conclusive, unless the Board of Works could show a statutory right to the lateral support within the twenty years. Now, the only statutory right that they had was the power of constructing a sewer. The minority thought that that showed that the Legislature intended that the sewer when constructed should be maintained and kept, but the majority seemed to think that it was possible to construct the sewer so strongly that it could do without the lateral support. What the majority said was this: "If the construction contended for on the other side is correct, we cannot impute to the Legislature the injustice of supposing that they would take away from the owner of the soil the lateral support of which was wanted, the right to compensation for depriving him of the right to do what he liked with his own property, and we can find no provision in the Act of Parliament giving him compensation as we read it." I do not discuss whether they read it rightly or wrongly. "The right to compensation is confined to persons whose land is directly affected by the sewer being carried through or under it, and therefore there being no such right, we think there is no such right taken away from the owner of the soil adjoining, and consequently he is not liable in an action." That is the case which was decided. It has not only no direct application to the case before me, but when you come to examine its indirect application is the other way; because see what the reason for the judgment was. I gather that if the judges had found a clause giving compensation to the owners of the adjoining soil, they would have decided the other way on the ground that they got compensation. But here I find the largest possible clause of compensation, which I think would hardly admit of discussion, so that anybody whose rights are injuriously affected would be entitled to compensation. So that they might well hold, consistently with this Act of Parliament, that the incident of lateral support was given to the local authority, in connection with the sewer as well as the right to carry it over or under the road. This being my opinion which I have given at some length, as I was deciding once for all, and I thought the parties might desire it, I am of opinion that the motion should be refused and in accordance with the usual practice of the court, the costs will be costs in the cause.

Solicitors: *Letts*, for *R. Davenport*. Birmingham; *Robinson and Preston*, for *Ansell*, Aston.

CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, Feb. 10, 1877.

(Before KELLY, C.B., MELLORE, LUSH, and DENMAN, JJ., and HUDDLESTON, B.)

REG. v. OLIVER AND AUSTIN.

Indictment—After verdict—Amendment—Debtors Act 1869.

The Debtors Act 1869 (32 & 33 Vict. c. 62), s. 11, subs. 15, enacts that any person adjudged bankrupt shall be guilty of a misdemeanor if within four months before the presentation of a bankruptcy petition against him, he being a trader,

pawns, pledges, or disposes of, otherwise than in the ordinary way of his trade, any property which he has obtained on credit and has not paid for, unless the jury is satisfied that he had no intent to defraud.

An indictment stated that heretofore and before the committing of the offence next hereinafter mentioned, to wit on &c., A. and B. were adjudicated bankrupts, and that the said A. and B. afterwards, with intent to defraud their creditors, unlawfully, within four months next before the presentation of a bankruptcy petition against them, they being traders, did pawn, pledge and dispose of, otherwise than in the ordinary way of their trade, certain property which they had obtained upon credit, and had not paid for.

Held, on objection after verdict, that the indictment did not show substantially the offence under the above enactment, and that an amendment could not then be made.

CASE reserved for the opinion of this Court by the Recorder of Hastings.

At the quarter sessions of the peace for the borough of Hastings, held before me as recorder, on the 27th Oct. 1876, an indictment came on to be tried against the defendants framed under sub-sects. 3, 9, 12, 14, and 15 of sect. 11 of 32 & 33 Vict. c. 62 (*The Debtors Act 1869*). The defendants were acquitted on the first four counts, and convicted on the 5th, which was as follows:

And the jurors aforesaid, on their oath aforesaid, do further present that heretofore [and before the committing of the offence next hereinafter mentioned] to wit on the 6th March in the year of our Lord 1876, James Oliver and Thomas Austin were adjudicated bankrupts, and that the said James Oliver and Thomas Austin [afterwards] with intent to defraud their creditors, unlawfully, within four months next before the presentation of a bankruptcy petition against them, they being traders, did pawn, pledge, and dispose of otherwise than in the ordinary way of their trade, certain property which they had obtained upon credit, and had not paid for, against the form, &c.

A motion was then made in arrest of judgment to quash the count, on the ground that it was bad upon the face of it, and repugnant, inasmuch as it stated in the first part of it that the offence was committed after the bankruptcy, which it could not be; and in the other part of the count that it had been committed before the bankruptcy.

I held that, supposing the count as it originally stood to be bad after verdict, which I doubted. I had, at all events, power to amend it, and I did amend it by striking out the words in brackets as above, but I reserved the point for the opinion of the Court for the Consideration of Crown Cases Reserved, and bound the defendants over to come up for judgment at the next sessions.

If the Court should be of opinion that the count is bad after verdict as it originally stood, and that I had no power to amend it as above, then the count is to be quashed. But if the Court should be of a contrary opinion on either of these points, then the verdict is to stand, and the defendants are to come up for judgment accordingly.

R. H. HURST, Recorder of Hastings.

J. P. Grain, for the prisoner.—This conviction cannot be sustained. First, there is no power to amend after verdict under the 13 & 14 Vict. c. 100, s. 25: (*Reg. v. Larkin*, Decca. C. C. 365,

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6 Cox C. C. 377; *Reg. v. Frost*, Dears. C. C. 474; 6 Cox C. C. 526.) Secondly, the 5th count of the indictment is bad; it is framed upon the Debtors Act 1869 (32 & 33 Vict. c. 62), s. 11, subs. 15. The Act section begins "Any person adjudged bankrupt shall, in each of the cases following, be deemed guilty of a misdemeanor, and then the 15th subsection describes this case in the words following: "If within four months next before the presentation of a bankruptcy petition against him, he, being a trader, pawns, pledges, or disposes of otherwise than in the ordinary way of his trade, any property which he has obtained on credit and has not paid for, unless the jury is satisfied that he had no intent to defraud." The words "Any person adjudged bankrupt" run through each of the subsections, and it would not be sufficient merely to allege in the indictment that the prisoners with intent, &c. unlawfully, within four months next before the presentation of a bankruptcy petition against them did," &c. That would disclose no offence, as very often such petitions are not proceeded with or are dismissed, and no adjudication of bankruptcy takes place upon them. The averment, therefore, that the prisoners were adjudicated bankrupt is a material and necessary averment, and reading the indictment without the amendment, it stands thus, that before the offence the prisoners were adjudicated bankrupts, and they afterwards, within four months next before the presentation of a petition of bankruptcy, committed the offence, which could not be, as the offence must be committed before the adjudication of bankruptcy.

Willoughby, for the prosecution.—The introductory paragraph in the indictment as to the adjudication of bankruptcy, is mere inducement, and may be rejected as surplusage. It is only necessary to set forth the substance of the offence in the words of the Act 32 & 33 Vict. c. 62, s. 29, without alleging or setting forth any debt, act of bankruptcy, trading, adjudication, or any proceedings in, or order, warrant, or document of any court acting under the Bankruptcy Act 1869. After striking out the introductory paragraph a sufficient description of the offence would remain. [LUSH, J.—What though the petition may have been dismissed. This indictment would be proved if the prisoners had been adjudicated bankrupts ten years ago, and afterwards a second petition in bankruptcy were filed which was ultimately dismissed, and within four months of the second petition they pawned their property. But that would be no offence.] In such a case as that supposed there would be no conviction, as the evidence would be insufficient. But here the objection arises after verdict, when the offence must be taken to have been proved. The 11 & 12 Vict. c. 100, s. 24 and *Reg. v. Parker* (L. Rep. 1 C. C. R. 228; 11 Cox C. C. 478) were then cited.

KELLY, C.B.—I am always desirous to sustain a conviction when it is one of which the person convicted is undoubtedly guilty, but to hold this count after verdict to be a good count would, in my opinion, be opposed to the rules of criminal pleading. The offence, under the statute, is substantially this. When a trader has committed a fraud by pawning, pledging, or disposing of, otherwise than in the ordinary way of his trade, property obtained on credit within four months before a petition in bankruptcy against him, and that petition has been followed in due course by adju-

dication of bankruptcy, the offence is complete. Now the question is whether such an offence is stated in this count of the indictment? The count begins by alleging that "heretofore and before the committing of the offence hereinafter mentioned, these traders were adjudicated bankrupts, and that the said traders afterwards, that is after the adjudication of bankruptcy was pronounced against them, with intent to defraud their creditors within four months next before the presentation of a bankruptcy petition," did the act which constitutes the offence. Taking the whole count together it amounts to this, that after these traders had been adjudicated bankrupts, it may be a year or many years afterwards, they committed a fraud, and that was followed by a petition in bankruptcy against them, and there the count stops. Now, it is said that we are to presume after verdict that there had been an adjudication in bankruptcy upon this petition against these traders. If so, that would be to supply an allegation of an adjudication in bankruptcy upon a new petition, which we cannot do. I know of no authority for introducing such a statement by way of presumption after verdict. It was further said that we might strike out the words in the introduction "before the committing of the offence next hereinafter mentioned," and then the count would stand thus, "that heretofore, to wit on the 6th March, these traders were adjudicated bankrupts," and that then we might strike out the word "afterwards," and it would proceed "and the said traders, with intent to defraud their creditors within four months next before the presentation of a bankruptcy petition against them," committed the offence. Then we must make this further amendment of charging the presentation of "a bankruptcy petition against them" into "the presentation of the bankruptcy petition against them." Now, where is the authority for making these alterations and amendments? I am of opinion that no such amendment or intendment as suggested can be made after verdict, when the contrary is alleged as here. The only clause in the Debtors Act which can raise a doubt on the point, is sect. 19, but that has no application to a case like the present. I think, therefore, that the conviction must be quashed.

MELLOR, J.—I cannot quite agree in the judgment of the Chief Baron. I do not wish to express a dissent from it, but rather a doubt upon it. I am inclined to think that we may read the count by the usual intendments after verdict, so that enough will remain on the face of it to show that within four months after the presentation of a petition in bankruptcy against these traders, and their being adjudicated bankrupts upon it, they committed the offence. I admit that the words I have to reject in so reading the count are difficult to deal with. But I think I can see, notwithstanding the allegation "that before the committing of the offence hereinafter mentioned, the prisoners were adjudicated bankrupts," an allegation that the prisoners were traders, and within four months before the presentation of a petition in bankruptcy against them they committed the offence, and that we may intend they were adjudicated bankrupts upon that. If I can do that the offence is complete. After verdict as we hold now, I think that the principle of sect. 19, countenances that intendment, and that we may and ought to reject words which are repugnant or which if taken literally would

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displace the effect of the whole count. These are the doubts I feel.

LUSH, J.—I agree with the Lord Chief Baron, and think that the conviction should be quashed. The 32 & 33 Vict. c. 62, s. 11, subs. 15, creates the offence in these terms [His Lordship then read the enactment], and sect. 19 enacts that “in an indictment for an offence under the Act it shall be sufficient to set forth the substance of the offence charged in the words of the Act specifying the offence or as near thereto as circumstances admit, without alleging or setting forth any debt, act of bankruptcy, trading, adjudication, or any proceedings in, or order, warrant, or document of, any court acting under the Bankruptcy Act 1869.” The substance of the offence charged is that the trader who commits the offence within four months of the presentation of a bankruptcy petition against him should be afterwards adjudicated a bankrupt upon that petition, that the act done while in a state of insolvency should be followed up by bankruptcy. Does this count state that? It states that before the committing of the offence hereinafter mentioned the prisoners were adjudicated bankrupts, and that afterwards, with intent to defraud their creditors, within four months before the presentation of a petition in bankruptcy against them, they did the acts charged. A man may be a bankrupt more than once, and the count may be read that after a first bankruptcy, and within four months before the presentation of a petition in bankruptcy against them, that must be taken a new petition, they did the acts charged. And as petitions in bankruptcy sometimes come to nothing, and it is not alleged in the count that there was any adjudication in bankruptcy upon this petition, why is it to be intended that there was such an adjudication. If such an intendment cannot be made the count discloses no offence. To make the offence we must alter the indictment by intending that a bankruptcy adjudication occurred afterwards. I do not feel justified in making these alterations in the count. After verdict we may reject all superfluous averments, and if the averment “before the commission of the offence hereinafter mentioned” were struck out, no offence would be stated in the count, unless it can be intended that the presentation of a petition in bankruptcy alleged in the count was followed by an adjudication in bankruptcy. I do not think that we can fill up that omission by intendment, because a verdict of guilty has been found. Sect. 19 of the Act only makes an indictment good when it states the offence in substance. But here it does not state that the presentation of a bankruptcy petition was followed by an adjudication in bankruptcy, which is necessary to complete the offence.

DENMAN, J.—I agree with the Lord Chief Baron and my brother Lush, J.

HUDDLESTON, B.—I concur with my brother Mellor, J. in entertaining doubts in this case. I doubt whether all that is necessary after verdict to constitute the offence does not appear on the face of this count of the indictment. I am inclined to think that under sect. 24 of 14 & 15 Vict. c. 100, which says that no indictment shall be held insufficient (*inter alia*) for omitting to state the time at which the offence was committed in any case where time is not of the essence of the offence, nor for stating the time imperfectly, may cure the objection that by the words “before” and “afterwards”

in this count the time has been improperly stated. But on the point that this count is good after verdict, I am inclined to think that enough appears on the face of the indictment to show the offence substantially. I agree that the offence must be committed within four months before the presentation of a petition in bankruptcy which is followed by an adjudication in bankruptcy. But could they have been convicted upon this indictment if after having been bankrupts ten years previously they had within four months next before the presentation of a new petition in bankruptcy not followed up by an adjudication of bankruptcy against them? I think not, and if not, may we not after verdict reject the words “before the commission of the offence hereinafter mentioned” and the word “afterwards” as surplusage. I entertain some doubt upon this point.

Conviction quashed.

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT WESTMINSTER.

Reported by W. APPELTON, Esq., Barrister-at-Law.

Monday, June 19, 1876.

LEWIS v. CARR.

Municipal Corporations Act (5 & 6 Will. 4, c. 76), ss. 28, 52, and 53—Borough—Alderman's contract with council—Disqualification—Action for penalties.

By sect. 28 of the 5 & 6 Will. 4, c. 76, it is enacted that no person shall be qualified to be elected, or to be a councillor or an alderman of one of the boroughs named in the schedule to the Act during such time as he shall have either directly or indirectly any share or interest in any contract or employment with, by, or on behalf of the council of the borough. By sect. 53, if any person shall act as mayor, alderman, or councillor, for any borough after he shall cease to be qualified according to the provisions of the Act, or after he shall become disqualified to hold any such office, he shall for every such offence forfeit the sum of 50*l.*, such sum to be recovered, &c.

The defendant was a burgess and an alderman of the borough of Macclesfield. On six different occasions, between the 19th of June and the 31st of Dec. 1874, goods were supplied from the defendant's shop to the town council according to the orders of the council, who subsequently paid for the goods.

The defendant subsequently, on the 19th of June, 1875, and afterwards, acted five times as an alderman of the borough.

The plaintiff sued the defendant to recover the penalties under sect. 53 of the Municipal Corporation Act for his having so acted.

Held (affirming the decision of the Exchequer Division below), that the defendant, under sect. 28, he was disqualified from being an alderman of the borough only so long as his interest in the contract with the council continued, and he did not cease to be qualified, or become disqualified

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after that interest had determined, and therefore that he was not liable.

THIS was an appeal from the decision of the Exchequer Division. The plaintiff brought his action under sect. 53 of the Municipal Corporation Act (5 & 6 Will. 4, c. 76), to recover penalties against the defendant for having acted as an alderman of the borough of Macclesfield. At the trial before Lord Coleridge, C.J., at the Chester Summer Assizes 1875, the learned judge thought that the case came within the mischief contemplated by the Act, and a verdict was entered for the plaintiff, execution having, however, stayed to enable the defendant to move.

A rule nisi calling upon the plaintiff to show cause why the verdict should not be set aside, and a new trial granted on the ground of misdirection, was accordingly obtained in the Exchequer Division for the defendant, and made absolute.

The plaintiff now appealed.

The case in the court below will be found fully reported *ante* p. 156; 34 L. T. Rep. N.S. 390.

J. Brown, Q.C. (J. Williams with him), for the plaintiff.—The office of alderman was vacated when the defendant took the contract with the council. It cannot be resumed when the contract has terminated. The defendant by acting as alderman after taking the contract has brought himself within the words of the 33rd section, and the mischief contemplated by the Act. *Reg. v. Francis* (18 Q. B. 526; 21 L. J. 304, Q. B.) is a decision upon this 28th section, but it only decided that a *quo warranto* might be applied for notwithstanding more than 12 months had elapsed from the time of the election. The court did not say more than that the disqualification continued during the existence of the contract. That case is not in point here.

M'Intyre, Q.C. for the defendant.—The disqualification continues only during the continuance of the contract; otherwise the burgess would be disqualified from acting as alderman for ever. Sect. 28 is aimed at continuous contracts. In sect. 52, where it is intended that a man shall "become disqualified and cease to hold the office," it says so in terms. It cannot be intended that that section should apply to a burgess taking contracts with the council, or it would have said so. *Nicholson v. Fields* (31 L. J. 233, Ex.; 7 H. & N. 810) is in point. He also referred to

Burn's Justice of the Peace, vol. 3, p. 121; 18 Geo. 2, c. 20, s. 1.

J. Brown, Q.C. replied.

JAMES, L.J.—I am of opinion that the judgment of the Court of Exchequer in this case must be affirmed. I think it is clear that some limitation to the period during which, under sect. 53, a man is liable to the fine for acting as alderman or councillor after he has ceased to be qualified, must be implied from the words of the section. Otherwise a person once disqualified could never again be elected, or re-elected, and act without incurring the penalty, although his disqualification might be removed. Under sect. 28 it is provided that no person shall be qualified "to be elected" or to be a councillor or alderman "during such time" as he shall be interested in a contract with the council. I do not think, under this section, that the limitation of disqualification is confined to the election only. Applying that limitation to the rest of the section the result is that the defen-

dant was not capable of being a councillor or alderman "during such time" as he was engaged in business contracts with the council. Then we must apply the same construction to the 53rd section as we have done to the 28th, and it follows that the defendant was only disqualified from being an alderman during the continuance of his contract with the council, and as he is not asserted to have acted during that time, but afterwards, he is not liable to the penalty for acting after the disqualification had ceased.

MELLISH, L.J.—I am of the same opinion.

BAGGALLAY, J.A.—I am of the same opinion. The acts provide four cases in which the alderman or councillor becomes disqualified. They are: If he shall be bankrupt or insolvent, or make a composition with his creditors, or be absent from the borough for more than six months at a time (unless in case of illness); but in the same section (the 52nd) it is provided that on payment of creditors or on return to the borough, if not otherwise disqualified, the person may be re-elected. I think that whatever may be the disqualification intended in the 28th section, if it had been intended that a person duly elected, who by entering into a contract with the council had become disqualified should be excluded from holding office until re-elected, it would have been specifically so stated, as it is in the class of cases mentioned in the 52nd. There are no such words in the 28th section, and I am of opinion that the judgment of the Exchequer Division was right and should be affirmed.

QUAIN, J.—If the contention for the appellant is right, a person once disqualified could never again act in his office of alderman. "During such time," in sect. 28, must be applied to sect. 53, and he then is liable to the penalty, if he acts in the office whilst interested in a contract with the council.

ARCHIBALD, J., concurred.

Judgment for defendant. Judgment below affirmed.

Solicitors for plaintiff, A. E. Francis.

Solicitors for defendant, Stephens and Stephens, for Parratt, May, and Sons, Macclesfield.

June 22 and Nov. 10, 1876.

(Before JAMES and MELLISH, L.JJ., BAGGALLAY, J.A., and QUAIN, J.)

THE MAYOR, &C., OF WORCESTER v. THE ASSESSMENT COMMITTEE OF THE DROITWICH UNION.

Poor rate—Local board—Rateable value of waterworks—Charges limited by statute 11 & 12 Vict. c. 63, s. 93 (the Public Health Act 1848).

The local board of W. were the owners and occupiers of waterworks in the parish of C., and acting under sect. 93 of the Public Health Act 1848, they supplied the inhabitants of W. with water on an estimate which, after paying the expenses of maintaining the works, and supplying the water, left a very small margin of profit to the board. The respondents, within whose union the parish of C. was situated, rated the local board on a basis of the profit they might have made, if they had been a company occupying the works solely for the purpose of making a profit.

Held, (1) that according to the true construction of the Public Health Act 1848, s. 93, the local board

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were bound to make an estimate of the sum they actually required for the maintainance of the waterworks, and could not levy a larger sum by a water rate than they were so estimated to require, (2) (affirming the decision of the Divisional Court of Appeal) that they were rateable for the relief of the poor only in respect of the profit they actually derived from the occupation of the waterworks, and not in respect of the profit which a company occupying the works solely for the purpose of profit might make.

THIS was an appeal from a decision of the Divisional Court of Appeal from Inferior Courts giving judgment for the appellants upon a special case stated for the opinion of the court by consent between the parties, and by order of Blackburn, J. in pursuance of the 12 & 13 Vict. c. 45, s. 11.

The special case, and the arguments and judgments in the court below will be found ante p. 140; 34 L. T. Rep. N. S. 288.

For the purposes of this report the facts sufficiently appear from the head note above, and the judgments of the Court of Appeal (*post*).

By sect. 93 of the Public Health Act 1848, (11 & 12 Vict. c. 63) it is enacted "That whenever and so long as any premises are supplied with water by the local board of health, for the purposes of domestic use, cleanliness, or drainage, they shall make and levy, in addition to any other rate, a water rate upon the occupier except as hereinafter provided, and the rate so made shall be assessed upon the net annual value of the premises ascertained in the manner hereinbefore prescribed with respect to special and general district rate," &c.

Sect. 94 provides that the water rate shall be payable in advance, and gives power to stop the water in case of non-payment of the rate.

Jelf (with him *H. Matthews*, Q.C.), for the Droitwich Union, the respondents below.—It is immaterial whether the local board make a profit in money out of the work, or whether they make a profit at all. Ability to make a profit is the true test of the measure of the rateability under the old statute 43 Eliz. [*MELLISH*, L. J.—But is that so when you are rating a public body who are bound not to make any profit?] By sect. 93 of the Public Health Act 1848, the local board are enabled to levy a water rate on the inhabitants, and by sect. 73 they are enabled to buy premises for the waterworks. It is their own fault if they do not get the rateable value out of the works. The test, as laid down in the *Mersey Docks* case is that the capability of owners and occupiers in the district to make profits in money or their equivalent is to be the guide in rating them to the relief of the poor. The local board are exactly in the same position as the inhabitants of Worcester, and these get substantial advantages, although not in money, out of the waterworks. This case differs from the *Mersey Docks v. Jones* and the *Mersey Docks v. Cameron* (11 H. L. Rep. 443; 20 C. B., N. S., 56), where the trustees were expressly forbidden to make any profit at all. Corporations might reduce their rates to nothing, if the contention of the other side is right. The case of the *Mayor of Liverpool v. The Overseers of Wavertree* (30 Justice of the Peace, 101) is distinguishable from the present, for there an express limit was placed to the profit which could be made. He also cited

Reg. v. Justices of Hull, 4 E. & B. 29; and sub nom.

Reg. v. Cooper, 23 L. J. 183, M. C.;

Reg. v. Longwood, 21 L. J. 215, M. C.; 17 Q. B. 871;

Reg. v. Kentmere, 21 L. J. 13, M. C.; 17 Q. B. 551;

Reg. v. Longwood, 18 Q. B. 116;

Mayor of Liverpool v. Overseers of West Derby,

6 E. & B. 704; 25 L. J. 112, M. C.;

Reg. v. Mayor of Manchester, 21 L. J. 160, M. C.

Powell, Q.C. and *Castle* for the local board, the appellants below.—The local board are not in the position of a hypothetical tenant without any restriction, for they are obliged to supply the town with water at a price. The rate is to be made beforehand to meet the board's expenses. There is no question of deducting the expenses from the rate. The position of the board is precisely that of the corporation in the *Mayor of Liverpool v. The Overseers of Wavertree* (*ubi sup.*), which is a direct authority in our favour. They referred also to

The Metropolitan Board of Works v. West Ham, 23

L. T. Rep. N. S. 490; L. Rep. 6 Q. B. 193;

Commissioners of Leith Harbour v. Inspector of the Poor, L. Rep. 1 Sc. App. 17.

Jelf replied.

Our adv. vult.

QUAIN, J., who heard the arguments, died before judgment was delivered.

The judgment of the court was delivered on 10th Nov. by *MELLISH*, L.J., as follows.—The question to be determined in this case is on what principle the corporation of Worcester are to be assessed to the poor rate in respect of a certain reservoir and water works situate within the Droitwich Union, which were erected and are maintained by the corporation under the provisions of the public Health Act for the purpose of supplying the town of Worcester with water. The corporation contend that "the provisions of the Public Health Act contain the only authority for the appellants to charge a water rate on consumers of water, and that such rate only is authorised by the statute as might be reasonably expected to be necessary to defray the expenses incident to the water supply, and that they have no authority by the said Act or otherwise to receive any more money from the consumers than is required to pay the above-mentioned expenses. And further, that as the inhabitants have, on the faith of the existing rates, adopted the water supply of the appellants, and suffered their private resources to fall into disuse without special causes, it would be a breach of good faith to alter such rates. And that, therefore, the appellants are only rateable for the rent which a tenant from year to year would give for the land subject to the existing rates, and the same restrictions (if any) as those under which the appellants hold it, and not that which a tenant entirely unfettered might give. The respondents, on the other hand, contend that it is right to rate the appellants in respect of the waterworks in *Claines* (as directed by sect. 1 of the 6 & 7 Will. 4, c. 96) at what a tenant would give with liberty to raise the price of water as he might think proper, so far as not restricted by law; that there were no restrictions by law in the present case, and that the fact that appellants, in fixing their rates, looked only to the benefit of the inhabitants and ratepayers of the city of Worcester, only transfers the advantage and benefit of the property from themselves to those inhabitants and ratepayers for whom they are trustees, and

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that it would be unfair that the inhabitants and ratepayers of the city of Worcester should enjoy this advantage and benefit at the expense of the parish of Claines and the rest of the Droitwich Union." It has been held by the Divisional Court of Appeal that the contention of the corporation is right, and we are of opinion that their decision ought to be affirmed. There are two questions to be considered. First, are the corporation, according to the true construction of the Public Health Act, prevented from charging for the use of the water a larger sum than the sum they actually require for the maintenance and repair of the waterworks; and, secondly, if they are, can they be rated as occupiers in respect of profits, which the law does not allow them to earn. Now, with respect to the first question, we think that the corporation in making a water rate under sect. 93 of the Public Health Act are bound to make an estimate of the sum they actually require for the maintenance of the water works, and cannot legally levy a larger sum by a water rate than the sum they so require. The 94th section makes the water rate payable in advance, and enables the supply of any persons who neglects to pay it to be cut off, and we think it cannot have been intended that the corporation should charge any person more than his fair share of the sum which is required to maintain the waterworks. There is nothing in the case to prove that the 651*l.* which is stated to be on the average of eight years, the whole net income the corporation have derived from the waterworks was not the whole sum they required for the maintenance of the waterworks. The question then is whether, in applying the rule given by the Parochial Assessment Act, the court is to consider what rent a tenant from year to year would give for the reservoir and waterworks, who was subject to the same restrictions the corporation are subject to, or what rent a tenant from year to year would give who was subject to no such restrictions, and we are of opinion that the hypothetical tenant is to be a tenant subject to the restrictions. The case of the corporation of Liverpool, and the overseers of Wavertree, as reported in the Justice of the Peace is directly in point, and we are of opinion that case was correctly decided. Blackburn, J., there says, "The whole question turns on the rule given by the Parochial Assessment Act, which says the occupier is rateable at what a tenant from year to year will give, subject to the same restrictions as those under which the tenant holds it." This decision seems to us to be right on principle. An occupier of land is not rateable in respect of the whole profit derived from the land, but only in respect of the profit which he himself derives from the land. If there be a common in the possession of the lord of the manor, he is not rateable in respect of the profits derived by the commoners from the common, although, in rating the lands of the commoners, the fact of their lands being rendered more valuable by reason of the occupier being entitled to a right of common is taken into account. So in the present case the rent, and, therefore, the rateable value of every house in Worcester, is increased by reason of the occupier being entitled to cheap water from the waterworks of the corporation, and if the corporation in respect of the reservoir and waterworks were rated at the profit which a tenant under no restriction could get from the waterworks, the

same profit would be rated twice over. If the works were transferred to a tenant, who was under no restriction as to the price he charged for water, the rateable value of the waterworks would be increased, but there would be a corresponding diminution of the rateable value of the premises supplied with the water. We may also observe that the reservoir by itself without the power of connecting the reservoir with the houses by pipes running through the streets is, probably, worth nothing, and certainly is not worth 600*l.* a year, and it is the same Act of Parliament which gives the power to lay the pipes, and, therefore, creates the value of the reservoir which contains the restrictions on the amount of profit, which the occupier of the reservoir can earn. Even in the case of the reservoirs of public companies established by Act of Parliament to supply towns with water, in estimating the rateable value of the reservoirs, the court only considers the amount of profit which the terms of their Act enable the company to earn, not the profits which the company might earn if Parliament had enabled the company to establish the waterworks without restriction as to the price to be charged to consumers. So also in rating a railway, or any other work made under an Act of Parliament, the calculation must always commence with the profits, which are actually earned according to the terms of the Act of Parliament, not with the profits which might be earned if the company was unlimited in its charges. It follows, therefore, that, according to the contention of the appellants, the corporation are rateable in respect of their reservoir at a higher sum than a waterworks company established by Act of Parliament would be rateable, and are rateable on an assumption, which not only is not true, but which cannot be true, namely, that a tenant is in possession of a reservoir with the monopoly of the supply of a particular town with water, and is unlimited in respect of his charges.

Judgment below affirmed.

Solicitors for appellants, *Church, Sons, and Clarke, for Southall, Worcester.*

Solicitors for respondents, *Tucker and Lake, for Bearcroft, Droitwich.*

Saturday, Nov. 4, 1876.

(Before COLERIDGE, C.J., MELLISH, L.J., and BRETT, J.A.)

REG. v. COLLINS.

Local board—Election—Quo warranto—Scrutiny of votes—Certificate of chairman—When final—Miscounting—Judicial decision—11 & 12 Vict. c. 63, s. 27—Public Health Act 1848.

At an election of members for a local board of health, the chairman, acting under sect. 27 of the Public Health Act 1848, certified that seven persons, of whom the defendant was one, and had the smallest number of votes, were elected. The relator, who was a candidate, had three votes less than the defendant. Upon a scrutiny before a judge of assize without a jury, it appeared that by correction of mistakes in counting, the votes for the relator and the defendant were equal; that one vote for the relator had been mislaid and not counted at all; and that two votes for the relator which the chairman had found to be valid were

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in fact invalid, although no objection had been made to them at the time of their reception.

Held (affirming the judgment of the Queen's Bench Division below), on a *quo warranto*, that mistakes made in the chairman's ministerial capacity alone could be inquired into, but that his certificate was conclusive as to all matters upon which he could, by using the means provided by the Act, come to a judicial decision, and that, therefore, the chairman's addition of the votes could, but the validity of the votes could not, be questioned.

THIS was an appeal from a decision of the Queen's Bench Division making absolute a rule to enter the verdict for the relator on a *quo warranto* issue.

The *quo warranto* called on the defendant to show by what title he acted as a member of a local board of health. Plea, that the defendant was duly elected, and traverse of the plea by the relator.

The issue was tried before Blackburn, J., without a jury, at the Dorchester Winter Assizes 1875. A verdict was entered for the defendant, leave being reserved for the relator to have the verdict entered for him.

The relator accordingly obtained a rule *nisi* pursuant to his leave reserved, and, upon cause being shown, the Queen's Bench Division (Mellor and Field, JJ., Blackburn, J. dissenting) made the rule absolute.

From this decision the relator now appealed.

The case in the court below is fully reported *ante* p. 173; 34 L. T. Rep. N. S. 447. The facts sufficiently appear from the head note above.

By sect. 27 of the Public Health Act 1848 (11 & 12 Vict. c. 63) it is enacted:

That the chairman shall on the day immediately following the day of the election, and on as many days immediately succeeding as may be necessary, attend at the office of the local board of health, and ascertain the validity of the votes by an examination of the rate books and such other books and documents as he may think necessary, and by examining such persons as he may see fit; and he shall cast up such of the votes as he shall find to be valid and to have been duly given, collected, or received, and ascertain the number of such votes for each candidate. And the candidates to the number to be elected, who being duly qualified, shall have obtained the greatest number of votes, shall be deemed to be elected and shall be certified as such by the said chairman under his hand; and to each person so elected the said chairman shall send or deliver notice of such election; and the said chairman shall also cause to be made a list containing the names of the candidates together with (in case of a contest) the number of votes given for each and the names of the persons elected; and shall sign and certify the same, and shall deliver such list, together with the nomination and voting paper which he shall have received to the local board of health at their first or next meeting (as the case may be), who shall cause the same to be deposited in their office, and the same shall during office hours thereof be kept open to public inspection, together with all other documents relating to the election, for six months after the election shall have taken place, without fee or reward; and the said chairman shall cause such lists to be printed and copies thereof to be affixed at the usual places for affixing notices for parochial business within the parts for which the election shall have been made.

The whole of this Act is now repealed by 38 & 39 Vict. c. 55, but the provisions of sect. 27, as to the duties of the returning officer at elections are re-enacted in the new Act (Schedule 2, ss. 51 & 54), in precisely the same terms as in sect. 27, with the insertion of the following clause between the words "Such votes for each candidate," and "and the candidates."

Any candidate may himself attend, or may appoint any

agent to attend the examination and casting up of the votes; any candidate or agent so attending who obstructs or in any way interferes with the examination and casting up of the votes, may, by order of the returning officer, be forthwith removed from the place appointed for that purpose, and shall not be permitted to return.

Cole, Q.C. (with him Pinder), for the defendant.

—The question is, whether the certificate of the chairman, the presiding officer at elections of local boards of health, is conclusive, or whether it can be afterwards questioned; and, if so, in what manner? Blackburn, J., in the court below, gives reasons, which are conclusive, to show that the Legislature did not intend, by the enactments in sect. 27 of the Public Health Act 1848, to make the chairman's certificate final. The Act provides that the voting and nomination papers should be kept open for the inspection of the public for six months, the object being to give the public an opportunity of examining the voting papers to ascertain whether the votes were valid. If no scrutiny can be held, why should the voting papers be kept open at all? *Reg. v. Morgan* (25 L. T. Rep. N. S. 930; L. Rep. 7 Q. B. 26), should have been cited in the court below in addition to the cases there mentioned. In that case a *quo warranto* went, where a chairman had wrongly held that a nomination, under sect. 24, was bad. Under that section a chairman can clearly hold a judicial inquiry into whether a nomination is valid or not. [BRETT, J.—The chairman is to come to a decision after using the means of inquiry provided by the Act. That is arriving at a judicial, or, at all events, a *quasi* judicial decision.] It is submitted that there is no distinction between what a chairman does judicially or what he does ministerially for this purpose. The two capacities cannot be separated. It would be impossible to ascertain how the chairman arrived at his result; whether by miscounting or improper rejection of votes.

Kingdon, Q.C. (with him H. C. Bennett), for the relator, were not called on.

LORD COLERIDGE, C.J.—In this case we are asked to reconsider the question decided in the judgments of the court below, and it is suggested that the judgment of Mr. Justice Blackburn should be followed, and that of my brothers Mellor and Field overruled. The effect of the judgment of the majority of the court below appears to be this: that where, on an election of a local board, the returning officer has made an error in his ministerial capacity, the mistake may be inquired into by means of a *quo warranto*; but where the mistake has occurred otherwise, the certificate of the returning officer is final, and the mistake cannot afterwards be inquired into. I am of opinion that the latter view is the correct one. The statute is the Public Health Act 1848, and the important section is the 27th. [His Lordship here read the section (*ubi sup.*)] Now, by this section the chairman is to ascertain the validity of the votes, and he is to come to a conclusion on their validity or invalidity by the process and means which the Act affords. It might occur to some minds that other means and a better process could have been provided, but, taking the section as it stands, the Legislature has determined that the chairman may come to a decision whether the votes are valid or not, by examining the rate book and witnesses, &c., and that the decision cannot be questioned in so far as it is judicial. I am of opinion that, as has been pointed out by my brother Brett, a judi-

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cial decision means arriving at a decision after using means of inquiry, and I am clear that under this section the chairman's proceedings are judicial. In this Act, if the chairman has neglected or refused to comply with its provisions, he is liable (sect. 28) to a penalty of 50*l*. There is no question of that sort here. In this case there were only two votes with regard to which the question is important. It is not a question of miscasting, but of votes which ought not to have been received, because if objected to they would have been found invalid. Now upon this the point arises: Is the certificate of the returning officer valid and conclusive? I think it is; I think the Act of 1848 intends that the chairman should make his certificate on the result of examining books and witnesses if necessary, and not merely upon the result of his having cast up the number of the votes. So the matter would stand, I think, on the true construction of the statute. The extreme difficulty and inconvenience of providing for questioning the decision of the chairman by *quo warranto* is obvious, and the distinction between calling in question his judicial decision and merely questioning his addition, is also very plain. So obvious is the inconvenience in the former case, that in the case of municipal elections an Act has been passed to remove it, and provide a method of calling the certificate in question: (35 & 36 Vict. c. 33.) But we are not compelled to depend entirely upon the construction of the Act in this matter. The very question of the conclusiveness of the certificate has been raised before Lord Campbell in *Reg. v. Cross* (19 L. T. Rep. O. S. 35). Blackburn, J. appears to have been erroneous in thinking that Lord Campbell did not decide the point in *Reg. v. Cross* (*ubi sup.*) He decided it expressly, it being, as he said, a "novel and important one." There were two points raised: one, whether the chairman was properly appointed; and, secondly, whether his certificate was final and conclusive. Lord Campbell said that it was, as far as the validity of the votes were concerned, though he said it might not be so with regard to the correctness of the casting up. It is therefore a decision (although at *Nisi Prius* only) of a judge singularly competent to decide upon the construction of statutes, made after full argument by very learned counsel, and although inviting review, no one has yet asked to have it reviewed. We are, therefore, supported in the construction of this Act by the judgment of that eminent judge. I am of opinion that the majority of the court below put the true construction upon the Act, and that their judgment ought to be affirmed.

MELLISH, L.J.—I am of the same opinion. According to the ordinary construction of statutes creating a new elective body, the proceedings of that body can be questioned in the Court of Queen's Bench, but when the Act provides otherwise, those proceedings cannot be questioned at all. Here judicial and ministerial powers are given by the Act to the Chairman of the Local Board. I think the words are clearly sufficient to give judicial powers, and the Act then says that he shall cast up such votes "as he shall find to be valid." I think that the finding of the votes to be valid is a judicial proceeding, because he is to decide after examination of the rate book and witnesses. It is true that he has not power to examine witnesses on oath, but the inquiry is still

a *quasi* judicial one. The casting up of the votes is clearly only ministerial; I think the latter proceeding may be questioned, but not the former. It would be a great inconvenience that proceedings of this nature should be open to question on *quo warranto*, and the Legislature may have had that inconvenience in view when the 27th section was enacted. I think that the opinion of Lord Campbell in *Reg. v. Cross* was correct, and that we must follow it. Another Act has been passed as to municipal elections, making a reform in a similar case to this. And as to the election of local boards, there is a clause in a later Act (sects 38 & 39 Vict. c. 55, sch. 2 and *seq.*) that any candidate or his agent may be present at the examination of voting papers, but not giving any appeal from the returning officer's finding on the validity of the votes. I am therefore of opinion that the judgment of the Queen's Bench Division ought to be affirmed.

BRETT, J.A.—I am of the same opinion.

AMPHLETT, J.A.—On the whole, I am not prepared to differ from the result of the judgment of the rest of the court, but I must say that, if not supported by the authority of Lord Campbell's opinion, I should have had great difficulty in coming to a conclusion in this case, because I think that the Act was not intended to give judicial power to the chairman, but when I find the contrary opinion in a decision of Lord Campbell, given so long ago, and not questioned up to this time, and when I find that the Legislature has passed an Act of Parliament to allow agents to be present, I come to the conclusion that it may have been intended in the Act of 1848 that the chairman should inquire judicially into the validity of the votes, and that his certificate should be final.

Judgment affirmed.

Solicitor for the relator, *McArthur*.

Solicitors for defendant, *Coombe and Wainwright*.

Dec. 9 and 11, 1876.

STONE v. THE MAYOR, ALDERMEN, AND BURGESSES OF YEOVIL.

Waterworks Clauses Act 1847 (10 Vict. c. 17)—*Lands Clauses Consolidation Act 1845* (8 & 9 Vict. c. 18) s. 9—*Diversion of streams—Tenant for life—Injury to land—Compensation—Ultra vires.*

A reference to valuation, under sect. 9 of the *Lands Clauses Consolidation Act 1845*, may be had in the case of "permanent damage or injury" to lands held by a tenant for life, as well as to lands "to be purchased or taken from any party under any disability or incapacity," &c.

Defendants, a municipal corporation, were, under a local waterworks Act, which incorporated the *Lands Clauses Consolidation Act 1845*, and the *Waterworks Clauses Act 1847*, empowered to "take, use, divert, and appropriate" certain streams and sources of water, and amongst others a stream which flowed to, and was essential to the working of, a mill, of which the plaintiff was tenant for life. Defendants accordingly gave plaintiff notice of their intention to divert the whole of the stream, and did take and divert a great portion of it.

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Subsequently, by an agreement, made under the powers of the special Act, plaintiff and defendants agreed to refer to two surveyors "the amount of compensation money to be now paid by the corporation for the damage which the owner or owners for the time being of the said premises may sustain by the abstraction of the whole of the said streams, &c.," which the corporation were empowered to take and divert.

The surveyors were unable to agree, and a third surveyor was nominated under sect. 9 of the Lands Clauses Consolidation Act 1845, who made his award, assessing a sum as compensation for the "permanent damage and injury which the owner or owners for the time being of the above-mentioned mill, &c., may have sustained, or shall or may sustain by the abstraction of the whole of the streams," &c.

The plaintiff sued the defendants to recover the sum so assessed, and filed his statement of claim setting out the above facts, and claiming the amount, and a mandamus directing the defendants to pay it into the bank, under the provisions of the Lands Clauses Consolidation Act 1845.

The defendants demurred.

Held (affirming the decision of the Common Pleas Division), that the defendants' reference to valuation was not *ultra vires*; that there had been a good valuation under sect. 9 of the Lands Clauses Consolidation Act 1845; and that the plaintiff was entitled to compensation in respect of the whole of the streams which the defendants had given him notice of their intention to take, and not merely in respect of so much of the streams as had been already taken.

APPEAL from a decision of the Common Pleas Division.

The case in the court below is fully reported ante p. 235; 34 L. T. Rep. N. S. 874.

The facts, for the purposes of the present report, sufficiently appear from the head note above, and the judgments (*post*).

Sect. 9 of 8 & 9 Vict. c. 18 enacts that,

The purchase money or compensation to be paid for any lands to be purchased or taken from any party under any disability or incapacity, and not having power to sell or convey such lands except under the provisions of this, or the special Act, and the compensation to be paid for any permanent damage or injury to any such lands, shall not, except where the same shall have been determined by the verdict of a jury, or by arbitration, or by the valuation of a surveyor appointed by two justices under the provision hereinafter contained, be less than shall be determined by the valuation of two able practical surveyors, one of whom shall be nominated by the promoters of the undertaking, and the other by the other party, and, if such two surveyors cannot agree in the valuation, then by such third surveyor as any two justices shall, upon application of either party, after notice to the other party, for that purpose nominate, &c.

Sect. 22 enacts that,

If no agreement be come to between the promoters of the undertaking and the owners of or parties by this Act enabled to sell and convey, or release any lands taken or required for or injuriously affected by the execution of the undertaking, or any interest in such lands, as to the value of such lands, or of any interest therein, or as to the compensation to be made in respect thereof, and if in any such case the compensation claimed shall not exceed 50*l.*, the same shall be settled by two justices

If exceeding 50*l.* the compensation is to be settled by arbitration or by the verdict of a jury: (s. 23.)

And sect. 68 enacts that,

If any party shall be entitled to any compensation in respect of any lands, or if any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special Act, or any Act incorporated therewith, and if the compensation claimed in such case shall exceed the sum of 50*l.*, such party may have the same settled by arbitration, or by the verdict of a jury as he shall think fit, and, if such party desire to have the same settled by arbitration, it shall be lawful for him to give notice in writing to the promoters of the undertaking of such his desire, stating in such notice the nature of the interest in such lands in respect of which he claims compensation, and the amount of compensation so claimed therein; and unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and shall enter into a written agreement for that purpose within twenty-one days after the receipt of any such notice from any party so entitled, the same shall be settled by arbitration in the manner herein provided.

The section then goes on to provide for the mode of settling compensation by a jury.

The 6th section of the Waterworks Clauses Act 1847 (10 & 11 Vict. c. 17), enacts that,

Where by the special Act the undertakers shall be empowered, for the purpose of constructing or supplying waterworks, to take or use any lands or streams, otherwise than with the consent of the owners and occupiers thereof, they shall, in exercising the powers so given to them, be subject to the provisions and restrictions contained in this Act, and, if the lands be situated in England or Ireland, to the provisions and restrictions contained in the Lands Clauses Consolidation Act 1845, and shall make to the owners and occupiers of, and all the parties interested in, any land or streams taken or used for the purpose of the special Act, or injuriously affected by the construction or maintenance of the works thereby authorised, or otherwise by the execution of the powers thereby conferred, full compensation, to be ascertained in the manner provided by the Lands Clauses Consolidation Act 1845.

And sect. 12 enacts that:

Subject to the provisions and restrictions in this and the special Act and any Act incorporated therewith, the undertakers may, amongst other things, from time to time divert and impound the water from the streams mentioned for that purpose in the special Act, or the plans or books of reference, and alter the course of any such streams, not being navigable, and also take such waters as may be found in and under or on the lands to be taken for constructing the works: Provided always, that in the exercise of the said powers the undertakers shall do as little damage as can be, &c., and shall make full compensation to all parties interested for all damages sustained by them through the exercise of such powers.

Kingdon, Q.C. and H. Cary Batten for the defendants.—The agreement for submission to valuation is *ultra vires* on the part of the defendants: (*The Ashbury Railway Carriage and Iron Company v. Riche*, 33 L. T. Rep. N. S. 450; L. Rep. 7 H. of L. 553; 44 L. J. 185, Ex.; see also *Frend and Ware's Precedents* as to Agreements *ultra vires*.) The plaintiff is only tenant for life, and the remainderman may repudiate the arrangement, and require to be paid again. When this agreement was made, the decision in *Ferrand v. The Mayor of Bradford* (21 Beav. 402) was supposed to be law, but it has since been overruled by *Bush v. The Trowbridge Waterworks Company* (32 L. T. Rep. N. S. 182; L. Rep. 19 Ex. 291); affirmed by the Lords Justices (33 L. T. Rep. N. S. 137; L. Rep. 10 Ch. 459). The latter case shows defendants are not purchasers. The plaintiff has mistaken his remedy in proceeding under sect. 9 of the Lands Clauses Act, which does not apply to consequential damage, but only to property purchased and damage to such property. [BRAMWELL, J.A.—Does not "such" lands mean lands in posses-

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sion of persons under disability?] The court below eliminated "such" from sect. 9 of the Lands Clauses Consolidation Act, and introduced "or to be sustained" into sect. 12 of the Waterworks Clauses Act; "such" may be referred back to the heading of the group of sections which is "with respect to purchase of lands by agreement." *Croft v. London and North-Western Railway Company* (3 B. & S. 436; 32 L. J. 113, Q. B.), which was relied on for the plaintiff below, does not apply. *Hutton v. London and South-Western Railway Company* (7 Hare 259) was also cited.

Petheram for the plaintiff.—It must be taken on demurrer that the allegations in the statement of claim are true. It is stated that it was within the defendants' power to take the water; that notice was given that there was a permanent injury to plaintiff's property, and that the agreement was duly made. By the Waterworks Clauses Act 1847, the special Act, and the Lands Clauses Consolidation Acts together, the parties are entitled to enter into an agreement as to assessing the amount under sect. 9 of the Lands Clauses Consolidation Act; and by the Waterworks Clauses Act, and the special Act, they are entitled to make the compensation a sum payable at once, "Such" in sect. 9 is to be construed as Bramwell, J.A. has suggested. [COCKBURN, C.J.—The local Act treats the taking of the water as the acquiring of a right, not as a mode of injuriously affecting the land.] This is an actual purchase of property under the Acts; but if it were a case of "injuriously affecting" lands, sect. 22 and sect. 23 of the Lands Clauses Consolidation Act show that sect. 6 and sect. 9, were meant to apply to it. The defendants were *intra vires* in making the agreement to refer, and compensation has been rightly assessed for the taking of the whole stream.

Kingdon, Q.C. replied.

COCKBURN, C.J.—The appellants, the municipal corporation of Yeovil, the defendants in the suit below, were, by a local Act of Parliament passed in 1870, empowered to construct waterworks for supplying the borough of Yeovil and a certain adjacent district with water. For this purpose they were empowered to "purchase, enter upon, take, use, get, divert, and appropriate the streams, springs, waters, and sources of water shown on the deposited plans, and described in the deposited books of reference." The Waterworks Clauses Act 1847 and the Lands Clauses Consolidation Act of 1845 are incorporated with the local Act. Among the streams so authorized to be taken was one which, rising some distance above a mill and premises of which the respondent, the plaintiff in the suit below, is seized as tenant for life, and flowing onwards to his mill and premises, was essential to the working of the mill. The appellants, under the powers of their Act, gave notice to the respondent of their intention to divert and appropriate the whole of the stream, and they proceeded to take and divert a great portion, but not the whole of such water; the necessary effect of this diversion of the water being to cause serious and permanent injury to the respondent's mill. A correspondence took place between the solicitors for the respective parties, and an agreement was drawn up, upon which, after reciting the Act of Parliament, and that the corporation, for the purposes of the waterworks, "intend from time to time to take, use, divert, and appropriate the

waters" in question, and that Stone, as tenant for life of a certain mill called Withyhook Mill, was interested in such streams, each party proceeded, according to the terms of the 9th section of the Lands Clauses Consolidation Act, to appoint "an able practical surveyor to determine the amount of compensation to be paid by the corporation for the damage which the owner might sustain by the abstraction of the whole of the said streams, springs, and waters." The surveyors so appointed not being able to agree, application was made on behalf of both parties, according to the provisions of the section, to two justices to appoint a surveyor to determine the amount of compensation, which was accordingly done, and the amount assessed at 93l. 9s. 5d. The plaintiff having instituted a suit in the Court of Common Pleas for a *mandamus* to the corporation to deposit the amount according to the provision of the 69th section of the Lands Clauses Act, the defendants demur to the claim, their contention being that, in entering into the agreement, they were acting *ultra vires*; that having taken a portion of the water only, they were not bound to make compensation beyond the extent to which the abstraction of the water in the individual instance might injuriously affect the mill and premises; in support of which contention they mainly relied on the authority of a recent decision of the Master of the Rolls in a case of *Bush v. The Trowbridge Water Company*, upheld by the Lords Justices on appeal, in which a portion of the water of a stream having been diverted before it reached the plaintiff's land, it was held that compensation could not be claimed for the loss of the stream, but only so far as the diversion of the quantity taken injuriously affected the plaintiff's land. The present case is, however, plainly distinguishable from that of *Bush v. The Trowbridge Water Company*; for in the latter case the water company took power to divert only a portion of a brook which flowed through the plaintiff's land, and though the portion abstracted prevented the stream from being of the same practical benefit in the way of irrigation to the plaintiff which it had before, the brook or stream, though seriously diminished in quantity, continued to flow through the land as before, and it is upon this that the judgments of the Master of the Rolls and the Lords Justices appear to have proceeded. In the present case the corporation have taken power to divert the whole body of the stream, and gave notice of their intention to the plaintiff so to do, and the case comes within the decision of Lord Romilly, in *Ferrand v. The Mayor of Bradford*, which is by no means overruled by the decision in the *Trowbridge* case. Under these circumstances the plaintiff becomes entitled under the section of the local Act, and under sect. 6 of the General Waterworks Consolidation Act, to compensation for the value of the entire stream, and not merely to compensation proportionate to the degree in which his land may be injuriously affected by their partial abstraction of the water. By sect. 8 of the local Act, the corporation are empowered to enter upon and take and appropriate the stream and waters to which the Act relates as a whole, not to take as much of them as they may find convenient, or as much as they think it expedient to take from time to time. The owner or occupier of a stream so taken would have a perfect right to say, "you must take the whole or none." He would equally have a right to

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say, "you shall not take the water from time to time, leaving me in entire uncertainty when you will take all or none, or how much you will find it convenient to take next." And here the corporation gave notice, as I think by the Act of Parliament they were bound to do, of their intention to take the whole, and while they became entitled to take were bound to take the whole. The position of the respective parties would obviously otherwise be most unequal. Under these circumstances, I am of opinion that the corporation, if they took any of the water, were bound to pay for the whole before they could acquire the right to take any. If, having acquired the right to take the whole, they found it more convenient to take it by instalments, leaving the residue to flow on in its usual course, and giving the landowner the benefit of it in the meantime, they might possibly have the right to do so, but they could not compel the landowner to accept compensation on each renewed taking. Now, where the whole of a stream or other water is taken, both the general and the special Acts treat the right or interest in the water as a substantive right or interest which may be transferred and taken, and the value of which may be assessed and compensated, and not as something merely subordinate to the land, the loss of which must be looked at only as it injuriously affects the land. The 6th section to the general Act expressly says that compensation is to be made "for the value of streams so taken" as distinguished from damage to land or streams occasioned by the exercise of statutory powers given to take the water. No doubt, in estimating the value of a stream, it is necessary to take into account the use to which it can be put relatively to the land. In itself, except so far as the value of the fishing may be concerned, the value of a private stream is insignificant. It is only in so far as the water can be made available for purposes of irrigation, or for watering cattle, or the like, or as adding to the value of the property as ornamental water, that water can be said to have value, and the compensation to be paid for its loss must, practically speaking, be measured by the determination in the value of the land occasioned by such loss. Nevertheless, when a statute says that where water is taken its value must be assessed and paid for, it seems to follow that before any of it can be taken that value must be paid, and that the water cannot be taken in parts and compensation be made in proportion as the value of the land becomes from time to time affected by the loss. The difficulty consists in applying the Lands Clauses Consolidation Act, to which it becomes necessary to resort for the purpose of determining the amount of compensation to be paid in such a case as the present. The plaintiff, being tenant for life only, could not, except by virtue of this last mentioned Act, claim for more than his life interest, or bar those in remainder; but by sect. 7 a tenant for life is enabled to do so whether in respect of an estate in land, or, as in this case, in respect of an interest in water. But by the 9th section the compensation, except where the same shall have been determined by the verdict of a jury, or by arbitration, or the valuation of a surveyor appointed by two justices (for all which modes of proceeding provision is made by later sections of the Act) shall not be less than

shall be determined by the valuation of two able practical surveyors, one to be nominated by each party, and, if these cannot agree, by a third surveyor to be nominated by two justices. Though dealing in this part of the Act only with the power of a person under disability to convey the whole estate, the framers of the 9th section have further applied, as it were by anticipation, its provisions to permanent damage or injury to lands held by these parties, that being obviously the meaning of the words "such lands," which words cannot, I think, be struck out as surplusage, being on the contrary words essential to the true meaning of the enactment. But with this we are not concerned, inasmuch as we are here dealing with the substantive right to the water, and not with any consequential damage either to the water or the land by reason of the obstruction of any part of the stream. The difficulty consists in applying the 7th and 9th sections of the Act to a case not of voluntary purchase and conveyance, to which this part of the Act and these sections relate, but to a case in which the water is taken compulsorily. Looking, however, to the fact that upon the amount of compensation or purchase money ascertained to be payable to persons under disability, but entitled under the statute to convey, being paid into the account of the accountant-general under sect. 69, such persons must, under the operation of sect. 75, convey the land or water, as the case may be, to the promoters of the undertaking, and that in sect. 9 the mode of proceeding adopted by the parties in this case is mentioned as one that may be adopted for ascertaining the value, though it is there referred to with reference more immediately to the matter of voluntary sale, it seems to me that upon entering into this agreement the plaintiff may be considered as having been ready and willing to convey and the defendants to accept the conveyance of the plaintiff's right in the water, on the amount of compensation being assessed by this mode of proceeding. The tenant for life was, under sect. 7, enabled to convey the interest in the water, provided sect. 9, which was intended to protect the interests of those in remainder, was complied with. It was competent to the defendants to agree to the necessary steps being taken to satisfy the exigency of sect. 9. It was to the interest of both parties that this should be done in order to obviate the necessity of any other form of proceeding. If this course had not been adopted, recourse must have been had to a jury, or to arbitration on a different form as provided by the Act. It was, as it seems to me, clearly competent for the parties to proceed as they have done under the 9th section. I cannot, therefore, say that, in entering into the agreement to which the plaintiff seeks to hold the defendants bound, the latter were in any way acting *ultra vires*, and are therefore entitled to have the agreement treated as invalid. I am of opinion that this appeal must be dismissed. The judgment of the Common Pleas Division must be affirmed.

BRAMWELL, J.A.—I am of the same opinion. Notwithstanding that the Lord Chief Justice has stated the facts, I think it will be convenient if I shortly mention how I appreciate or understand them. Plaintiff, as the tenant for life of this mill, was entitled to the flow of water. The defendants have given notice to take the whole of the water; so that a wrong has been done to the plaintiff, if

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it were not that the defendants were authorised to do what they have done under the Act of Parliament. But that entails upon the defendants that they must in some way compensate the plaintiff, either by purchasing the right from him to do what they have done, or by compensating him for the damage they have done, and accordingly the plaintiff and the defendants have agreed that the defendants should. This is how I understand the facts; and I have no doubt the meaning is, that the defendants are to have for ever the right to do that which they are doing at this moment, and pay the price of compensation therefor. But the plaintiff, being only tenant for life, could not agree to a price less than should be fixed by two able practical surveyors, or in their default by a third able practical surveyor appointed by two justices. The plaintiff could agree to such sum as should be fixed by such able practical surveyor or surveyors, and he has agreed to take it on behalf of himself and his remainderman, and the defendants agreed to pay compensation in this way, and accordingly each appointed an able practical surveyor, and in default of the agreement of those two, the justices appointed a third surveyor, and he has estimated a value which, according to the agreement, ought to be paid by the defendants, but they object to do so. Therefore the plaintiff brought an action for a *mandamus* to compel them not to pay him, but to pay the money in at the appointed place. Under these circumstances—these being the facts as I appreciate them—the question is whether the agreement is *ultra vires*; that is to say, whether the defendants could agree—whether they could in point of law validly make such an agreement as this, and the question is just the same as though the plaintiff had been a tenant in fee and the money had only to be paid to him. Could the defendants agree with a tenant in fee for the purchase from him once for all of the right to do that which they have done and which they propose continuing to do? Now I am of opinion that they could lawfully and *intra vires* have entered into such an agreement as that. The first question I put to myself is what I put to Mr. Kingdon in the course of the argument. If this agreement cannot be entered into, what is the remedy of the plaintiff and those who shall come after him under this statute? And Mr. Kingdon answered, as I think he was bound to do: "He must, from time to time, as he is damaged, under the 68th section of the Lands Clauses Act, which is incorporated with the private Act of this company, take proceedings under that section." Then are those proceedings to be taken daily, monthly, yearly, or every five years? It is said, Well, if there is a damage to the extent of 50*l.* in the course of a month, why should not the man have it at once, and if the parties cannot agree, take proceedings under the 68th section? or, if not monthly, why not every five years? Is it conceivable that the Legislature can have intended to leave the parties in such a condition that all that can be done to adjust their rights is that there must be continually recurring proceedings under the 68th section? I am convinced that it cannot be so, unless by some extraordinary oversight on the part of the Legislature, and I think it not unreasonable to approach the construction of the other sections of the Act with the idea that this cannot have been the meaning, and that there must have been some other. Look-

ing at the private Act, it seems to me that under sect. 8 the defendants have power to purchase out and out the right which they propose to exercise for all time, because sect. 8 says that they may make and maintain the waterworks and enter upon, take, and use the lands described, and may purchase, enter upon, take, use, get, divert, and appropriate the streams, springs, waters, and sources of water. Now, what does it mean by saying that they may purchase the streams and sources of water? It does not mean merely that they may purchase of somebody the land in which the stream or source of water arises, for that would not be purchasing the water, because it is not the water of the landowner to sell. He may sell all the land, or he may sell all his rights in the springs which rise in the land, but he has no right of withholding the water from those persons to whom it would come in the natural course of things. Therefore that cannot be the meaning of the Act. The only sensible meaning that we can attach to these words is, that the water can be purchased in this sense—that no riparian owner to whom it may come shall have a right to complain. In other words, the defendants may purchase from all the riparian proprietors the right to divert the water without complaint. That, I think, is the obvious meaning of the Act. This opinion, so far as it goes, is not inconsistent with the decision in the *Trowbridge* case. If I thought it was, seeing who gave the judgment in that case, I should say what I am saying with the greatest hesitation and reserve; but in the *Trowbridge* case the question was different altogether from the one we have now to decide. As I understand the *Trowbridge* case, it was an attempt to make the corporation, who wanted a part of the stream only, take the whole of it, which was very properly refused. On these grounds, therefore, I think under sect. 8 of the local Act there was power to enter into this bargain. If I am wrong in this view, I think it would not matter, because I think the case would then come within sect. 9 of the Lands Clauses Act. I do not think the word "such" in that section ought to be rejected, but it cannot, to my mind, be read literally as it stands, or there would be, as Mr. Justice Brett ruled, this absurdity, that compensation is to be arranged for permanent injury or damage to lands which did not continue to belong to the landowner, but which had been taken by the company themselves. I agree with the Lord Chief Justice that the word "such" means "so owned," and that compensation is to be made for permanent damage or injury to any lands "so owned." The language of the section may be inaccurate, but I hold that to be the meaning of it. Mr. Petheram called our attention to the 22nd section. I suppose he meant to point out that under the agreement clauses an agreement was made for compensation. If that is so, supposing the case not to come within the 68th section, I think it is within the 9th section of the Land Clauses Act, and for the same reason as I have already given. Now is there a power given of compensating once for all? I hold that under the 68th and 9th sections together there is such a power. Consequently, whether this is to be treated as a purchase or as compensation for lands injuriously affected, it was clearly competent for the parties to enter into the agreement they have entered into; why should they not? We have been shown the enormous inconvenience that it

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should not be so. Take the case of lands injuriously affected. Suppose lights are obstructed. It could not be said that the tenant should bring his action and claim compensation under the 68th section, as the injury takes place "from time to time." It may be said that what obstructs the light is of a permanent character. I do not know that that is so. People may alter their works, or the obstruction may be made more permanent. Therefore you cannot say the damage is the same for all time. Then the case of a way may be put. It is an inconvenience to a person if a way be diverted so that his premises are made more difficult of access, and he is entitled to compensation. It may be that more people are coming by that way at one time than at another, and therefore the inconvenience is greater. But there is no doubt he may have compensation once for all. It may be said that it is impossible to put a value on so uncertain a thing as this, as the damage at one time may consist in taking half, or a quarter, or the whole of the water. Now I am satisfied a value can be put upon it. Any able practical surveyor might state a fair sum as what ought to be paid for any part necessary to be taken. I may refer to a case within my own knowledge, for I was counsel in it—that of the New River Company. That company bought the right of taking out of the Lea—not a certain quantity of water, but as much as they could take if they pleased by a gauge constructed in a particular way. It did not follow that they always took the whole. If the springs of the New River were abundant they took none; if they were low they took a great deal; and there was a proportionate value set upon what they did take. There are other arguments of inconvenience and otherwise why this should be so. What is the miller to do? When he knows once for all that he will have no further compensation for what has happened, he will adjust his mill to the probable supply of water which he expects to get. For instance, if the mill originally required a power of water called "A," and if he calculated that only half the water had been taken, he might reduce his mill accordingly. What is he to do when the supply is precarious? If he keeps the original mill he requires the whole of "A," and if he gets only half of "A" it will not work. That is hard upon him and on the corporation. But if he reduces the mill to the half of "A," and it works properly, the corporation may say, "You are not damaged at all; all the mill you have got is properly worked." That is a difficulty which may arise from this mode of compensation, that it may be either inordinate or inadequate. Another observation is this: If the plaintiff is to recover in consequence of his lands being injuriously affected by the execution of the works, he would be met by this difficulty—although I do not attach much importance to it: the company might say, "It is not by our works we have done what you complain of; it is because we choose to use certain sluices in a particular way." I think the Legislature meant to say that, when the works are executed in such a way as that they can be so used as to damage, compensation is to be paid, and it is giving a reason why the compensation should be once for all and not from time to time. It is to be observed that these words "from time to time" are not used in sect. 8 of the local Act. The case, I think, comes

properly within that section. If not, it comes properly within sect. 68 of the Lands Clauses Act. I think the words "from time to time" mean this, that it may be that "from time to time" there will be an alteration in the amount of permanent damage done, or within the power of the company to do, just as a railway company, or any company that takes lands, might obstruct lights by a permanent building, and then might afterwards, under their powers, further obstruct those lights. That is the sort of case of "from time to time" which the Legislature contemplates. In the result, therefore, I am of opinion that there was a power to purchase this right under the 8th section of the local Act; that if there was not, there was a power to agree upon a compensation to be paid under the 9th and 68th sections of the Lands Clauses Act; and that the case before us is equally good, whether the one or the other construction is right; and consequently that the judgment of the court below is right, and should be affirmed.

AMPHLETT, J.A.—I am of the same opinion. The case has been so fully gone into that I shall make but few observations. In fact I should make none were it not for the impression that seems to have been in the mind of the court below, and in which I am unable to agree, that the case of *Ferrand v. Mayor of Bradford* was, in fact, overruled by the case of *Bush v. The Trunobridge Waterworks Company*. I entirely agree with what the Lord Chief Justice has said, that those two cases stand perfectly well together—that one does not overrule the other; and I am firm in that view, because the case of *Ferrand v. The Mayor of Bradford* was cited both before the present Master of the Rolls and before the Lords Justices, and neither one nor the other ever alluded to the case, or ever stated that they overruled it, which they would, I think, as a matter of courtesy in so recent a case as that had they intended to do so. It is hardly credible that they would have overruled it, if they intended to do so, without giving some reasons. If you look at their judgment you will find they distinguish it altogether from the former case. What was the former case? The Corporation of Bradford, as it appears by the report, under their power to take the whole or what they wanted from time to time, had, before the Bill was filed, taken the whole of the water flowing through the plaintiff's lands. The question was whether that was a purchase, so that the corporation could be called upon to deposit the presumed value before they could be allowed to go on with the diversion of the water. They having, by the terms of their Act, power to purchase the stream, by taking the whole of the water, had destroyed the stream which came through the plaintiff's property, and the Master of the Rolls held in that case that it was a purchase of the stream, and therefore the provisions of the Act obliged them to pay the presumed value into court before they could take it. The subsequent case was this: there was a similar power to take the whole or a part. All the defendants had done there was to divert a portion of the stream. The wish of the plaintiff, because they had so taken a portion, was to say, "Now you have taken a part, and you must purchase the whole," and he prayed an injunction upon that ground. Both the Master of the Rolls and the Lords Justices held that that was not a case of purchasing the

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stream. The defendants had power, under their Act, to take a portion of the stream, and the plaintiffs must go, under the 85th section of the Lands Clauses Consolidation Act, and obtain compensation for the injury done to the stream, and to his land, by their taking a portion of the water. It appears to me, therefore, that those two cases stand, and I should be sorry if it were understood that the former case overruled the latter. Now the present case is exactly the same as the case of *Ferrand v. The Mayor of Bradford*. There is power to purchase the stream, and looking at the General Waterworks Act, combined with the local Act, they have power if they like, to take "from time to time," either the whole or a portion. Under these circumstances I agree with what my learned brothers have said, that in this case, like the case of *Ferrand v. The Mayor of Bradford*, it is a purchase of the whole stream, and therefore the purchasing clauses appear to me to be the clauses that govern the case. But if I am wrong in that, supposing that it does not come within the purchasing clauses, but comes within the 85th section, which enables compensation to be given for damage done to land, I think the result in this particular case is exactly the same. The result would not have been the same if the application here had been to oblige them to pay the full value of the stream into court, as in *Bush's case*. That could not be done. The plaintiff is merely coming here for compensation for the damage done to him by diversion of the stream, and therefore, supposing that it comes under the 85th section, it appears to me that compensation can be obtained in that manner precisely in the same way as if it were a purchase. There is some little ambiguity in the sections, but when you examine them particularly you will find that there can be no doubt that a limited owner can obtain under the clause full compensation, both for himself and the remainderman, for the damage either done or apprehended to the land. It is admitted that if it were a purchase, that is so, because under the purchase clauses of the Act a limited owner can deal with a corporation or a company exactly the same as if he were the owner in fee, subject only to the reservation that if the price is not settled by arbitration or by the verdict of a jury, then the agreed price must not be less than what may be found by two able practical surveyors. Then you come to the 68th section, which provides for compensation for damage. The 68th section does not in so many words say that a tenant for life shall be on the same footing as a tenant in fee, and he can get compensation not only for himself but for those who shall succeed him, but if you look at the next section it is necessarily inferred, because that section refers not only to the purchase-money of land arising from a sale, but provides also for the compensation to be paid for any permanent damage done to "any such land." The inference, therefore, is that any tenant for life is as much able to bargain for any such permanent damage as for purchase-money. Supposing that to be so, it is further confirmed by section 9, which, as my Lord Chief Justice and brother Bramwell have both said, clearly includes cases of compensation for damage as well as of purchase-money, because I cannot in the least agree with the suggestion of Mr. Kingdon that those words in section 9, "compensation to be paid for any permanent damage or

injury to any such lands" may mean compensation for injury done to mines or anything of that sort. They don't appear to me to be thinking of that at all. I entirely agree with the construction my brother Bramwell mentioned in the course of the argument, that it means any lands belonging to parties under disability. Therefore I cannot agree with what the court below seemed to consider, that the word "such" might practically be eliminated from the section altogether. If you eliminate the word "such" altogether, you arrive at the absurd notion that a person having an absolute interest as tenant in fee, would have to submit to the valuation of a practical surveyor before forming a new contract. But when you construe "take such lands" as referring to a person under disability, then the whole thing is rendered perfectly clear and distinct. I think this shows the tenant for life had power to bind the remainderman. Then the question is raised whether under this statement of claim it is made out that he has done so. What the parties did was to enter into an agreement. I am now assuming that the tenant for life could if he liked settle the price with the corporation, subject only to the 9th section; well, then, they were evidently intending to go under the 9th section; they agreed that the price should be settled by two able practical surveyors whom they named, and if they agreed that should be the price, they did not intend to go any farther. Well, the surveyors did not agree. The tenant for life might possibly have objected to resorting to the justices in order to have a third able practical surveyor appointed. But the 8th paragraph of the claim says that the defendants themselves made application to the justices to appoint an able practical surveyor, and the plaintiff consented to it. Taking that allegation, what is it? The tenant for life having power to agree upon a price what he says is this, "We will not trouble ourselves to fix the price now. I agree with you that you shall have the stream for such a price as under the 9th section an able practical surveyor shall appoint." Having settled that price by reference, it seems to me all that is requisite. When he has reported that value, the 9th section is complied with, and then the whole matter is settled. For these reasons I think the demurrer is bad.

Judgment below affirmed.

Solicitors for plaintiff, *Warry, Robins, and Burges*, for *Thos. Ffooks*, *Sherborne*.

Solicitors for defendant, *Wedlake and Letts*, for *H. B. Batten*, *Yeovil*.

Nov. 27 and Dec. 21, 1876.

REG. v. ASPINALL AND OTHERS.

Conspiracy—Indictment—Intent to deceive persons buying shares in a company—Rules of Stock Exchange—Error.

The defendants were indicted for a criminal conspiracy and found guilty on the first two counts of the indictment.

The second count alleged that the defendants, who were directors, &c., of a new company, had conspired to deceive the members of the committee of the Stock Exchange, and to induce them, contrary to the intent of certain of their rules, to order a quotation of the shares of the company in the official list of the Stock Exchange, and "thereby

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to persuade divers liege subjects, who should thereafter buy and sell the shares of the said company, to believe that the said company was duly formed, and had complied with the said rules, so as to entitle the company to have their shares quoted in the official list of the Stock Exchange."

The defendants assigned error.

Held (affirming the decision of the Queen's Bench Division below), that the second count contained averments which, if taken to be proved in a sense adverse to the defendants, sufficiently supported the charge of criminal conspiracy.

THE defendants were indicted for a criminal conspiracy, and were found guilty on the first two counts of the indictment.

The defendants afterwards moved in arrest of judgment in the Queen's Bench Division, and the Court discharged the rule. Judgment was thereupon entered up and sentence pronounced, and the defendants, Aspinall and Knocker, then brought error.

The case in the court below will be found reported *ante* p. 412; 35 L. T. Rep. N. S. 738.

The two counts of the indictment upon which error was assigned, were as follows:

First count against Joseph Aspinall, William Whyte, Charles Knocker, John Saunders Muir, and two others: That by a deed made and dated the 27th March 1802, an undertaking was proposed to be carried on thenceforth in a building then erected near Throgmorton-street, City, for the transacting of buying and selling the public stocks or funds of this kingdom, and a capital sum of 20,000*l.* had been then subscribed for setting on foot and carrying on the said undertaking under the name of "The Stock Exchange," and was then divided into 400 shares of 50*l.* each, and nine persons were then appointed trustees and managers of the undertaking, and due provision was then made for election of trustees and managers from among the proprietors of the undertaking to fill up vacancies, so that there should be nine such trustees and managers. And for the management and transacting the concerns of the undertaking, thirty persons had, previous to 27th March 1802, been chosen by ballot at a general meeting of the proprietors, a committee for general purposes, and due provision was then made for an annual election by ballot of thirty proprietors of "The Stock Exchange," to act for the term of one year as aforesaid, and the committee for general purposes were thenceforth empowered to have the sole management, regulation, and direction of all the concerns of the undertaking, except the trusteeship thereof, and the direction and management of the buildings, and were empowered to admit such persons, whether proprietors or not, as they should think proper, to attend and frequent the building called the Stock Exchange, for the transacting therein the business of a stockbroker or jobber for one year, to be computed from the 25th March in each year, and at a price of admission fixed by the trustees and managers aforesaid. And that from and after the date of the deed, and at the time of taking the inquisition, the management, &c., of the concerns of the undertaking, except as aforesaid, had been and were carried on by the committee for general purposes of the Stock Exchange, and who had from time to time adopted rules and regulations for the conduct of business on the Stock Exchange which were in full force and effect in respect of the members of the Stock Exchange and Stock Exchange transactions, and the committee for general purposes had full power and authority to expel any member of the Stock Exchange who violated any of the regulations so adopted, or failed to comply with any of the decisions of the committee. Averment, that heretofore J. Aspinall and W. Whyte had been directors of a public company, called the Eupion Fuel and Gas Company (Limited), and one G. P. Knocker had been the secretary and public officer of the company, and G. S. Fry, J. S. Muir, and C. Knocker had been persons aiding and assisting in the establishment of the company, and that the company had proposed to raise a capital of 35,000*l.* by subscriptions of shares of 1*l.* each, in addition to 15,000*l.* represented by 15,000

fully paid-up shares, for the purpose of carrying out the objects of the company, and that the company was in all respects a new company. And that all persons dealing in the shares of a new company, according to the rules, regulations, and usages of the Stock Exchange, when such new company had not yet received the appointment of a special settling day in respect of the transactions in the shares of such new company, required, for the purpose of making their contracts and bargains in respect of the shares enforceable according to the rules and regulations of the Stock Exchange, that a special settling day should be fixed by the committee for general purposes of the Stock Exchange, upon which settling day all shares which had been theretofore bought and sold should be delivered and paid for according to the rules, regulations, and usages of the Stock Exchange. And that on April 1, 1874, an application had been made by and on behalf of Aspinall, Whyte, G. P. Knocker, Fry, Muir, and C. Knocker to the committee for general purposes of the Stock Exchange to appoint a special settling day for transactions in the shares of the company, and thereupon it became and was necessary that the company should comply with the terms of certain rules duly issued and published by the committee, and which rules were and are as follows:— "127. The committee will appoint a special settling day for transactions in the shares of a new company, provided that no allegation of fraud be substantiated; that there has been no misrepresentation or suppression of material facts; that sufficient scrip or shares are ready for delivery; and that no impediment exists to the settlement of the account. 128. The secretary to the share and loan department shall give one week's notice to the Stock Exchange of any application for a special settling day for transactions in the shares of a new company previous to such application being submitted to the committee, and shall require the production of the following documents, viz, the prospectus, the Act of Parliament, the articles of association, or a certificate that the company is constituted upon the cost book system, under the Statutory Laws; the original applications for shares, together with the allotment book signed by the chairman and secretary to the company, and a certificate signed in like manner, stating the number of shares applied for and unconditionally allotted, and the amount of deposits paid thereon; the banker's pass book and a certificate from the bankers, stating the amount of deposits received." And that Aspinall, Whyte, G. P. Knocker, Muir, C. Knocker, and Fry, knowing the premises, and contriving and intending to cheat and defraud had, on the 8rd of Feb. 1874, unlawfully conspired, combined, confederated, and agreed together, and with divers other persons to the jurors unknown, by divers false pretences, &c., to injure, deceive, prejudice, and defraud S. De Zoete, T. Fenn, and others, then being members of the committee for general purposes of the Stock Exchange, and to induce them, contrary to the true intent and meaning of the rule hereinbefore recited, to appoint a special settling day on the Stock Exchange for transactions in the shares of the company. And that Aspinall, Whyte, G. P. Knocker, Muir, C. Knocker, and Fry, in pursuance of the unlawful conspiracy, &c., unlawfully and knowingly did falsely pretend to S. H. De Zoete, T. Fenn, and others, then being members of the committee for general purposes of the Stock Exchange, that the number of shares of the company applied for by the public was then 34,365, that the number of shares of the company allotted unconditionally was then 34,365, and that the amount received by the company thereon was, on application, 10*s.* per share, amounting to the sum of 17,182*l.* 10*s.*, that 15,000 of the shares of the company had then been allotted to the patentees, and that no shares of the company had been conditionally allotted; whereas in truth and in fact, the number of shares of the company applied for by the public was not then 34,365, nor any number, and whereas the number of shares allotted unconditionally was not then 34,365; but the greater part of the shares had been allotted to the applicants for the same upon the condition that they, the applicants, should not be called upon to pay for the same, and whereas the amount received by the company upon the application for the shares was not 17,182*l.* 10*s.*, nor was any amount whatever received by the company from applicants for shares, and whereas 15,000 fully paid-up shares of the company had not been taken by the patentees, &c.

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Second count.—That at the time of committing the offence hereinafter mentioned, Aspinall and Whyte were directors and G. P. Knocker secretary of the Euphon Fuel and Gas Company (Limited), and Fry, Muir, and C. Knocker were persons aiding and assisting in the establishment of the company, and application had been made on behalf of the company to the committee for general purposes of the Stock Exchange to order the quotation of the new company in the official list of the Stock Exchange, under and in pursuance of a rule duly issued and published by the committee as follows:—

"129. The committee will order the quotation of a new company in the official list, provided that the company is of bona fide character and of sufficient magnitude and importance; that the requirements of rule 128 have been complied with, and that the prospectus has been publicly advertised, and agrees substantially with the Act of Parliament or the articles of association, and, in the case of limited companies, contains the memorandum of association; that it provides for the issue of not less than one half of the nominal capital, and for the payment of ten per cent. upon the amount subscribed; and sets forth the arrangements for raising the capital, whether by shares fully or partly paid up, with the amounts of each respectively, and also states the amount paid or to be paid in money or otherwise to concessionaires, owners of property, or others, on the formation of the company, or to contractors for works to be executed, and the number of shares, if any, proposed to be conditionally allotted; that two-thirds of the whole nominal capital proposed to be issued (shares reserved or granted in lieu of money payments to concessionaires, owners of property, or others, not being counted in such two-thirds), have been applied for and unconditionally allotted to the public; that the articles of association restrain the directors from employing the funds of the company in the purchase of its own shares, and that a member of the Stock Exchange is authorized by the company to give full information as to the formation of the undertaking, and able to satisfy the committee as to all particulars they may require. In cases where fully paid-up shares have been granted in lieu of money payments, an official certificate will be required that the contract providing for the issue of such shares has been filed with the Registrar of Joint Stock Companies, as prescribed by the 25th section of the Companies Amendment Act, 1867." Averment: That the defendants had applied to and requested one Sir R. W. Carden and others, a firm of stockbrokers and members of the Stock Exchange, and authorized them to give the information hereinbefore mentioned, and to apply to the committee to order the quotation of the shares of the company in the official list of the Stock Exchange, and S. P. Knocker had employed them to sell 5000 shares of the company on behalf of certain alleged vendors of patents, and they had bargained for the sale of 900 of the shares. And that Aspinall, Whyte, G. P. Knocker, Muir, C. Knocker, and Fry did, on the 3rd Feb. 1874, unlawfully conspire, combine, confederate and agree together, and with divers other persons whose names were to the jurors unknown, by divers false pretences, and artful and subtle means, devices, and stratagems, to injure and deceive the said members of the committee, and to induce them, contrary to the true intent and meaning of the rules in this count and in the first count of the indictment mentioned, to order a quotation of the shares of the company in the official list of the Stock Exchange, and thereby to induce and persuade divers of the liege subjects of our lady the Queen, who should thereafter buy and sell the shares of the company, to believe that the company was duly formed and constituted, and had in all respects complied with the rules and regulations of the said undertaking, in the first count of this indictment described and mentioned, to wit, the said Stock Exchange, so as to entitle the company to have their shares quoted in the official list of the said Stock Exchange. And that Aspinall, Whyte, C. P. Knocker, Muir, C. Knocker, and Fry, and the other persons, &c., in pursuance of the unlawful conspiracy, combination, confederacy, and agreement, unlawfully and knowingly did falsely pretend to De Zoete, Fenn, and others, members of the committee, &c., that the number of shares of the company applied for by the public was then 34,365, and that the amount received by the company thereon was on application 10s. per share, amounting to the sum of 17,182l. 10s., that 15,000 of the shares had been allotted to the patentees;

that no shares had been conditionally allotted; and did thereby induce the committee for general purposes of the Stock Exchange to order the shares to be quoted in the official list of the Stock Exchange on and after the 28th May 1874.

The record having been formally made up, the defendants, Aspinall and C. Knocker, assigned as error:

1. That neither the first nor the second count of the indictment discloses any criminal offence.

2. That the first count charges merely a conspiracy to deceive and defraud the committee of the Stock Exchange, and to induce them to appoint a settling day, and does not go on to aver an intent to defraud them or anyone of goods, money, or otherwise, or that any fraud was intended to result or would probably result from such appointment.

3. That the second count charges only a conspiracy to injure and deceive the committee, and to induce them to order a quotation of the shares of the company, and thereby induce persons who should thereafter buy and sell such shares to believe that the company was duly formed and had complied with the rules of the Stock Exchange, so as to be entitled to have the shares quoted. That it contains no averment that it was to defraud the committee of money, goods, chattels, or otherwise, or that it was intended thus to defraud such prospective buyers or sellers, or that any fraud would probably result therefrom.

4. That fraudulently and deceitfully to induce the committee to appoint a settling day or to order a quotation of shares is not necessarily unlawful by an averment that criminal fraud was intended or would probably result therefrom.

5. That to render a conspiracy indictable, either the means used or the object of the conspiracy must be unlawful, that neither of the counts shows either the means or the object to be criminally unlawful.

6. That it is quite consistent with the averment in both the counts that the company was good financially, and that the defendants Aspinall, Whyte, Muir, and Knocker, only induced by irregular, but not by criminal or unlawful, means the committee to appoint a settling day and to order a quotation of shares, without intending ultimate fraud being a necessary or a probable result; and that an inference of such fraud ought not to be drawn, especially as it is negatived by the fact that the said defendants were acquitted and found not guilty upon the last count, which avers an intent thus to defraud the public of money.

7. That the only objects of the conspiracy averred in the first and second counts are to induce the committee to appoint a settling day and to order a quotation of shares, and to induce probable buyers and sellers to believe that the rules of the Stock Exchange had been complied with, and that the quotation of shares was properly made; but no inference of an intended fraud upon the public ought to be drawn therefrom, because it is too remote, and because the jury negatived all the suggestions of intended fraud made in the other counts by finding the said defendants not guilty thereon.

Benjamin, Q.C. and Metcalf, Q.C., for the defendant Aspinall.—The first count of the indictment is clearly bad, as it only avers that the defendants conspired together to tell lies in order to induce the committee to give them a settling day in violation of their rules. It does not aver

a conspiracy to cheat anyone out of anything, or to do any appreciable injury to anyone. At law nothing can be inferred in criminal cases against the accused, which is not plainly averred in the indictment. A statute is required to make a conspiracy to cheat generally an indictable offence. That is an argument that a general allegation of an intention to defraud would not be good unless by statute. The second count is also bad. The words "quotation of the shares of the new company in the official list" have no legal meaning, and the count does not explain them in common language. A dealing with the shares is averred only in the case of Knocker, who was found not guilty. The court will therefore infer that a similar averment could not be made against the other defendants. The court below held the second count sufficient upon the allegation "to induce divers of the liege subjects, &c., who should thereafter buy," &c. It is not alleged that the defendants induced the public to buy upon a false belief. It is consistent with the allegations in the count that persons might buy the shares, and having bought be deceived into believing that the regulations of the Stock Exchange had been complied with. There is no allegation of anyone being in fact deceived; no averment that the shares would be worth any more by being quoted in the official list. *Reg. v. De Berenger* (3 Mau. & Sel. 67) is distinguishable from this case; there the indictment was for conspiracy to raise the public funds on a particular day, and thereby injure all the liege subjects who should buy on that day. Blackburn, J., in the court below, decided on the authority of that case. A conspiracy becomes indictable in two cases only: first, when the means used are unlawful in the sense that those using them could be made civilly or criminally responsible; secondly, when the end to be obtained is unlawful. Thus the mere telling of lies is not indictable, but if those lies are told to lead up to the accomplishment of a criminal end, the conspiracy is complete. *Reg. v. Dixon* (3 M. & S. p. 11) was the case of a baker selling bread with alum in it for children, and the natural consequence of the act charged was to injure. It was not necessary in that case to infer a criminal intent. Here you have to infer by ratiocination and syllogism that the object of the defendants' conspiracy was to injure and deceive the persons who might buy the shares. No such inferences can be drawn in criminal cases. The names of the buyers of the shares should have been alleged, as in *King v. The Queen* (7 Q. B. 795, in error). In *Reg. v. Warburton* (L. Rep. 1 C. C. R. 274) Cockburn, C. J. said it had been doubted whether the law of England had not gone too far in extending the offence of conspiracy. In all the above cases there was alleged an intent to defraud; there is no such allegation here. If all the averments relating to the Stock Exchange are omitted from the indictment, and it is taken that the representations were made direct to intended buyers, there is no allegation of injury to those buyers.

C. Bowen for C. Knocker.—The second count does not aver that the belief which the defendants are accused of conspiring to induce in the public is incorrect. This is analogous to an indictment for obtaining by false pretences, where it is not sufficient to allege simply that the defendant falsely pretended without going on

to allege that the pretence was in fact false. It is a rule of criminal law that no inferences can be drawn against the accused. Here everything must be assumed against them, which cannot be done even after verdict. The court can only infer after verdict that which it can see must have been proved. He cited and referred to

Reg. v. Wheatley, 2 Burr. 1125;
Spiers v. Parker, 1 T. R. 141;
Bishop v. Hayward, 4 T. R. 470, 472;
Reg. v. Fuller, 1 Raym. 509;
Reg. v. Peck, 9 A. & E. 686;
Reg. v. Fowler, 4 C. & P. 592;
Heymann v. The Queen, L. Rep. 8 Q. B. 102; 1
Chitty on Crimes, 172;
Reg. v. Perrot, 2 M. & S. 379.

The Solicitor-General (Sir H. Giffard), Poland and Besley with him, for the Crown.—There is no distinction between the indictment the court will make after verdict in a civil and in a criminal case. That is decided in *Heymann v. The Queen* (*ubi sup.*), and the principle is affirmed in *Reg. v. Goldsmith* (L. Rep. 2 C. C. R. 74.) See also as to imperfect averments being cured by verdict, *Stennel v. Hogg* (1 Wm. Saund. 228), and the judgments of Bramwell, B. and Grove, J. The analogies drawn for the defendants between indictments for conspiracy and obtaining money by false pretences do not apply. The latter is an offence under a statute, and the essentials are that the statement must be of an existing fact and false to the knowledge of the party making it; but in conspiracies the guilty concert is the gist of the offence. It is not even necessary to set out specifically the unlawful purpose; the conspirators may not have agreed upon it. The offence is complete when the criminal concert is complete. Here the offence is sufficiently set out in the second count. The ordinary and natural consequence of what the defendants are alleged to have done was to induce people to give more for the shares of the company through a belief that they had been quoted in the official list of the Stock Exchange. It is common knowledge which the court may take notice of that that belief would give a greater value to the shares. *Sydeserf's case* (11 Q. B. Rep. 245), and *Gill's case* (2 B. & Ald. 204) show that the conspiracy is the offence and not the overt act done in pursuance of it. In the present case the overt act as laid in the indictment explains the object of the conspiracy, although it is true it is not alleged specifically that no one of the rules of the Stock Exchange was complied with. The second count alleges that the defendants in pursuance of their conspiracy "unlawfully and knowingly did falsely pretend" certain things. This amounts to the same thing as if it had been alleged that in truth and in fact the company was not duly constituted.

Benjamin, Q.C. replied.

Cur. adv. vult.

The following judgments were delivered on Dec. 21st 1876.

BRETT, J.A.—Every pleading, civil or criminal, must contain allegations of the existence of all the facts necessary to support the charge or defence set up by such pleading. An indictment must, therefore, contain an allegation of every fact necessary to constitute the criminal charge preferred by it. As in order to make acts criminal they must always be done with a criminal mind, the existence of that criminality of mind must always be alleged. If, in order to support the charge, it

is necessary to show that certain acts have been committed, it is necessary to allege that those acts were in fact committed. If it is necessary to show that those acts, when they were committed, were done with a particular intent, it is necessary to aver that intention. If it is necessary, in order to support the charge, that the existence of a certain fact should be negated, that negative must be alleged. The first allegation thus mentioned is always contained in the preliminary assertion that the accused did the thing or things complained of "fraudulently," "falsely," "unlawfully," or "feloniously," &c. And that is the whole effect of this preliminary allegation. The necessity and the form of the allegations may be exemplified in an indictment for false pretences or perjury. To support a charge of obtaining money, &c. by false pretences it is necessary to show, and therefore to allege, that the prisoner with a wicked or criminal mind stated something which, if true, would be an existing fact; that he did so with intent to procure the possession of money, &c.; that he knew his statement was, that is to say, that so far as his mind was concerned he intended that his statement should be, false; that by the statement he did so act on the mind of the prosecutor as that he did thereby obtain money, &c.; that the statement was in fact untrue in the sense of being incorrect. And both the last allegations are necessary facts of the charge; for although the accused had a criminal intent and believed that his statement was false, yet if in fact either the prosecutor was not thereby persuaded, or by chance the statement was not incorrect, the charge is not supported, the crime is not committed. And it was for want of the allegation, that the pretences relied on by the prosecutor as the material false ones were, in fact, untrue, that the indictment was held bad in *Rea v. Perrot* (2 M. & S. 379). So in perjury, it is a necessary allegation that the statement on oath relied upon as the perjury was false in fact, in the sense of being incorrect in fact. Though the accused believed he was swearing a falsehood, and was thereby morally perjured, yet, if by chance his statement were true in fact, he could not be convicted of perjury. There is another rule with regard to pleading which must be enunciated, the rule with regard to the effect to be given to pleadings after verdict. It is thus stated in *Heymann v. The Queen* (L. Rep. 8 Q. B. 102): "Where an averment, which is necessary for the support of the pleading, is imperfectly stated, and the verdict on an issue involving that averment is found, if it appears to the court after verdict that the verdict could not have been found on this issue without proof of this averment, there, after verdict, the defective averment, which might have been bad on demurrer, is cured by the verdict." Upon this it should be observed that the averment spoken of is an averment imperfectly stated, i.e. an averment which is stated but which is imperfectly stated. The rule is not applicable to the case of the total omission of an essential averment. If there be such a total omission, the verdict is no cure. And when it is said that the verdict could not have been found without proof of the averment, the meaning is, that the verdict could not have been found without finding this imperfect averment to have been proved in a sense adverse to the accused. Another rule is, that in considering an indictment on a writ of error, and therefore

after verdict, it is not necessary for and is not open to the court to inquire what facts were proved at the trial. The question is, whether, assuming the facts which are accurately alleged in the indictment to have been proved as alleged, and the facts which are imperfectly alleged to have been proved in a sense adverse to the accused, the charge would be supported. If it would, the indictment on error after verdict is sufficient. But, if, assuming both the above mentioned allegations of facts, the perfect and imperfect allegations to be proved respectively as before stated, the charge would not be supported for want of the existence of some other allegation, affirmative or negative, which has been totally omitted, then the indictment is bad notwithstanding the verdict. The verdict is only to be taken as conclusive evidence that the facts alleged in the indictment accurately and inaccurately were proved in a sense adverse to the accused. If those facts, so proved, would not support the charge, the indictment is bad on a writ of error. In order to apply these rules to the present case, it is necessary next to determine what are the essential facts to be alleged in order to support a charge of conspiracy. Now, first, the crime of conspiracy is completely committed, if it is committed at all, the moment two or more have agreed that they will do, at once or at some future time, certain things. It is not necessary, in order to complete the offence, that any one thing should be done beyond the agreement. The conspirators may repent and stop, or may have no opportunity, or may be prevented, or may fail. Nevertheless the crime is complete; it was completed when they agreed. It is not, of course, every agreement which is a criminal conspiracy. It is difficult, perhaps, to enunciate an exhaustive or a complete definition; but agreements may be described which are undoubtedly criminal. An agreement to accomplish an end forbidden by law, though by means which would be harmless if used to accomplish an unforbidden end, is a criminal conspiracy. An agreement to accomplish, by means which are, if done by themselves, forbidden by law, an end which is harmless if accomplished by unforbidden means, is a criminal conspiracy. An agreement made with a fraudulent or wicked mind to do that which, if done, would give to the prosecutor a right of suit founded on fraud, or on violence exercised on or towards him, is a criminal conspiracy: see *Reg. v. Warburton* (L. Rep. 1 C. C. 274). There may be, and probably are, others. If the second count in this indictment contains averments sufficiently stated which are enough to show sufficiently that the defendants unlawfully, i.e. with minds intending to do wrong, agreed, by false pretences, to cheat and defraud those who might buy shares in the company, it sufficiently alleges a criminal conspiracy within the last rule above enunciated; for, if any person were cheated, by false pretences, into purchasing a commodity which, but for such falsehood, he would not have purchased, it is undoubted that he could maintain some suit for relief or remedy founded on the falsehood and fraud thus perpetrated on him. This is the case of *Rea v. De Berenger* (3 M. & S. 67). It was there held that it was a criminal conspiracy to agree to endeavour to raise the price of the public funds on a particular day by false rumours. This was not because it is an injury to the public to raise the value of the

public funds; but because it is fraudulent against those who purchase a vendible commodity to raise the price of it, at the time they purchase it, by fraudulent falsehoods on which they are intended to act. The conspiracy was held to be criminal, not because the article to be dealt in was the public funds, but because the public funds were a vendible commodity. And it was held that the offence was complete the moment the agreement was made, and that it was unnecessary to specify the persons who became purchasers. It may be well to notice, too, that the judges did not shrink from acting judicially on the knowledge that the public funds were a vendible commodity. The question therefore is, whether there are, in the second count of this indictment, allegations, some accurately and some inaccurately stated, which, assuming them to be proved in a sense adverse to the defendants, show that there was an agreement to cheat and defraud, by means of false pretences, those who might buy shares in the company named. The wicked mind or intention of the defendants is alleged in the usual form, namely that they "unlawfully agreed." There is an allegation that they agreed to use "false pretences." It was urged that this was too general and therefore unjust. The same argument was used and overruled in *Rees v. Gill* (2 B. & Ald. 204); *Reg. v. Gomperts* (9 Q. B. 824), and in *Sydserrf v. The Queen* (11 Q. B. 245). There is an allegation that the defendants agreed by false pretences "to deceive the members of the committee of the Stock Exchange, and to induce them, 'contrary to the true intent and meaning of the said rules hereinbefore in this count and in the first count mentioned,' to order a quotation of the shares of the company in the official list of the Stock Exchange." Much minute criticism was exercised on this allegation; but it seems certainly capable, if found to be proved in a sense adverse to the defendants, of bearing this construction, "that the defendants agreed to make such false pretences as might appear necessary to deceive the committee, when the time for them to order should come, into ordering a quotation as if the rules authorising such a quotation had been fulfilled, although in fact the rules should not have been fulfilled. You do not deceive a person into doing a thing contrary to rules if the rules have been fulfilled. It was said that it was unfair and unjust not to point out to the defendants which of the rules, or what part of the rules, it was suggested they intended should not be observed. This is the argument which was urged in *Gill's* case and the others against the general allegation that the defendants agreed to use "false pretences." The answer to such an objection is, that the agreement in those cases may not have determined what the pretences should be, or in this case which rule or which part of a rule should not be observed. The agreement may have been to deceive the committee, by any falsehood which would do so, into believing that whatever part of the rules should turn out to be in fact incapable of being fulfilled had been fulfilled. As for instance, if two-thirds of the whole nominal capital proposed to be issued should not in fact, when the time for procuring the order for quotation should arrive, have been applied for and unconditionally allotted to the public, to deceive the committee by false pretences into believing that they had been, and so that rule 128 had been complied with. The next allegation is, "and

thereby to induce and persuade divers of the liege subjects who should thereafter buy and sell the shares of the said company to believe that the said company was duly formed and constituted, and had in all respects complied with the rules and regulations of the Stock Exchange, so as to entitle the said company to have their shares quoted in the official list of the said Stock Exchange." Take this to be proved in a sense adverse to the defendants, and it is certainly capable of this construction, that the defendants agreed to deceive the committee into granting a quotation as if the rules authorising a quotation had been complied with, although such rules should not have been complied with, in particulars which, if the committee had not been deceived, would have prevented them from ordering the quotation, and that the agreement of the defendants further was, that they would thereby, if they could, induce purchasers of shares to believe that the rules had been complied with, although they should not have been in essential particulars. It is not sensible to suppose that they agreed, by deceiving the committee, to induce purchasers to believe that the rules had been fulfilled only when the rules had in fact been fulfilled. In such case there could be no need to deceive or use false pretences. It was objected that the court could not take judicial notice that a non-compliance with the rules set out in the count would, if known, depreciate the price of shares. That is like suggesting that the judges in *Rees v. Berenger* ought not to have taken judicial notice that the public funds were vendible commodities. But judges are entitled and bound to take judicial notice of that which is the common knowledge of the great majority of mankind, or of the great majority of men of business. They are therefore, in these days, bound to take notice that shares in limited companies are a vendible commodity, and that a purchaser of ordinary intelligence would prefer to purchase shares in a limited company which had fulfilled the requirements of rule 128, rather than in the same company when it had not fulfilled those requirements. They must, if that be true, also take notice that a quotation of a company by persons entrusted to examine whether such requirements had been fulfilled, and further entrusted not to allow such a quotation unless those requirements have been fulfilled, must have some effect on the mind of an ordinary purchaser of shares as to whether he would or would not purchase, or as to the price he would give. And therefore, the court may or must take judicial notice that the agreement imputed in the count to the defendants is an agreement to deceive the committee, and thereby, that is to say, by such deceit, to induce and persuade a purchaser to believe, at the moment he is making up his mind to purchase, in the existence of circumstances which do not in fact exist, the existence or non-existence of which must affect his decision if he be of ordinary intelligence. It is not stated that this agreement was made with intent to cheat and defraud. The statement, therefore, may be said to be imperfect. But to come to such an agreement with an evil mind is to agree to cheat and defraud, and the finding by a jury in a sense adverse to the accused that such an agreement to induce such a belief was come to, is to find that the agreement was come to with a wicked mind, that is to say, with an intent to cheat and defraud. If that be

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so, the count is, as has been said, sufficient on error after verdict. The case of *King v. The Queen* (7 Q. B. 782) was strongly relied on by the defendants; but it does not seem to us to be applicable. The defect on which the Court of Exchequer Chamber acted in that case was, that the indictment charged a conspiracy to cheat and defraud "certain liege subjects being tradesmen." It was held that such an allegation in such form in pleading meant "certain definite tradesmen alleged to be known to the defendants at the time of the criminal agreement," and therefore that such definite tradesmen ought, in describing the conspiracy, to be named or an excuse be averred for not naming them. If the second count in the present case had not averred that the persons intended to be induced to believe, &c. were those "who should thereafter buy and sell shares," the case would have been applicable, but as this indictment has such an allegation the case is not applicable. If in that case there had been added after the words "being tradesmen" the phrase, "who should thereafter deal with the defendants," the indictment in that case would have been sufficient according to *Reg. v. Gill*, *Reg. v. Gompertz*, and *Sydserrf v. The Queen*. We are of opinion, therefore, that the second count in this case is sufficient after verdict. We give no opinion whatever as to the first count. The judgment of the Court of Queen's Bench must be affirmed.

AMPLETT, J.A.—The only question which we considered necessary to have fully argued before us was the sufficiency of the second count of the indictment to support the conviction of the plaintiffs in error (hereinafter called the defendants) of a criminal conspiracy. This count begins by stating that the defendants were directors or persons aiding in the establishment of the Eupion Fuel and Gas Company (Limited), and that application had been made to the committee for general purposes of the London Stock Exchange to order the quotation of the shares of the said new company in the official list of the said Stock Exchange under a certain rule No. 129, duly issued and published, by which the committee were to order the quotation of a new company in the official list, provided that the company was of a *bona fide* character and of sufficient magnitude and importance, and that the requirements of rule 128 set out in the first count, and the further requirements of the said rule 129, were complied with. Those requirements were evidently calculated and intended to insure as far as possible the respectability and solvency of any new company before it was allowed to be quoted in the official list; and amongst others there were the following important requirements, viz., that in case of limited companies the memorandum of association provided for the issue of not less than one half of the nominal capital, and for the payment of 10 per cent. upon the amount subscribed, and that two-thirds of the whole amount of the capital proposed to be issued, with certain exceptions not necessary to be here stated, should have been applied for and unconditionally allotted to the public. Now, as the rules of a public body of such celebrity as the London Stock Exchange must be widely known to brokers and others dealing with shares, it is plain that to obtain a quotation of their shares in the official list must be advantageous to companies and enhance the value of their shares. Purchasers, on seeing the

shares so quoted, would have a right to believe that the requirements of the Stock Exchange had been complied with, and that the company had therefore satisfied an independent body like the committee of its respectability and solvency, and it cannot be doubted that they would be willing to give a higher price for the shares in consequence. This being so, I think it is established by the case of *Rees v. De Berenger* (3 M. & S. 67), that a conspiracy to procure by fraud and falsehood the shares of a company to be quoted in the official list, and thus give a fictitious value to the shares beyond what they would otherwise bring in the market, is a fraud upon the public and an indictable offence. This, in fact, was not denied on the part of the defendants; but it was contended that the averment of the conspiracy in the second count was not sufficient, even after verdict, to sustain the charge. That averment, omitting for the moment the overt acts subsequently charged, was as follows—[read the count.] In the first place, it was objected that there is no allegation of any design to injure and deceive purchasers, but only the members of the committee of the Stock Exchange; that omission, however, appears to me immaterial if the natural and probable effect of deceiving the committee in the mode alleged would be to injure and deceive purchasers. It was further objected that there is no allegation of any design to give a fictitious value to the shares, and that it ought not to be inferred in a criminal case; but here again I think that, if the design alleged was to induce purchasers to believe that the position and prospects of the company were better than they really were, the further design of inducing such purchasers to give a higher price for the shares, being the natural and probable consequence, ought to be inferred: (see *Rees v. Dixon*, 3 M. & S. p. 15.) But then it was argued with great force by Mr. Bowen that there is no allegation that what the purchasers were to be induced to believe was, in any respect that could affect the price of the shares, untrue, in which case it must be admitted that there could be no fraud upon the purchasers. Now the facts which the purchasers were to be induced to believe are as follows: first, that the said company was duly formed and constituted, which certainly is not negatived; and secondly, that they had in all respects complied with the rules and regulations of the Stock Exchange, so as to entitle the company to have their shares quoted in the official list, and this is not in any way negatived, except by the allegation that the design was by false pretences to induce the committee, contrary to the true intent and meaning of the said rules in the second count and in the first count mentioned, to order the quotation; and looking at those rules, it will appear that some of them relate merely to the convenient transaction of business by the committee of the Stock Exchange, and whether complied with or not, could have no effect upon the value of the shares in the market. It would therefore, it was urged, be consistent with all the allegations of the conspiracy that the only rules which the purchasers were to be induced to believe, contrary to the fact, had been complied with, were such as could not by possibility affect, in the mind of the purchasers, the value of the shares. This appears to me a serious objection; and I have considerable doubt, whether it is cured by the overt acts alleged in

the subsequent part of the count; for, in the first place, it was held in the case of *Rea v. Perrott* (*ubi sup.*) that an indictment for obtaining money under false pretences must negative by special averment the truth of the pretences, and that it is not enough, even after verdict, to charge that the defendant falsely pretended a number of different facts; and I think that the reasoning of the judges in that case applies as much to an indictment for conspiracy as to an indictment for false pretences, where, as in this case, the unlawfulness of the end depends upon the nature of the false pretences employed to attain it, and where, therefore, the ordinary rule, that the false pretences need not be specially alleged in an indictment for conspiracy, does not, in my opinion, apply. And in the next place, the false pretences alleged are not necessarily inconsistent with full compliance with the rules; since, for instance, it may have been falsely asserted, as is alleged, that the number of shares allotted unconditionally was 34,365, and that 10 per cent. had been paid thereon, and that no shares had been conditionally allotted, yet it may be true, for anything that appears, that two-thirds of the whole amount of the nominal capital had been applied for and allotted unconditionally, and 10 per cent. paid thereon, which was all that the rules required. Under these circumstances I am by no means sure that this defect would not have been fatal to the count on demurrer or a motion to quash it; but it appears to me to be one of those defects which, according to the rule laid down in *Serjeant Williams' notes to Saunders* (vol. 1, p. 261) and acted upon in the two cases cited by the Solicitor-General, *Heymann v. The Queen* and *Rea v. Goldsmith* (*ubi sup.*) is cured by verdict. No injustice can be done to the defendants by acting upon this rule, because it must be assumed that the judge properly directed the jury as to what false pretences must be proved to justify a conviction. Upon the whole, therefore, I am of opinion that the count is sufficient to sustain the conviction, and that the error assigned cannot be allowed. Having arrived at this conclusion, it is not necessary for me to express, and I abstain from expressing, any opinion upon the validity of the first count.

BRETT, J.A.—Lord Justice Mellish concurs in the judgment which I have delivered.

Judgment affirmed.

Solicitors for the prosecution, *Abrahams and Roffey*.

Solicitor for Aspinall, *Golding*.

Solicitors for Knocker, *Wontner and Sons*.

SITTINGS AT LINCOLN'S INN.

Reported by E. S. BOCKE, Esq., Barrister-at-Law.

We Wednesday, Feb. 14, 1877.

(Before JAMES, L.J., and BRAMWELL and AMPHLETT, JJ.A.)

SYERS v. METROPOLITAN BOARD OF WORKS.

Compulsory powers—Notice to treat—Right of tenant to compensation—Lands Clauses Consolidation Act 1845, s. 18.

Defendants had, under the powers of the Metropolitan Streets Improvement Act 1872, purchased a house of the owner, pending the plaintiff's tenancy, and had given the plaintiff, who was a

quarterly tenant, notice to quit at the expiration of his tenancy.

On motion for an injunction to restrain the defendants from entering upon the premises until they had given the plaintiff the notice to treat required by sect. 18 of the Lands Clauses Consolidation Act 1845, and should have paid him, or deposited in the bank, the compensation awarded to be paid under the Act, for his interest in the premises, Held (affirming the decision of the Master of the Rolls), that the plaintiff, as a quarterly tenant, had no interest, legal or equitable, in the premises within the meaning of sect. 18 of the Lands Clauses Act.

The Board, in giving the notice to quit, were merely exercising their right as reversioners under their purchase from the freeholder.

THIS was an appeal by the plaintiff from a decision of the Master of the Rolls. The plaintiff was quarterly tenant of No. 56, Turnmill-street, Clerkenwell. The house being required for the purposes of the Metropolitan Streets Improvement Act 1872, the Metropolitan Board of Works in Dec. 1875. purchased it of the freeholder, under the compulsory powers of the Lands Clauses Consolidation Act. Having thus become owners of the premises, the defendants served the plaintiff with a notice to quit in June 1876, or at the expiration of his tenancy, on the ground that the house was required to be pulled down. The plaintiff thereupon brought an action with the object of having the defendants restrained from pulling down the house until they should have compensated him for his alleged interest therein. In the court below the plaintiff moved for an injunction to restrain the defendants from entering upon the premises until they had given him the notice required by sect. 18 of the Lands Clauses Consolidation Act 1845, and should have either paid to the plaintiff, or deposited in the bank, as in the Act provided, the purchase money or compensation agreed or awarded to be paid under the said Act for the interest of the plaintiff in the premises.

Jessel, M.R., said:—Speaking roughly, I understand the Act to mean this,—you shall not take possession of any man's land, whatever his legal interest may be in it, until you have paid or secured to him the amount eventually payable to him as compensation simply, or as purchase money and compensation for taking away the land—you shall not enter upon it nor interfere with his possession. And, again, you are not entitled to take a partial interest in the land to the prejudice of the owner of the rest of the land. He may compel you to say if you buy up one you shall buy up all. Therefore, I consider that you have to decide, first, whether the man is entitled to any compensation at all. If he is not, there is no reason to prevent the company from taking possession of the land. If he has neither the legal estate nor an equitable interest, he cannot, as I read the Act, be entitled to any compensation at all. The position of the tenant in this case is a very simple one. He was tenant from three months to three months. Notice was given to the landlord; the three months tenancy of the tenant was not disputed; the purchase of the land was completed by the Metropolitan Board of Works, who gave the notice; then the notice to determine the tenancy was given by the then legal owners, and the tenancy expired by virtue of the notice. Therefore, the person who comes before

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me and complains has certainly no legal interest in the property in question. His legal interest, or whatever it was, has legally expired. Has he any equitable interest as distinguished from a legal interest? I cannot find out why he should have. The whole of the equitable interest which is in the landlord subject to his term has been bought and paid for by the Metropolitan Board of Works. Therefore, they have purchased up the whole equitable interest, and are entitled to possession. It was indeed suggested by counsel on behalf of the plaintiff that there is a duty binding upon the landlord to renew the lease or the tenancy if his tenant demands it. I have heard that such a notion prevailed in times past, but not in this country. In the country where such notions have prevailed they have not been sought to be enforced by the terror of the judiciary, but by other and more unpleasant means. But, as I said before, I never knew that there was such an idea in this country, and I repudiate the assertion that a man ceases to be an honest man as a landlord even if he refuses in the extreme case which was put, to renew a lease to his tenant, although that tenant, and his ancestors before him, had held the property in question for sixty years under a term, at the expiration of that term. That being so, I consider there was no legal nor equitable interest in the person in question. Then it is alleged, even assuming that he has neither a legal nor an equitable interest, yet he has acquired something by force of this Act of Parliament. The Act was intended to protect the persons whom I roughly call the landowners and occupiers who are already interested in this land, from being deprived compulsorily against their will of their ownership or possession. This man has not been deprived of either. Therefore, why should the Act of Parliament apply to him? It seems to me, from the reason of the thing, that he is not entitled to any compensation at all. But I must go to the words of the Act, because I am told they compel me to say that, on the reason of the thing, and the general purview of the Act, the result at which I ought to arrive could not be arrived at. The Act begins by a series of sections which are headed in this way: "And with respect to the purchase and taking of the lands otherwise than by agreement,"—"compulsory powers." It is very important to recollect that in this Act there are these headings. Now those are general provisions as to the purchase of lands. They begin with clause 16. After divers other headings we then come to a new heading "leases," which begins with the 119th section. This is an entirely new heading. The first question I have to consider is, whether the heading as to leases was intended to provide altogether for compensation in the cases specially provided for, because it is not every lease, but only certain leases, which are provided for. It does appear to me that the sections from 119 to 122 were intended to be specific provisions for those special cases, and to decide what is to be done in those cases, and to decide it once for all. Now the 119th section applies to a different case altogether, namely, to a case where only part of the land is required. The 121st section does apply to this case. It says, "If any such land shall be in the possession of any person having no greater interest therein than as tenant for a year, or from year to year, and if such person be required to give up possession of any lands so

occupied by him before the expiration of his term or interest therein, he shall be entitled to compensation for the value of his unexpired term or interest in such lands, and for any just allowance which ought to be made to him by an incoming tenant, and for any loss or injury he may sustain; or if a part only of such lands be required, compensation for the damage done to him in his tenancy by severing the lands held by him, or otherwise injuriously affecting the same, and the amount of such compensation shall be determined by two justices, in case the parties differ about the same; and upon payment or tender of the amount of such compensation, all such persons shall respectively deliver up to the promoters of the undertaking, or to the person appointed by them to take possession thereof, any such lands in their possession required for the purposes of this special Act." Now, as I read the section, there is nothing to control it at all. All that is required on the part of the company, or public body, exercising the powers of the special Act, is to give to those persons having a less interest than that of tenant from year to year, notice demanding possession (it does not require them to give any notice to take) to go before justices, to get the amount assessed, and then to pay that amount. That being done, they are entitled to possession. They do not require any conveyance. They take possession, and I think they are then entitled to it, and that none of the other sections prohibiting companies, corporations, or other bodies to which this Act applies, from taking possession of land, control or overrule this section, which says that, upon payment being made, the tenant in question shall deliver up possession to the company. Well, if that is so—if these are put in a separate class, and it is provided that they are not to go out merely on a notice to treat, they are not to have their interest taken away under a notice to treat, but they may have it taken away under a demand of possession, and nothing more. Why should this tenant be entitled to a larger interest than anybody else of the same class? I cannot see it at all. I cannot see why, if the company does not require possession before the expiration of the interest, that that throws you back on the other clause, because, in the case I have put, his unexpired interest is nil, and, therefore, his compensation is nil. Why should he not deliver up possession for nothing, if he were there? It appears to me from the moment he is served with the notice, he is to be paid for his unexpired interest, and then to deliver up possession. But when that interest has expired, he is to have no compensation. As I read the Act, it is entirely consistent with the view I have taken of the general nature of these provisions; and, reading it as I do, I am of opinion that this application must fail. Costs to be costs in the cause.

On the appeal,

O. H. Anderson contended that the plaintiff had a legal right to compensation, as a party interested in the premises, within the meaning of sect. 18 of the Lands Clauses Consolidation Act, at the time when the notice to treat was served on the owner, and that the defendants ought also to have served the plaintiff with a notice to treat under that section, and could not now take possession without giving him compensation. The words of the section were, "You are bound to give notice to treat to all the parties interested in the lands,"

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and if all the parties interested were to have notice, why should not a yearly tenant? (JAMES, L.J.—They cannot disturb the parties under the Act without giving them notice, but you are not within the Act at all. The defendants have merely, as owners of the fee simple, given the tenant notice to quit.) As the defendants were acquiring the interest of the plaintiff in the house, they ought to pay him compensation for a year's value of the tenancy before they took possession.

Cookson, Q.C. and Everitt, for the defendants, were not called upon.

JAMES, L.J.—I am of opinion that there is not the slightest foundation for this application. The truth is, it is contrary to the universal practice that has prevailed ever since railways have been established with statutory powers. Railway companies and other companies never do buy the interest of short tenants whom they can get rid of by legal notice, unless they want possession before the expiration of the notice, for which special provision is made by the Act of Parliament. The company deals with the freeholder. It acquires, either under compulsory powers or by contract with the freeholder (it may be by voluntary agreement) his interest, and with that the whole of his interest. Part of that interest is the right to determine the tenant's right by giving three months' notice. They have bought the freehold; they are assignees of the freehold; they do give the tenant three months' notice, as any other assignee of the reversion might do; and at the end of the three months the tenant must give up possession or be subject to be turned out by process of law—not under any statutory power, but under the right which is incidental to the property of the company. The Master of the Rolls could not have made any other order than the one he has made, and we must refuse this appeal with costs.

BRAMWELL, J.A.—I am of the same opinion. The defendants are not exercising any statutory powers here at all, nor threatening to exercise any. They are claiming to exercise that right which they have as reversioners at common law. Then there is another conclusive argument against the plaintiff. They are not bound to give notice at any particular time. They need not, therefore, have given notice until the three months had expired and the tenancy had expired; and what on earth were they then to ask the man to treat about? He had no interest remaining. It is rather strange to me that this experiment should have been tried in one court; that it should have come to a second court is something wonderful.

APPHLETT, J.A.—I am of the same opinion.

Appeal dismissed with costs.

Solicitors, *E. J. Eady*; *The Solicitors to the Board of Works.*

Wednesday, Feb. 14, 1877.

(Before JAMES, L.J., and BRAMWELL and APPHLETT, JJ.A.)

RODERICK v. ASTON LOCAL BOARD OF HEALTH.

Sewer—Powers of local authority—Public Health Act 1875 (38 & 39 Vict. c. 55), ss. 16, 19, 32, 144, 150, 303.

An urban or rural sanitary authority has power by the Public Health Act 1875, to make a sewer in private property, even though the sewer may be raised above the level of the ground, and may

necessitate an embankment of considerable height being built over it. In such case, ample compensation is provided by the Act.

According to the true construction of the words "into, through, or under" in sect. 16, it is not necessary to carry the sewer under ground, but it may be carried "on or over" any lands within the district of the local authorities.

THIS was an appeal by the plaintiffs from a decision of the Master of the Rolls (reported ante 485).

The question for the consideration of the court was whether under sect. 16 of the Public Health Act of 1875, the defendants had power "to carry any sewer, after giving reasonable notice in writing to the owner or occupier (if on the report of the surveyor it appears necessary), into, through, or under any land whatsoever within their district," without actually buying the land. In an action brought to restrain the defendants from doing what they proposed, the Master of the Rolls refused to grant an injunction.

On the appeal,

Chitty, Q.C. and Alexander Glen, for the appellants, contended that the word "through" in sect. 16 of the Act only authorised the defendants to construct their sewer under ground, unless they chose to purchase the land which the Act gave them power to do. If the defendants constructed the sewer as proposed without purchasing the land, the plaintiffs would sustain an injury for which the compensation clauses would supply a wholly inadequate remedy. They referred to

Public Health Act 1875, ss. 16, 19, 32, 144, 150, 303; *Metropolitan Board of Works v. Metropolitan Railway Company*, 19 L. T. Rep. N. S. 10; L. Rep. 4 O. P. 192;

North London Railway Company v. Metropolitan Board of Works, 38 L. T. Rep. N. S. 383; *Johas* 405;

Brownlow v. Metropolitan Board of Works, 6 L. T. Rep. N. S. 187; L. J. 140, O. P.;

Bicket v. Metropolitan Railway Company, 16 L. T. Rep. N. S. 542; 36 L. J. 204, Q. B.

Davey, Q.C. and Woodroffe, for the defendants, were not called upon.

JAMES, L.J.—I think we must affirm the decision of the Master of the Rolls. It is said there may be some great injustice done. I do not know about that. I think the compensation clause, so far as pecuniary damage or any damage is concerned, will be sufficient to cover any compensation which may be required, and there does seem a very ample case for compensation. It may be said that it is very hard that a piece of a man's land shall be taken away without his consent or without the defendants buying it. On the other hand, I can easily see that if these local authorities were obliged to buy every bit of every house or property that they wanted, it might have the effect of making it impossible to make any arrangements for what is called the sanitation of the district. Those considerations may tell one against the other. All we have to consider is what is the plain meaning of the words, and I am of opinion that the plain meaning of the words is that you are at liberty to go "into, through, or under." I cannot find any sufficient reason whatsoever in those words or in the context of the Act of Parliament to show that when the Legislature says you may go "into, through, or under" they mean, in fact, only to say "under," because it must come to that. If the argument of the appellant prevails, it must be that the Legislature says

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you are to go "into, through, and under," but not "on or over." I think we cannot introduce that exception into this clause.

BRAMWELL, J.A.—I am of the same opinion. I confess I had some misgivings whether it was intended that there should be a power to make a sewer above ground under this Act of Parliament. But I think it is very likely it never was thought of or contemplated, most sewers being subterranean, and therefore it may be that words were used which go further than the actual intention of the persons who drew the Act of Parliament. On the other hand, it may be that if their attention had been called to it, they would have used words sufficient to enable that to be done which is going to be done in this case; but we have not to consider the intention of the Legislature, but the meaning of the words which they have used; and as to that it appears to me nothing more can be said than has been said by the Lord Justice. If we read these words as Mr. Chitty wants us to read them, the word "through" has no meaning at all, and we must read the words with the copulative conjunction "into, through, and under" instead of "into, through, or under."

AMPHLETT, J.A.—I feel very strongly—quite as strongly as Mr. Chitty has expressed himself—that there might be cases of extreme hardship. You might have ornamental grounds going down to a river, and a sewer might be made to cut a man's house off from the river by going over the centre of his garden; or it may be, by going through a part of his house. But I think we cannot vary the plain language of the Legislature by any consideration of such circumstances as these; and perhaps it is a sufficient answer to the hardship to say that if anything was done at all vexatiously, on going to a jury to assess the damages, they would give something very enormous to mark their disapprobation of the way in which the board were carrying out their works. But, however that may be, I find words that I cannot get over, and therefore, whether it was intended by the Legislature or not, there the words are, and we must give effect to them.

Appeal dismissed with costs.

Solicitors: *Letts* for R. Davenport, Birmingham; *Robinson and Preston*, for Ansell, Aston.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Reported by G. WELBY KING, and F. GOULD, Esqrs.,
Barristers-at-Law.

Monday, Feb. 12, 1877.

(Before Vice-Chancellor MALINS.)

FLOWER v. LOCAL BOARD OF LOW LEYTON.

Public Health Act 1875 (38 & 39 Vict., c. 55) sect. 264—Action against local board—Notice of action—When necessary—Demurrer to statement of defence.

The provision of the Public Health Act 1875, sect. 264, that a process shall not be sued out against a local authority for anything done or omitted under the Act until one month after notice, does not apply where the delay of a month would cause irreparable mischief, and defeat the object of the suit, but if the object of the suit clearly is damages,

although an injunction may be asked as subsidiary, such notice is requisite.

DEMURRER to statement of defence.

The plaintiff, by his statement of claim, alleged that he was the lessee and occupier of a farm at Leyton, part of which consisted of a field called Blackbird's Field. The defendants were the local authority in whom all the sewers in the district were vested, and under whose control they were placed by the Public Health Act 1875, and an open ditch, which was one of such sewers, ran along the side of Blackbird's Field for 150 yards, or thereabouts. The plaintiff alleged that sewage matter was allowed to accumulate in the ditch, and overflow part of Blackbird's Field, to the damage of the plaintiff. That the sewage and water had for more than two years past occasionally overflowed the ditch, and that the plaintiff had on several occasions complained thereof, but that until the last nine or ten months the overflow was comparatively insignificant, and the damage caused thereby not of the serious character which it had within that time assumed. That after several previous complaints to the defendants, and promises by them that the nuisance should be abated, the plaintiff, in the month of December 1875, again complained, stating that unless the same was effectually reduced within one month from that time, proceedings in Chancery would be commenced against the defendants. That the defendants wrote, saying that new works were to be executed, which it was hoped would remove all cause of complaint. That, notwithstanding repeated subsequent complaints by the plaintiff, the nuisance still continued, to the great damage of the plaintiff. That the plaintiff had also made frequent applications to the defendants for compensation on account of the damage already caused to him, but that the defendants had neglected and refused to make any such compensation, and had on the 15th June 1876, informed the plaintiff that the defendants' board had resolved to repudiate every claim made by the plaintiff.

The plaintiff claimed: That the amount of damages which had been or should be sustained by him by reason of the overflow of sewage and water from the said ditch might be assessed, and the defendants ordered to pay the amount to the plaintiff, and that the defendants might be restrained from causing or permitting any sewage or water to overflow from the said open ditch on to Blackbird's Field, or any part thereof.

The plaintiff's writ was issued on the 4th July 1876. The defendants delivered their statement of defence on the 14th Nov. 1876, and as a separate and independent ground of defence, said that they were a local authority within the meaning of the Public Health Act 1875 (38 & 39 Vict. c. 55), and that no such notice of action stating the cause of action, and the name and place of abode of the intended plaintiff, and of his attorney or agent in the cause, as prescribed by the 264th section of the said Act, was served on the defendants prior to the issuing of the writ in the action, and on this ground alone the defendants claimed a judgment in their favour, with costs. (a)

(a) 38 & 39 Vict. c. 55, sect. 264, provides that: "A writ or process shall not be sued out against or served on any local authority, or any member thereof, or any officer of a local authority, or person acting in his aid, for anything done or intended to be done or omitted to be done under the provisions of this Act, until the ex-

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The plaintiff demurred to this defence.

The plaintiff had not moved for an injunction.

J. Pearson, Q.C. and Shebbeare for the demurrer.

—The plaintiff prays both for an injunction and for damages. Where the relief sought is an injunction, to delay which might cause irreparable damage to the plaintiff, the Public Health Act 1875, sec. 264, as to giving a month's notice of the proceedings does not apply: (*Attorney-General v. Hackney Local Board*, 33 L. T. Rep., N.S. 244; L. Rep. 20 Eq. 626.)

Glasse, Q.C. and H. A. Giffard for the defendants.

—The plaintiff's real claim is for damages, and nothing else. He does not require the injunction. The 19th section of the Act requires the local authority to keep the ditch properly cleansed and emptied. *Poulsum v. Thirst* (16 L. T. Rep. N.S. 324; L. Rep. 2 C. P. 449) shows that this is an action requiring the prescribed notice to be given. They cited also *Jolliffe v. Wallasey Local Board* (29 L. T. Rep. N.S. 582; L. Rep. 9 C. P. 62). [*MALINS, V.C.*—I think the fair meaning of section 264 is that no writ in an action praying damages only shall be issued without notice. If I come to the conclusion that the substance and object of the action is an injunction, then I think the section does apply, but not if the object is damages.]

Pearson, Q.C. in reply.—The contention is, that because the plaintiff did not apply by motion for an injunction, the statement of defence is not demurrable.

MALINS, V.C.—This is an action in which the plaintiff claims that the amount of damages which have been or shall be sustained by him, by reason of the overflow of sewage and water from an open ditch adjoining the western side of Blackbird's Field may be assessed under the direction of the court, and that the defendants may be ordered to pay the amount thereof to the plaintiff, and that the defendants may be restrained by injunction from causing or permitting any sewage or water to overflow from the side of the open ditch on to Blackbird's Field or any part thereof. The defendants are a local board within the provisions of the Public Health Act of 1875. [His Lordship read section 264.] Now the object of that Act is plain, that these boards should not be liable to be continually vexed with actions. I think it is quite clear that, where damages only are the principal object of a suit, the board is entitled to notice of action under the 264th section, but it is said that this section does not apply where the object is to prevent irreparable mischief being done. Now, when the object of the suit is such that the delay of a month would be to defeat the plaintiff's object, I agree with Vice-Chancellor Bacon in the case of *Attorney-General v. Hackney Local Board*, that an action may be begun without notice and an injunction moved for the next day. I think it is the duty of the court to look at the nature of the case made, and ascertain whether the object of the action is

piration of one calendar month after notice in writing has been served on such local authority, member, officer, or person, clearly stating the cause of action, and the name and place of abode of the intended plaintiff, and of his attorney or agent in the cause; and on the trial of any such action the plaintiff shall not be at liberty to go into evidence of any cause of action which is not stated in the notice so served; and unless such notice is proved, the jury shall find for the defendant."

damages or an injunction. If this had been a case like *Attorney-General v. Hackney Local Board*, I should have thought that the provision of the Act as to giving notice did not apply, but the primary object of the plaintiff here evidently was damages. [His Lordship referred to the statement of claim.] I look at the statement of claim, and I cannot help seeing from the statement itself that the real claim is for damages, and that the injunction is merely subsidiary. I think also that I am bound to look at the conduct of the parties, and it appears that, although this writ was issued six months ago, the plaintiff never moved for an injunction. My own opinion is, that the defendants might have moved to stay the action, but they did not do so. However, I think the defence is good, and therefore the demurrer fails.

Solicitors for the plaintiff, *Houghtons and Byfield*.
Solicitor for the defendants, *Robert T. Wragg*.

Monday, Jan. 29, 1877.

(Before the MASTER OF THE ROLLS.)

HOLME v. GUY.

Charity—Action of ejectment by governors of charity—Sanction of Charity Commissioners—Charitable Trusts Act 1853 (16 & 17 Vict. c. 137), s. 17.

The sanction of the Charity Commissioners is not required under the 17th section of the Charitable Trusts Act 1853, to authorise the governors of a charity to bring an action to recover possession of land or other property belonging to the charity.

THE plaintiffs in this action were the governors of the Asby Endowed Grammar School, in the county of Westmoreland, and they brought this action against the defendant, the former schoolmaster of the said school, claiming an injunction restraining the defendant from presenting himself at the school, or teaching therein, or attempting to do so, or otherwise intermeddling therewith, and also an injunction restraining the defendant from remaining in occupation of the schoolhouse, or the land belonging thereto. By the statement of claim, it was alleged that the defendant had never been properly appointed to the office of schoolmaster, and was unfit for such office; that he had been formerly removed therefrom by a resolution of the governors, of which notice had been given to him; and that he had been required to deliver up possession of the schoolhouse and land, but he had neglected to do so, and continued to present himself at the school to teach, and to occupy the schoolhouse and the land belonging thereto.

The defendant demurred on the ground that an order or certificate from the Charity Commissioners, authorising the action, had not been obtained, as required by the 17th section of the Charitable Trusts Act 1853.

Shebbeare, for the demurrer, argued that this action came within the words in the section "suit or other proceeding."

E. Culler, for the plaintiff, contended that the section applied only to suits and other proceedings relating to the administration of the property of the charity, and not to such an action as this, which was virtually a common law action of ejectment. He cited

Re Lister's Hospital, 6 De G. M. & G. 184;
Braund v. Earl of Devon, L. Rep. 3 Ch. 800;

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Re St. Giles's and St George's Bloomsbury Trusts, 25 Beav. 313:

Re Ford's Charity, 3 Drew. 324.

JESSEL, M.R.—I have often had to consider this point in chambers, and I have a very clear opinion on it. The first question is, what is the purview of the Act? I cannot do better than quote what was said by Lord Cranworth in *Re Lister's Hospital* (*sup.*). He said, "The object of the Act was to stop the enormous abuses which had grown up in the administration of charities in reference to proceedings which used to be instituted to the good of no one. It would, however, be a very strong thing to say that if there is a matter in which the Court of Chancery ought to act, it cannot act until it is set in motion by the sanction of the Charity Commissioners. The Legislature never intended thus to tie the hands of the court; by any suit or matter actually pending, is meant pending at the time of the application, not pending at the passing of the Act." I also entirely agree with the criticism of Lord Hatherley on that judgment in *Braund v. The Earl of Devon* (*sup.*), where he says: "The object, no doubt, of the provision in the statute was, as is stated in *Re Lister's Hospital*, to put an end to certain very scandalous proceedings on the part of individuals"—these scandalous proceedings were Chancery proceedings—"who, ascertaining that there was a fund disposable for the purpose of charities which had been overlooked, and thinking that a considerable profit might be made in the way of costs, instituted proceedings which were not likely to produce good to any one. But the object with which that particular section was passed cannot, of course, confine its operation, except so far as the terms warrant it, to the particular cases which originated it. Of course, it is impossible to distinguish in any Act of Parliament the motives of those who might afterwards be induced to institute suits respecting charities, and therefore the Legislature thought it right that, in the case of every suit with reference to the administration of charitable funds, there should be an application to the commissioners, a matter of no very great difficulty, not precluding any parties interested in the charities from justice, but, on the contrary, very much facilitating and assisting them, and guiding them in the institution of their suits." And Lord Justice Selwyn, in the same case, says, "The suit is within the very terms of the Act—a suit for obtaining relief concerning or relating to any charity, or the estate, funds, property, or income thereof." Then he goes on to say, "There is no condition precedent in this section that those funds should have been ascertained, or should have been set apart, or any scheme directed for the administration of those funds. The words are general, and we are bound to follow them." There is no other authority on this point to which I think it necessary to refer. The next question is, what is the object of this action? The governors of a charity dismissed a schoolmaster, and he insists on retaining possession of the schoolhouse. The action is what would formerly have been an action of ejectment; it is to obtain possession of a schoolhouse. If the Judicature Act had not been passed, this would have been a mere action at law, demurrable in equity. If the Charitable Trusts Act did not intend to interfere with actions at law, the fact that actions are now brought in any division of the High Court of Justice can make no

difference. Now, what are the words of the section, and how ought the court to construe them? Although the court is not at liberty to construe an Act of Parliament by the motives which influenced the Legislature, yet, when the history of law and legislation and prior judgments tell the court what the object of the legislation was, it must read the section with a view of finding out whether it fairly carries out that object, and not with a view of extending it to something that was not intended. Now, reading the 17th section in that way, I have no hesitation in saying that, in my opinion, it was not intended to interfere or restrict actions at law. The more it is studied, the more, I think, this appears. It begins: "Before any suit, petition, or other proceeding (not being an application in any suit or matter actually pending) for obtaining any relief, order, or direction concerning or relating to any charity, or the estate, funds, property, or income thereof, shall be commenced, presented, or taken by any person whomsoever." An action at law is certainly a proceeding, but the Legislature would hardly describe an action at law by the words "suit, petition, or other proceeding." Again, the words "commenced, presented, or taken," are applicable to equity procedure, not to an action at law which is "brought." But that is not all. The words "relief, order, or direction," are not applicable to actions at common law, but to equity procedure. "Relief" was sought by a bill, an "order or direction" by a "petition or other proceeding." What you obtained at common law was a "judgment," which is a well-known distinctive term, though it is now applicable to all the actions in the High Court. Further, an action at law could not have related to a charity. It might, in a sense, relate to "the estate, funds, income, or property thereof," because they might happen to belong to a charity, but it does not relate to "the estate, funds, income, or property" of a charity *quâ* charity. An action for trespass for breaking and entering a close of a charity does in one sense relate to the property of the charity, but it in fact relates to the possession of it, and it would be in a very wide and remote sense that such an action could be said to ask "relief relating to a charity or the estate thereof." I am therefore satisfied, upon the words of the section I have referred to, if there were nothing more, that they cannot be fairly attributed to an action at law. Now come the words, "there shall be transmitted by such person"—that is, the complainant—"to the said board notice in writing of such proposed suit, petition, or proceeding;" again, the word "action" is omitted, and "such statement, information, and particulars as may be requisite or proper, or may be required from time to time by the said board for explaining the nature and objects thereof; and the said board, if upon consideration of the circumstances they so think fit, may, by an order or certificate signed by their secretary, authorise or direct any suit, petition, or other proceeding to be commenced, presented, or taken with respect to the charity." Now that is all they can authorise. The only proceedings which shall be taken are with respect to such charity. Although the former part of the section mentions "the estate, funds, property, or income thereof," when you come to look at the certificate, it is with respect only to the charity, and it is

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seen that the words "estate, funds, property, or income thereof" are used with reference to administration of the charity property. The section then says: "And every such order or certificate may be in such form, and may contain such statements and particulars, as such board shall think fit; and (save as herein otherwise provided) no suit, petition, or other proceeding for obtaining any such relief, order, or direction as last aforesaid shall be entertained or proceeded with by the Court of Chancery, or by any court or judge, except upon and in conformity with an order or certificate of the said board." Now it is suggested that the words "any court or judge" would include any common law court or judge. But is that the way they would have been described if the superior courts at Westminster were intended to be included? There were courts and judges besides the Court of Chancery, which had equitable jurisdiction, such as the Palatine Courts of Lancaster and Durham, and the County Courts. It is not necessary to import so violent a construction as that "any court or judge" shall mean the superior courts at Westminster. Then the section says: "Provided always that this enactment shall not extend to or affect any such petition or proceeding in which any person shall claim any property, or seek any relief adversely to any charity." But the next section throws more light upon the question, if any more light were wanted. The 18th section says, "Provided always that it shall be lawful for Her Majesty's Attorney-General, acting *ex officio*, to make such applications, and take and prosecute such proceedings with respect to any charity in the Court of Chancery, or otherwise as to him may seem fit, as if this Act had not passed"—the Attorney-General did not bring an action at law, but filed an information; no doubt he could have filed the information in almost any court as a matter of privilege—"and that nothing in this Act contained shall be construed as dispensing with the fiat or allowance of Her Majesty's Attorney-General with respect to any proceeding, not being an application under the jurisdiction created by this Act, where such fiat or allowance was necessary before the passing of this Act." Whether the Act is looked at historically, as by Lord Cranworth, or historically and judicially, as by Lord Hatherley, it appears to me that the fair meaning of the section is that it is not to interfere with an ordinary action at law, whether of trespass or ejectment, and I should be extending the operation of the statute passed for a totally different purpose, namely, to stop those costly proceedings which submitted the property of charities to equity litigation, if I were to hold it to apply to an ordinary action at law to recover the possession of a schoolhouse. Whether or not it is desirable that a check should be placed upon the proceedings of the governors of charities, even as to such proceedings as these, it is for the Legislature, and not for courts of justice to determine. In my opinion, the consent of the Charity Commissioners is not required for such an action as this, and I therefore overrule the demurrer.

Solicitors, *Kynaston and Gasquet; Johneton and Harrison.*

QUEEN'S BENCH DIVISION.

Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

Saturday, April 14, 1877.

IPSWICH GUARDIANS (apps.) v. GREAT YARMOUTH GUARDIANS (resps.); ASTON GUARDIANS (apps.) v. BIRMINGHAM GUARDIANS (resps.); ST. LEONARDS SHOREDITCH OVERSEERS (apps.) v. BURTON-UPON-TRENT GUARDIANS (resps.)

Poor Law—Settlement—Three years' residence—Completion before the Act—39 & 40 Vict. c. 61.

By sect. 34 of the Divided Parishes and Poor Law Amendment Act 1876, where any person shall have resided for the term of three years in any parish upon conditions therein stated, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise.

Held, that a residence upon these conditions, which was completed before the passing of the Act, creates no legal settlement.

THESE appeals from quarter sessions raised the same point, and were heard together:—

IPSWICH v. GREAT YARMOUTH.

This was an appeal against an order of removal, whereby it was adjudged that the last legal settlement of Sarah Ann Elizabeth Goddard, a pauper, was in the parish of Saint Matthew, Ipswich, in the Ipswich Poor Law Union, and ordering the removal of the said Sarah A. E. Goddard to the said Ipswich Union. The appeal came on for hearing at the quarter sessions of the peace held for the borough of Great Yarmouth on the 8th Jan. last, and was dismissed with costs, and the said order of removal was confirmed subject to the opinion of the Queen's Bench Division of the High Court of Justice upon the following case.

On the hearing of the appeal the following facts were proved or admitted:

1. On the 20th Sept. 1857 the said Sarah A. E. Goddard, hereinafter called "the pauper," was born in the parish of Great Yarmouth, where her father was then living.

2. In the year 1867 John Goddard, the father of the pauper, went to reside in Church-lane, in the parish of St. Matthew, Ipswich, in the appellants' union, and resided in the said parish of St. Matthew continuously in such manner and under such circumstances in each of the years of such residence as would in accordance with the several statutes in that behalf render him irremovable, down to Aug. 1873, when he left and went to America, leaving his wife and family (except the pauper, who was then absent, as in the next paragraph mentioned) still living in Church-lane, and he has not since resided in the appellants' union.

3. The pauper resided with her father in Church-lane, from the time he went to reside there till the autumn of 1872, when she was sent to a home near London to be treated for fits. She returned to her mother in Church-lane just after her father sailed for America, and continued to live with her and the other children there till the end of 1873; since which time they have not lived at Ipswich.

4. On the 20th Sept. 1873 the pauper attained the age of 16 years.

5. On the 19th June 1874 the pauper became chargeable to the parish of Great Yarmouth, where she was then residing, and she has been a pauper inmate of the workhouse of that parish,

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chargeable as aforesaid, from that time to the present.

6. On the 17th Nov. 1876 the order of removal was applied for and obtained, and due notice of appeal against it was subsequently given by the appellants.

7. On the 15th Aug. 1876 the Divided Parishes Act and Poor Law Amendment Act 1876 (39 & 40 Vict. c. 61) was passed, and it was under the 34th and 35th sections of that Act that the order of removal was granted.

8. No evidence was given that the said John Goddard or the pauper had obtained any settlement in the appellants' union, unless they acquired settlements under the provisions of the said Act by reason of the said John Goddard having resided in the parish of St. Mary, Ipswich, from 1869 to 1873, as aforesaid.

9. No evidence was given of any settlement acquired by the pauper other than her birth settlement in the respondents' parish of Great Yarmouth as aforesaid, and any derivative settlement she may have acquired from her said father under sect. 35 of the said Act.

It was contended on the part of the respondents that the pauper's father acquired a settlement in the Ipswich Union by three years' residence in the parish of St. Matthew, Ipswich, under the 34th section of the above Act, and that the pauper took her father's settlement under the 35th section thereof.

It was contended on the part of the appellants, first, that the provisions of the said Act in regard to settlements by residence are not retrospective, and therefore the said John Goddard acquired no settlement in the said parish of St. Matthew, Ipswich, in the appellants' said union, by reason of his having resided there for three years and upwards; secondly, that if the Act is retrospective in regard to settlements by residence, it confers no settlement on persons who were not at the time of the passing of the said Act residing or have not since resided in the parish in which such settlement is claimed; thirdly, that even if the Act is so far retrospective in regard to its provisions as to settlement by residence as to confer a settlement in respect of a residence completed before the passing of the said Act, it has not a retrospective operation so far as regards the date of the actual acquisition of such settlement, and that no person whose residence was completed before the passing of the Act could actually be in possession of a settlement by virtue of such residence till the date of the passing of such Act, even if the said Act on coming into operation did confer a settlement upon him by virtue of such previous residence; fourthly, that as the said Act was not in operation when the pauper attained the age of sixteen years, viz. in 1873, her father had not then acquired any settlement by residence or otherwise in the said parish of St. Matthew, Ipswich, in the appellants' said union, and, consequently, that the settlement (if any) which the pauper then took of and from her said father (whatever it may have been) was not the settlement relied upon by the respondents, or any settlement in the parish of St. Matthew, in the appellants' union, and that by sect. 35 of the said Act she has, in the absence of evidence of her having since acquired any other settlement in her own right, retained the settlement (if any) which she then derived from her father, and has

not derived from him any settlement he has since acquired by reason of the passing of the said Act or otherwise.

The question for the opinion of the court is, whether on the above-stated facts the last legal settlement of the pauper was in the parish of St. Matthew, Ipswich.

If the court is of opinion that the answer should be in the affirmative, then the said order of removal and the order of the court of quarter sessions are to stand confirmed with costs, in the court below and in this court.

If the court is of opinion that the answer should be in the negative, then the order of removal and the order of quarter sessions are to be quashed with costs in the court below and in this court.

ASTON v. BIRMINGHAM.

This was an appeal against an order of two justices for the borough of Birmingham, for the removal of Maria Boden from the parish of Birmingham to the Aston Union.

The appeal was tried at Epiphany Quarter Sessions for the borough of Birmingham before the recorder, who confirmed the said order, subject to the opinion of the Queen's Bench Division of the High Court of Justice on the following case.

It was proved on the trial of the said appeal that the said Maria Boden was married to Charles Boden, and that after their marriage they resided together in Aston Union continuously from 1863 to 1868 without receiving relief, when the said Charles Boden died.

After his death Maria Boden received relief from the guardians of the Aston Union, and in Oct. 1875 she left Aston, and came to reside in Birmingham.

In July 1876 Maria Boden received relief from the guardians of the parish of Birmingham, and on the 27th Sept. 1876 the respondents obtained the said order for her removal to Aston.

It was contended on behalf of the respondents that under the 34th section of the 39 & 40 Vict. c. 61, the paupers's last place of settlement was Aston Union, either by reason of her husband's residence there, or in respect of her own residence there, as his wife until 1868.

On behalf of the appellants it was contended that the said 34th section did not apply to a case where the residence necessary to give a settlement under it had ceased before the application for the order of removal; and further that it did not apply where the said residence had ceased before the date of the passing of the Act.

If the court shall be of opinion that Maria Boden gained a settlement in the Aston Union under the said 34th section of the said Act, by reason of her own or her husband's residence therein, then the aforesaid order of removal is to stand confirmed; but if the court shall be of a contrary opinion, then the said order of removal and the order of sessions confirming the same are to be quashed.

ST. LEONARD'S SHOREDITCH v. BURTON-UPON-TRENT.

This was a special case stated by the Court of Quarter Sessions for the county of Middlesex, in the matter of an appeal against an order for the removal of Thomas Worth from the said parish of St. Leonard, Shoreditch, in the county of Middlesex, to the said Burton-upon-Trent Union.

1. An order of removal was made by one of the

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Metropolitan Police magistrates on the 22nd Nov. 1876, adjudging the last legal settlement of one Thomas Worth, a pauper, to be in the parish of Burton-upon-Trent, in the said union, and ordering his removal from the parish of St. Leonard, Shoreditch, in the county of Middlesex, to the Burton-upon-Trent Union.

2. The guardians of the said union appealed against such order to the January general sessions of the peace for the said county of Middlesex.

3. The grounds of removal and particulars of settlement as set forth in the notice of chargeability and statements of grounds of removal were as follows, that is to say: that in or about the year 1860 the said Thomas Worth commenced to reside in the parish or township of Burton-upon-Trent, in the said Burton-upon-Trent Union, and that he continued to reside continuously in the said township or parish for a period of three years and upwards, viz., till the year 1876.

4. The grounds of appeal were (among others which it is not now necessary to specify), that the said Thomas Worth had ceased to reside in the said township or parish of Burton-upon-Trent some months ago, before the passing of the Divided Parishes and Poor Law Amendment Act 1876, and did not acquire any settlement in the said township or parish by reason of his residence therein under the provisions of the said Act.

5. The appeal came on for hearing at the said sessions, when the following admissions were made by the parties thereto with regard to the facts and the matters at issue in the said appeal, that is to say:

It was admitted by the appellants that the said Thomas Worth had resided from the year 1860 until Feb. 1876 in the said township or parish of Burton-upon-Trent, in such manner and under such circumstances in each of the years of his said residence as would in accordance with the several statutes in that behalf have rendered him irremovable; but it was admitted by the respondents that he had ceased to reside in the said township or parish in the month of Feb. 1876, and consequently before the passing of the Divided Parishes and Poor Law Amendment Act 1876 (39 & 40 Vict. c. 61).

6. The only question between the said parties in the said appeal was whether, upon the facts stated above, a settlement was acquired by the said Thomas Worth by his residence in the said township and parish of Burton-upon-Trent, under sect. 34 of the said statute.

7. It was contended by the respondents that, as the pauper was a person who had resided as mentioned in sect. 34 in the parish of Burton-upon-Trent, a new settlement was given to him by such section, although he had ceased to reside therein before the passing of the Act. It was contended by the appellants that the period of three years' residence contemplated by the said section was a period of three years, the whole or some part of which had taken place after the passing of the Act, and that a residence which had terminated before the passing of the Act could not confer a settlement under the said Act.

8. The said sessions decided in favour of the respondents, and affirmed the said order of removal with costs, subject to a special case.

The question for the opinion of this honourable court is, whether the pauper gained a settlement under sect. 34. If this court shall answer this

question in the affirmative, the order of sessions is to stand; but if in the negative, the order of removal and the order of sessions confirming the same are to be quashed.

The following are the three sections of the Divided Parishes and Poor Law Amendment Act 1876 (39 & 40 Vict. c. 61), relating to this subject:

Sect. 34. Where any person shall have resided for the term of three years in any parish, in such manner and under such circumstances in each of such years as would in accordance with the several statutes in that behalf render him irremovable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise, provided that an order of removal in respect of a settlement acquired under this section shall not be made upon the evidence of the person to be removed, without such corroboration as the justices or court think sufficient.

Sect. 35. No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another. An illegitimate child shall retain the settlement of its mother until such child acquires another settlement. If any child in this section mentioned shall not have acquired a settlement for itself, or being a female shall not have derived a settlement from her husband, and it cannot be shown what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born.

Sect. 36. The provisions relating to settlement shall not apply to any pauper removed under any order of removal, or without such order under the provisions in that behalf contained in the Union Chargeability Act 1865, before the passing of this Act, or in receipt of non-resident relief lawfully given, or in respect of whom any order of removal shall be pending at the passing of this Act.

Metcalf, Q.C. (with him *Temple Cooke*) argued for the respondents in the first case, that whatever might have been the intention of the Legislature, the words used had clearly a retrospective effect, and made a three years residence at any period of a person's life a legal settlement to be acted upon after the passing of the Act.

Buszard, Q.C. (with him *A. P. Stone*) was heard in support of the same argument on behalf of the respondents in the second case.

J. F. Clerk followed on the same side on behalf of the respondents in the third case.

W. Graham and *Poyser* appeared for the appellants in the first case, *F. M. White*, Q.C. and *J. O. Carter* for the appellants in the second case, and *E. Lumley* for the appellants in the third case, but they were none of them heard by the court.

COCKBURN, C.J.—I think these rules to set aside the judgments of quarter session must be made absolute. I myself entertain no doubt of any kind. Clearly, in my opinion, the words of the 34th section relate only to a residence which must be completed after the passing of the Act. All enactments must have a merely prospective operation, unless the words are distinct in their reference to the past. These are not words which are necessarily retrospective, and if we can adopt another construction we ought to do so, in order to carry out the admitted intention of the Legislature. But further than that, the language used in the section will not to my mind lend itself to any retrospective meaning. The words are, "Where any person shall have resided for the

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term of three years in any parish." "he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise." The provision is concerning a period until a person shall acquire a settlement in some other parish; if the provision were intended to relate to a settlement which a person might previously have obtained during the whole of his life, the limiting words would have been "until he has acquired." That is sufficient to show that the words of the section were never meant to lend themselves to any construction but that which is admitted by the intention of the Legislature. This last "shall" in the section simplifies the matter, and makes the meaning of the whole provision quite clear. If a person becomes a resident after the passing of the Act, and continues so under the conditions mentioned for three years, or if a person completes such a residence after the passing of the Act, he obtains thereby a settlement in the parish of his residence. In order to give a retro-active operation to any legislative enactment we ought to see clearly that it was so intended. I do not believe there was any such intention on the part of the Legislature with respect to this provision; but even if I were satisfied that there was, I should not consider the words used sufficient to justify us in carrying out that intention. The orders, therefore, must all be quashed, and the appeals allowed.

MELLOR J.—I am entirely of the same opinion. I think it is a very clear case, and I have no doubt about it whatever. It would require the strongest words to make me suppose that the Legislature intended that a residence of three years at any past period of a man's life should be his settlement for the future; and the limitation of the period to the person's hereafter acquiring another settlement is enough to my mind to show that the residence which gives a settlement must at least be completed after the passing of the Act.

Judgment for the appellants.

Solicitors for the Ipswich Guardians, *E. Bromley*, for *W. B. Ross*, Ipswich.

Solicitors for the Great Yarmouth Guardians, *Torr, Janeway, Tagart, and Co.*, for *P. Danby Palmer*, Great Yarmouth.

Solicitors for the Aston Guardians, *Beale, Mari-gold, Beale, and Co.*

Solicitors for the Birmingham Guardians, *Torr, Janeway, Tagart, and Co.*, for *W. G. Coulton*, Birmingham.

Solicitors for St. Leonard's, Shoreditch, Overseers, *Carey, Warburton, and Co.*

Solicitors for Burton-upon-Trent Guardians, *E. H. Wilkins*, for *Henry Goodger*, Burton-upon-Trent.

Saturday, April 14, 1877.

REG. (on the prosecution of Cookson) v. LAND TAX COMMISSIONERS.

Land tax—Transfer to other district—38 Geo. 3, c. 5, ss. 36 and 53—4 & 5 Will. 4, c. 60, s. 1.

Two properties in one parish had been assessed to the land tax, from the time of the earliest schedule in existence, as part of the district or place, in which were comprised the next adjoining parish, these two properties, and a third property which had been reputed to be extra-parochial. The only lands in this district liable to land tax since 1806

have been those belonging to these three properties.

In 1873 the two first mentioned properties were transferred to and assessed in the parish in which they are situated, under 4 & 5 Will. 4, c. 60, s. 1; and upon appeal by the owner of the third property, the Land Tax Commissioners affirmed the transfer.

Held, upon mandamus to the commissioners, obtained at the instance of the said appellant, that the usage established under such circumstances ought to be sustained, and that the transfer and new assessment must be set aside, under 38 Geo. 3, c. 5, ss. 36 and 53.

THIS was a special case stated for the opinion of the Queen's Bench Division of the High Court of Justice by order of the said court, dated the 1st June 1876, and with the consent of the parties.

1. Meldon is a parish in the county of Northumberland, adjoining the parish of Mitford in the same county. Mr. John Cookson is the owner of a property called River Green situate between and adjoining the said parishes of Meldon and Mitford, and in the said county of Northumberland. This property has been generally reputed to be extra-parochial, but it has the longest common boundary with the parish of Mitford. Overseers, however, have been appointed and have acted continuously downward from the year 1836, and are still acting down to the present time.

2. For a considerable time before the year 1873, the said property of River Green and two other properties known as Edington and Molesden, both in the parish of Mitford, had been together assessed to the land tax in a district or place which furnished its separate quota. This district or place in the schedules for earlier years was headed "Meldon, with River Green, Molesden, and Edington;" and in those for later years Meldon. The said properties had annually paid their respective portions of and in the quota furnished by the said district or place according to their respective values. A search made among the schedules in the office of the clerk of the peace for the said county shows that this had been the case in every year since 1748 (before which year there is no land tax schedule there in existence), with the exception of the years 1754, 1768, 1770, 1775, 1777, 1780, 1805, and 1827, for which years the schedules are missing. Since the year 1806 at least, the said properties of River Green, Molesden, and Edington have been the only properties comprised in such district or place which remained liable to the land tax, and have, for the purposes of the annual assessment, constituted the whole of such district or place.

3. Down to the year 1862 the district or place mentioned in the last paragraph formed part of the division of Castle Ward, but in that year it was transferred with its quota under the provisions of 4 & 5 Will. 4, c. 60, s. 1, to the division of Morpeth ward, and has since remained in the last-mentioned division.

4. Since the year 1862 the assessment for such district or place, together with that of the adjoining district or place of Mitford, have been made in the form and manner shown by a document (made part of the case) which was a copy of the same for the year 1872-3. In such document, of the properties assessed under the head of Meldon, the first two comprise the property called Edington aforesaid; the third, fourth, and fifth com-

prise the property called Molesden aforesaid, and the last four comprise the property called River Green aforesaid. All of such properties are equally assessed to their respective portions of the quota of 39*l.* 12*s.* 7*d.*

5. The properties assessed under the head of Mitford in the said assessment are all equally assessed to their respective portions of the quota of 85*l.* 16*s.* 6*d.*

6. In the early part of the year 1873, Sir Arthur Monck (who has now taken the name of Middleton), who was and is the owner of the property called Edington aforesaid, was desirous of redeeming the land tax thereon, when it was for the first time discovered by the officials at the Land Tax Redemption Office, Somerset House, that Edington had been assessed in the parish of Meldon instead of the parish of Mitford, in which it was situated, and they refused to allow the redemption on that ground. After ascertaining, as the fact was, that the said properties called Edington and Molesden aforesaid were situated in the parish of Mitford, and not in the parish of Meldon, the said Land Tax Commissioners, on the application of the said Sir Arthur Monck and of Colonel Mitford, the owner of the property called Molesden, ordered that the said properties called Edington and Molesden should be transferred to and assessed in Mitford; and accordingly in the assessment for 1873-4, the said properties were transferred and assessed under the head of Mitford, and not as before under the head of Meldon. No portion of the quota payable by the district assessed under the head of Meldon was transferred with them.

7. The commissioners of Her Majesty's Treasury never either assented to or dissented from the transfer in the last paragraph mentioned.

8. The assessment for the year 1875-6 was practically the same as the above-mentioned assessment for 1873-4. In such assessment the said properties of Edington and Molesden are shown as the last five items placed under the head of Mitford, and they are, together with the other properties, placed under such head assessed to their respective portions of the quota of 86*l.* 14*s.* 2*d.*, payable by the district assessed under the head of Mitford at the rate of about 2*d.* in the pound, according to their respective annual values, as shown in the first column of such assessment.

9. The property called River Green is in the said assessment the only property placed under the head of Meldon, and is assessed to the whole quota of 39*l.* 16*s.* 10*d.*, payable by the district assessed under the head of Meldon, at the rate of about 1*s.* 10*d.* in the pound, according to the annual value of such property as shown in the first column of such assessment.

10. The following table shows in a tabular form the alterations above mentioned:

Quotas Payable.	1872-3.		1875-6.	
	£	s. d.	£	s. d.
Mitford	85	16 6	86	14 2
Meldon	39	12 7½	39	16 10
Rate in the Pound.	1872-3.		1875-6	
	d.	s. d.	s. d.	
District of Mitford	3½	0 2½	0 2½	
District of Meldon	7½	1 10½	1 10½	
Edington	7½	0 3½	0 3½	
Molesden	7½	1 10½	1 10½	
River Green	7½	1 10½	1 10½	

11. Mr. John Cookson, the appellant herein,

and the owner of the property called River Green, was prevented from appealing to the said commissioners in the year 1874, owing to an informality in the proceedings taken on his behalf; but in the year 1875 he appealed and contended that the commissioners had no power to make the transfer above mentioned, and that if they had such power they had exercised it improperly. He also claimed before the commissioners that if they transferred the properties called Edington and Molesden to the district or place assessed under the head of Mitford, they should also transfer the property called River Green to the same, because by virtue of 31 & 32 Vict. c. 122, s. 27, it had been annexed to and incorporated with the parish of Mitford for the purpose of collecting and assessing the land tax. The commissioners maintained the transfer of the properties called Edington and Molesden, and declined to transfer the property called River Green.

12. On the 18th May 1876, a rule *nisi* for a *mandamus* was obtained, and by the consent of the appellant and respondents the same was made absolute by the Queen's Bench Division of the High Court of Justice, subject to the present special case. The questions for the opinion of the Court are:

1. Whether the Land Tax Commissioners had power to transfer the said properties of Edington and Molesden from the district or place assessed under the head of Meldon to the district or place assessed under the head of Mitford, or ought to have transferred the same?

2. Whether, if such transfer was within the power of the commissioners, and ought to have been made, the property called River Green ought or ought not also to be transferred?

3. Whether the assessment for the year 1875-6 is good and valid in law?

If the court is of opinion that the commissioners had power to transfer, and ought to have transferred the properties called Edington and Molesden to the district or place assessed under the head of Mitford, but ought not to transfer the property called River Green to such district or place, then the assessment is to stand.

If the court is of opinion either that the commissioners had no power to transfer, or ought not to have transferred, the properties called Edington and Molesden to the district or place assessed under the head of Mitford, or that they ought to have transferred, and ought to transfer, the property called River Green to such district or place, then the said assessment is to be altered in accordance with such opinion of the court; and

If the court is of opinion that the said assessment is valid, and ought to stand, then judgment is to be given for the said commissioners with such costs as the said court shall direct; but if the court is of opinion that the said assessment is invalid and ought to be altered, then judgment is to be given for the appellant with such costs as the said court shall direct.

Herschell, Q.C. (with him Ridley) argued for the appellant, the prosecutor.—The last of the Annual Land Tax Acts (38 Geo. 3, c. 5) was made perpetual in the same year 1798, subject to redemption and purchase in the manner therein stated, by 38 Geo. 3, c. 60. This latter Act being partly re-enacted in the Consolidating Act of 1802 (42 Geo. 3, c. 116), sect. 180 of this Act of 1802 provides

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for a continued assessment of the district as long as any part of the land tax charged thereon remains unredeemed in the same terms as sect. 74 of 38 Geo. 3, c. 60, except that the reference therein to the quota for each district is applied to 38 Geo. 3, c. 5. In 4 & 5 Will. 4, c. 60, s. 1, the commissioners are empowered "if and as they shall see fit (subject as herein provided) to transfer the jurisdiction of any of the parishes, townships, hamlets, tithings, or places, in any county from the division or divisions to which the same respectively now belong, together with the quotas payable by them respectively at the time of such transfer, to any adjoining or other division or divisions of the same county, or to any new division or divisions," subject to certain formalities, "and the commissioners whose respective divisions shall be extended or created in manner aforesaid shall have full jurisdiction and control in, over, and throughout the several parishes, townships, tithings, hamlets, or places, so as aforesaid transferred, and shall and may execute all the powers and provisions of the Acts relating to the land tax, and of the Acts relating to the duties of assessed taxes, in assessing, charging, raising, and enforcing payment of the said taxes respectively, in and throughout the same; and the parishes, townships, tithings, hamlets, or places so as aforesaid respectively transferred shall be considered as forming part of the division to which they shall be or shall have been transferred, for all the purposes of the Acts relating to the land tax and the assessed taxes respectively, anything in any former statute contained to the contrary thereof notwithstanding." The only other statute relating to this case is the 31 & 32 Vict. c. 122, which by sect. 27 incorporates all places reputed to be extra-parochial with the next adjoining parish with which it has the longest common boundary. The statutes concerning the land tax were elaborately considered in *Reg. v. Land Tax Commissioners* (2 E. & B. 694), and it was laid down by the Queen's Bench that the duty of the Commissioners of Land Tax, in assessing the contributions by the several parishes within a division, is regulated not by 38 Geo. 3, c. 5, s. 8, but by 38 Geo. 3, c. 60, s. 74 (re-enacted by 42 Geo. 3, c. 116, s. 180), which treats the quota payable by each parish towards making up the amount charged on the division as permanent at its then proportion to the other parishes of the division. And this is not altered by any later enactment. And it was held that, where such quota had, up to the year 1852, been unchanged for 150 years, the commissioners were right in continuing the assessment for that year at such quota, although the result was that an unequal poundage was levied in the several parishes. The section which especially applies to the particular case of these two estates being assessed to the parish adjoining that in which they are situated is the 36th of 38 Geo. 3, c. 5, by which it is enacted "that, for the avoiding all obstructions and delays in assessing and collecting the sums by this Act to be rated and assessed upon any manors, lands, tenements, rents, tithes, or other hereditaments, all places, constablewicks, divisions, and allotments which have been used to be taxed and assessed shall pay and be assessed in such county, hundred, rape, wapentake, constablewick, division, or place of allotment within England, Wales, and Berwick-upon-Tweed, as the same have heretofore been usually assessed in, and not elsewhere."

A. L. Smith (with him *C. Hall*) for the commissioners, the defendants.—There is nothing in the case cited to interfere with this decision of the Land Tax Commissioners. The quotas of these parishes have not been disturbed, and the unequal poundage is the same result as that which was held to be no objection to the commissioners' decision in the case then before the court. By the 53rd section of 38 Geo. 3, c. 5, it is expressly provided that "every person who shall be rated and assessed for or in respect of any manors, messuages, lands, or tenements, or other the premises, according to the former clauses of this Act, shall be rated and assessed in the places where such manors, messuages, lands, and tenements and other the premises respectively do lie, and not elsewhere." The commissioners have, according to the discretion vested in them by 4 & 5 Will. 4, c. 60, s. 1, seen fit to transfer the jurisdiction of these places to the division in which, by this section 53 of 38 Geo. 3, c. 5, they ought originally to have been assessed.

Herschell, Q.C. was not heard in reply.

Cockburn, C.J.—I think this writ of *mandamus* must be made absolute. If the statutes had from the first been strictly interpreted and acted upon, these lands of Edington and Moleaden would have contributed to the quota of the parish of Mitford, but by some mistake they have from the original imposition of the tax been assessed as part of the adjoining parish of Meldon. It would be in the highest degree unjust that the long established assessment of land in Mitford should be lowered at the cost of the adjoining parish, the quotas of both remaining the same; and it would be monstrous if a transfer causing such an injustice, although by order of the Land Tax Commissioners, could not be rectified. It seems to me, however, that by the case which has been cited, we are at liberty to hold that an assessment, so long established as this has been, is as unalterable as the quota to which it contributes. The commissioners therefore should not have disturbed the usage by which these lands had always been rated and assessed in Meldon, but should have allowed the appeal of the landowner who was interested in the continuation of the old assessment.

Mellor, J.—I am of the same opinion. It may be that either conclusion must be attended with some injustice, and it may well be contended that the intention was to assess lands in the places where they lie. But I feel we ought to uphold this usage, however it arose, by which the several contributions have become definitely and equally fixed, if we have any authority to do so. I think we may under the case cited, and our judgment will therefore be for the prosecutor, who was the appellant before the commissioners.

Judgment for the prosecutor.

Solicitors for appellant, the prosecutor, *Cookson*, *Wainright*, and *Pennington*, for J. and N. G. *Clayton*, Newcastle-upon-Tyne.

Solicitors for defendants, the commissioners, *Shum*, *Crossman*, and *Crossman*, for G. *Brumell*, jun., Morpeth.

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EXCHEQUER DIVISION.

Reported by HENRY LINGZ, Esq., Barrister-at-Law.

Tuesday, Jan. 30, 1877.

(Before CLEASBY and POLLOCK, BB.)

APPEAL FROM INFERIOR COURT.

BROADHEAD (app.) v. HOLDSWORTH (resp.)

The Vaccination Acts 1867 and 1871 (30 & 31 Vict. c. 84, s. 20) Schedule Form O; 34 & 35 Vict. c. 98, sects. 7, 11, 15)—“Insusceptibility of successful vaccination, or child having had small pox”—Certificate of in “Form O” as altered by Poor Law Board—Transmission of certificate to vaccination officer—Duty of parent in that respect—“Casus omissus.”

A parent who holds a certificate of his child having had small pox, but not one of its “insusceptibility of successful vaccination,” is not within, and is not required by, the terms of sect. 7 of the Vaccination Act 1871 (34 & 35 Vict. c. 98), to transmit such certificate to the vaccination officer; nor, inasmuch as “having had small pox” and “insusceptibility of successful vaccination” are two distinct and different things, is he liable to the penalty imposed by that section upon persons failing to transmit a certificate of such “insusceptibility.”

So held, by the Exchequer Division (Cleasby and Pollock, BB.), who thought the case was “casus omissus” in the Act of Parliament.

1. This was a case stated by two justices of the borough of Huddersfield for the opinion of the court under 21 Vict. c. 43.

2. On the 2nd June 1876, the appellant, Wm. Broadhead, laid an information before a justice of the peace against the respondent, Arthur Holdsworth, of Marsh, in Huddersfield, for that he had reason to believe that a certain child called Arthur Perrier Holdsworth, under the age of fourteen years, residing within the Huddersfield Poor Law Union (for which the appellant acts), had not been successfully vaccinated. That the appellant had duly given the respondent, as the father of the said child, notice to procure its being vaccinated, and that such notice had been disregarded.

3. The charge against the respondent arose under the 30 & 31 Vict. cap. 84, sect. 31, under which the information was laid. That section enacts that “if any registrar or any officer appointed by the guardians to enforce the provisions of this Act, shall give information in writing to a justice of the peace that he has reason to believe that any child under the age of fourteen years, being within the union or parish for which the informant acts, has not been successfully vaccinated, and that he has given notice to the parent or person having the custody of such child to procure its being vaccinated, and that this notice has been disregarded, the justice may summon such parent or person to appear with the child before him at a certain time and place, and upon the appearance, if the justice shall find, after such examination as he shall deem necessary, that the child has not been vaccinated nor has already had the small pox, he may if he see fit make an order under his hand and seal directing such child to be vaccinated within a certain time; and if at the expiration of such time the child shall not have been vaccinated, or shall not be shown to be then unfit to be vaccinated, or to be insusceptible of vaccination, the person upon whom such order shall have

been made shall be proceeded against summarily, and unless he can show some reasonable ground for his omission to carry the order into effect, shall be liable to a penalty not exceeding 20s.”

4. Upon the hearing of the said information, it was proved by the respondent, and admitted, that his child, the said Arthur Perrier Holdsworth, had then already had the small pox, and the justices thereupon discharged the respondent, holding that the Vaccination Acts did not require a certificate of the child having had the small pox to be transmitted.

5. It was, however, contended on behalf of the appellant that, although the respondent had not been found guilty of the offence of not taking or causing to be taken his child to be vaccinated, he was yet guilty of an offence by not transmitting a certificate of the fact of such child having had the small pox, according to Form O in the schedule to the General Orders of the Local Government Board, issued on the 30th Nov. 1871, and the appellant sought to have the respondent convicted upon the ground of the non-transmission of such a certificate, relying upon the 4th paragraph of sect. 11 of the 34 & 35 Vict. c. 91 (the Vaccination Act 1871), which enacts as follows: “Where a person is charged with the offence of neglecting to take, or cause to be taken, any child to be vaccinated, and on the defence made by such person it appears to the justices having cognizance of the case that such person is not guilty of such offence, but has been guilty of the offence of not transmitting any certificate required by the principal Act or this Act with respect to the vaccination of such child, the justices may convict such person of the last mentioned offence in like manner as if he had been charged therewith.”

6. The justices were of opinion that in point of law the respondent was not required, either by the principal or the amending Act, to transmit a certificate of the fact of his child having had small pox, since, although sect. 20 of 30 & 31 Vict. c. 84, requires the medical practitioner, in cases where a child brought to him has already had small pox, to deliver to the parents a certificate of such fact, yet there is no provision requiring the parent to transmit such certificate to the vaccination officers; and further that sect. 7 of 34 & 35 Vict. c. 98, only requires certificates of a child being “unfit for or insusceptible of successful vaccination” to be transmitted by the parent to the vaccination officer, and does not in terms extend to the case of a child having had small pox; and that, as the penalty is imposed upon those only who act in contravention of the last mentioned section, the respondent was not guilty of any offence.

The justices therefore ordered the respondent to be discharged.

The question of law arising hereon was, whether the justices were right in deciding that the Vaccination Acts did not impose any penalty upon persons who fail to transmit to the vaccination officer a certificate of a child having had small pox.

The following sections of the Vaccination Acts 1867 and 1871, and the forms under the said Acts respectively, are those on which the question turned, and are material:

The Vaccination Act 1867 (30 & 31 Vict. c. 84) enacts:

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Sect. 20.—If any such public vaccinator or medical practitioner shall find that a child whom he has three times unsuccessfully vaccinated is insusceptible of successful vaccination, or that a child brought to him for vaccination has already had the small pox, he shall deliver to the parent or other person, as aforesaid, a certificate under his hand according to the form in the schedule hereunto annexed, marked C, or to the like effect; and the parent or such other person, as aforesaid, shall thenceforth not be required to cause the child to be vaccinated.

The Form C above referred to is as follows :

I, the undersigned, hereby certify that I have times unsuccessfully vaccinated the child of , of , in the parish (or township) of , in the county (or borough) of , aged , [or that the child has already had small pox (as the case may be)] and I am of opinion that such child is insusceptible of successful vaccination. Dated, &c.

(Signed) A.B.,
Public vaccinator of the union (or parish);

or, A.B.,
Medical practitioner (i.e., M.D., L.A.C., or F.R.C.S., or otherwise, as the case may be).

MEM.—This is to be kept by the parent or other person to whom it is given.

The other forms in the schedule are (B) a certificate of postponement of vaccination on account of unfitness by reason of health, which is also to be kept by the parent, &c., to whom given; and (D) a certificate of successful vaccination, which is to be transmitted by the public vaccinator, or if given by any other medical practitioner, then by the parent, &c., to the registrar of the district in which the operation is performed.

The Vaccination Act 1871 (34 & 35 Vict. c. 98) enacts :

Sect. 7. Every certificate of a child being unfit for, or insusceptible of, successful vaccination, if given by a public vaccinator, shall, instead of being delivered by him to the parent, be transmitted by such public vaccinator, and if given by any other medical practitioner, shall be transmitted by the parent of such child to the vaccination officer in like manner as if it were a certificate of successful vaccination, and within seven days after the examination of the child upon which such certificate is founded; and the public vaccinator shall, upon request, and without fee or charge, deliver to the parent a duplicate of such certificate transmitted by him. . . . Every person who acts in contravention of, or fails to comply with, any provision of this section, shall be liable, on summary conviction, to a penalty not exceeding 40s. . . .

The following is Form C, as altered by the Poor Law Board, under sect. 15 of the Vaccination Act 1871.

Medical certificate of insusceptibility of successful vaccination, or of child having had small pox.

I, the undersigned, hereby certify that , the child of , aged , born at , in the parish (township) of , in the county (borough) of , [has been times unsuccessfully vaccinated by me, and is, in my opinion, insusceptible of successful vaccination] or [has already had small pox.]

Dated, &c. (Signed)

[Public vaccinator of the union (parish) of .]
Medical practitioner duly registered.

Notice as to transmission of certificate (C).

The certificate, if given by a public vaccinator, is to be transmitted by him through the post to the vaccination officer, whose address is on the other side. The public vaccinator is bound, upon request, and without fee or charge, to deliver to the parent or person having the custody of the child, a duplicate of the certificate so transmitted by him.

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The certificate, if given by any other medical practitioner, is to be transmitted by post to the vaccination officer, whose address is on the other side, by the parent or person having the custody of the child. In either case it must be transmitted within seven days after the examination of the child upon which the certificate is founded.

The other forms (B and D) under the Act of 1871 are similar to forms (B and D) under the Act of 1867, but Form (B) instead of being kept by the parent, &c. as before, is now to be transmitted to the vaccination officer by the public vaccinator or the parent, &c., as in the case of the above certificate Form (C).

The *Solicitor-General* (Sir H. Giffard, Q.C.) (with whom were *A. L. Smith* and *S. Romilly*) for the appellant.—The scheme of the Vaccination Acts with reference to this question must be looked at. Sect. 20 of the Act of 1867 (30 & 31 Vict. c. 84) enacted, that if any public vaccinator should find that a child that he has three times unsuccessfully vaccinated was insusceptible of successful vaccination, or that a child brought to him for vaccination had already had small pox, he should deliver to the parent or other custodian of the child a certificate in the form marked (C) in the schedule to the Act, the intention being that the parent should be furnished with a defence upon any future attempt to cause the child to be vaccinated. There were thus two grounds upon which "insusceptibility" was declared, namely, the three unsuccessful attempts to vaccinate, and the having had the disease. That that was so, and that both were treated as amounting to insusceptibility, was shown by the form of the certificate itself. It certified that the child had been so many times "unsuccessfully vaccinated," or that "it had already had small pox," each of those things being a preliminary condition, then came the conclusion, "and I am of opinion that such child is"—what? "insusceptible of successful vaccination. Either contingency, therefore, satisfied the certificate of "insusceptibility." This certificate was to be kept by the parent, and so the public vaccinator, having no means of knowing the fact, might on imperfect or no information summon the parent, and then, upon the certificate being produced, the whole proceedings would be shown to be needless. To remedy this, sect. 7 of the amending Act of 1871 (34 & 35 Vict. c. 98) was passed, which provided that the certificate of insusceptibility given by a public vaccinator, instead of being delivered to the parent, should be transmitted by such vaccinator, and if given by any other medical practitioner, should be transmitted by the parent, to the vaccination officer, and a duplicate be given to the parent on request without charge. The Act of 1867 contemplated three conditions of things: first, unfitness to undergo the operation by reason of health; secondly, insusceptibility from whatever cause arising; and, thirdly, successful vaccination. In the two former cases the parent who was to be protected from the law being put in force against him was to hold the certificate. (Forms B and C respectively). Then came sect. 7 of the amending Act of 1871, but there was no trace in that Act of any intention to alter the law on the subject as declared by the Act of 1867, or to place the having had small pox in a different category with respect to insusceptibility from that of unsuccessful vaccination. The respondent contended, and the justices so decided, that the child having had small pox, the Vaccination Acts did not

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apply to it at all, and thus the main object of the statutes would be defeated. Sect. 15 of the later Act of 1871 empowered the Poor Law Board by order from time to time to "repeal, alter, and add to" the forms in the schedule to the earlier Act of 1867, and directed that the reference in either of the Acts to the form in the schedule, or to any forms, were to be construed to refer to the forms prescribed by any such order, and accordingly Form C was altered in pursuance of an order of the board. Now, reading the original Form C together with sect. 20 of the Act of 1867, it was clear that the statute imported that "insusceptibility" might be produced in two ways; namely, by the unsuccessful attempts to vaccinate, or by the child having had the disease, which two are treated as the same thing. The respondent contended, however, that the altered Form C made a distinction between the two, and treated them as different conditions, and that, therefore, the cogeny of sect. 20 no longer applied where small pox had previously existed. The appellant, on the contrary, submitted that sect. 15, which authorised only an alteration in a mere form, was not intended to, and could not, effect an alteration in the law, or in any way prevent or override the operation of the Vaccination Acts themselves upon a very large class of children. To hold that it did would be a very startling construction, and would involve the absurdity that the very form relied upon to escape the operation of the earlier statute did itself contemplate the certificate of the child's having already had small pox. Having had the disease created, or at all events was equivalent to, insusceptibility. [POLLOCK, B.—You say that, at any rate, the law by 30 & 31 Vict. c. 84, sched. Form C, has so laid it down?] Just so. The obligation was independent of the form, and was interpreted by it, but the form was not to outweigh the substance or to override the statute, and if it were to do so, a very numerous body of children would be outside the Acts altogether. Insusceptibility, in the sense contended for by the appellant, was to be certified under the new Act in the like manner as successful vaccination was to be certified under both the Acts; and the question for the court was whether or not, in the indirect way contended for by the respondent, one of the most important provisions of the Vaccination Acts had been repealed.

Poland (with him was *F. J. Clerk*) for the respondent, *contra*.—The decision of the magistrates was right, and the respondent could not be convicted, under sect. 7 of the Act of 1871, of not sending a certificate which he in fact did not possess. He had a certificate of the child "having had small pox," but not one of "insusceptibility of vaccination." On looking at the different sections it will be seen that the change made by the Poor Law Board was in accordance with the Act of 1867, and that the mistake made in that Act was in Form C in the schedule, and not in the Act itself. Sect. 20 treated the two things, insusceptibility and having had small pox, as separate and distinct. The words are, "if any such public vaccinator shall find that a child whom he has three times unsuccessfully vaccinated is insusceptible of successful vaccination." The insusceptibility arose from the fact of three attempts to vaccinate having been made: the section then went on—"or that a child brought to him for vaccination has already had small pox." Then in either of those

separate and distinct cases, he was to deliver to the parent, &c., a certificate in the Form C in the schedule, or to the like effect, and the parent, &c., should thenceforth not be required to cause the child to be vaccinated. Now the enactment having treated the two things as separate and distinct, the form in the schedule seems to have been taken from the marginal note, which is, "Provision for insusceptibility of successful vaccination," instead of from the Act, and so no doubt the certificate was open to the argument urged on the other side, that, construing it as a legal document, the words at the end of it, "and I am of opinion that such a child is insusceptible," &c., might be read as if they were, "and I am of opinion, therefore, that such child is insusceptible," &c. Now, however that may be, sect. 20 was plain in its terms, and it was fair to consider that the Legislature, in passing the Act of 1871, had that section before them, and then enacted that every certificate of a child being unfit for or insusceptible of successful vaccination, if given by a public vaccinator, should be transmitted by him, and if given by any other person, then that it should be transmitted by the parent. Now the "insusceptibility of successful vaccination" was that which was referred to in sect. 20 of the Act of 1867, namely, insusceptibility by reason of unsuccessful attempts to vaccinate; in such case there would be proof positive of "insusceptibility," and that was treated of in the body of the statute as being "insusceptible of successful vaccination." But a person who had had the small pox had a certificate of a fact which was a different matter. That being so, it was no doubt noticed that the forms in the earlier Act were not correct, and power was given by sect. 15 to the Poor Law Board to repeal, alter, or add to them. The board, reading the provisions of the statute, found that it dealt with separate things, and they headed their form in accordance therewith, as "medical certificate of insusceptibility of successful vaccination, or of child having had small pox." [He was here stopped by the court.]

CLEASBY, B.—I cannot help regretting the conclusion to which we are obliged to come in this case, but it seems to me that it is a case in which, unfortunately, legislation has been somewhat imperfect. It is, in fact, an instance of a *casus omisus*, and it is quite clear that we cannot supply such an omission, especially in an enactment creating an offence and inflicting a penalty upon its commission. It is not because the Legislature might have meant to include such a case as the present one within the terms of sect. 7 of the Vaccination Act of 1871, that we can therefore read that section as bringing the present case within it. The question which we have here to consider and determine is, whether or not the offence with which the respondent has been charged is an offence against the statute under which he has been proceeded against, and we cannot convict him of such an offence if the evidence in the case points entirely to another and different thing altogether. Now, on looking at the words of sect. 7, which creates the offence, we find that it is thereby enacted that "every certificate of a child being unfit for or insusceptible of successful vaccination, if given by a public vaccinator, shall, instead of being delivered by him to the parent, be transmitted by such public vaccinator, and, if given by any other medical practitioner, shall be

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transmitted by the parent of such child, to the vaccination officer." We have nothing to do on the present occasion with the case of a child being "unfit for vaccination," but have only to deal with the case of its being "insusceptible of successful vaccination," and with regard to that there is this positive enactment in sect. 7, that the certificate of such insusceptibility shall be transmitted either by the public vaccinator or by the parents (as the case may be) to the vaccination officer; and the section proceeds to enact that "every person who acts in contravention of or fails to comply with any provision of this section shall be liable, on summary conviction, to a penalty not exceeding 20s." Now this case is no doubt peculiar in this respect, that there was in the schedule to the former Act of 1867 a Form C, which apparently treated "insusceptibility of successful vaccination" and "having had small pox" as the same thing, that is to say, it made the certificate given of a child having been three times unsuccessfully vaccinated, or having had the disease, conclude with these words, "and is insusceptible of successful vaccination." The alteration made in the present form is, I think, easily to be understood, and the reason for it apparent, because it might well be that persons of skill might have some hesitation in signing such a certificate as that given in the form as it originally stood, and might feel that to certify that, because a child had had small pox once, it was therefore "insusceptible of successful vaccination," or that, in other words, it could not have small pox a second time, would be to certify as a fact that which was by no means a certain or assured thing. Accordingly, we find that power was, by sect. 15 of the Act of 1871, given to the Poor Law Board, from time to time, by order to "repeal, alter, and add to" the forms in the schedule to the Act of 1867, and this alteration in Form C was accordingly made by the board. When we look at this new form, and see what the alteration really is, the matter seems to be tolerably clear. It is headed "Medical certificate of insusceptibility of successful vaccination, or of child having had small pox." It then proceeds as follows: "I hereby certify that such child," and so on, and then comes, between brackets, the following words: ["has been times" (it must not be less than three) "unsuccessfully vaccinated by me, and is, in my opinion, insusceptible of successful vaccination."] Then it goes on, "or," and then between brackets again come these words: ["has already had small pox."] There are then directions, referred to by the figure 5 in the margin, that the set of words between brackets which do not apply to the particular case are to be struck out, so that the form will stand as a certificate of one of two things (and it must be of one or the other of them), namely, of the child either having been three times unsuccessfully vaccinated, and so, therefore, being "insusceptible of successful vaccination," or of its "having already had small pox." The certificate in the present case stands as a certificate that the child in question "has already had small pox." Now, sect. 7 of the Act of 1871 having directed that a certificate of a child being "insusceptible of successful vaccination" shall be transmitted to the vaccination officer, and having imposed a penalty upon the person who fails so to transmit it, we are asked by the appellant to

extend by construction the operation of that enactment so as to make it include the case of a person failing to transmit a certificate of a child "having had small pox," in other words, to say that every person who does not transmit a certificate of "insusceptibility of successful vaccination," whether he has one in his possession or not, deserves and is liable to punishment. It is quite impossible, I think, for us to do that, or to say that a person having, not a certificate of his child's "insusceptibility," but only of its "having had small pox," comes at all within the terms of this section of the Act of Parliament. The two things are quite distinct and different. Prior to the Act of 1871, and the altered form of the Poor Law Board, they would, no doubt, to a certain extent, have been the same thing, but they are now distinctly made two separate things. If a man possesses only a certificate of one particular kind he cannot be punished for not having transmitted a certificate of a totally different kind which he does not possess. It is of course much to be regretted that we should be compelled to decide this case upon the ground of its being a *casus omisus* in the Act of Parliament; but we have no alternative, and must therefore give judgment in favour of the respondent, and affirming the decision of the justices below.

POLLOCK, B.—I am of the same opinion, and for the same reasons.

Judgment for the respondent, affirming the decision of the justices.

Solicitors for the appellant, *Shum, Crossman, and Crossman*, agents for *J. Sykes and Son*, Huddersfield.

Solicitors for the respondent, *Layton and Jaques*, agents for *Mills and Bibby*, Huddersfield.

COMMON PLEAS DIVISION.

Reported by S. HARR, Esq., Barrister-at-Law.

Monday, Jan. 29, 1877.

BLACKPOOL PIER COMPANY *v.* FYLDE UNION.

APPEAL FROM INFERIOR COURT.

Poor rate—Pier below low water mark—31 & 32 Vict. c. 122, s. 27.

The portion of a flying pier below low water mark is neither an accretion from the sea, nor an extra parochial place, within the meaning of sect. 27 of the Poor Law Amendment Act 1868.

THIS was an appeal by way of special case from the decision of local magistrates. The question was whether the plaintiffs should be rated to the relief of the poor in respect of that portion of their pier which is situated below low water mark, and in respect of tolls taken by them as occupiers under 31 & 32 Vict. c. 122, sect. 27. That section enacts (amongst other things) that every extra parochial place shall for all civil parochial purposes be annexed to and incorporated with the next adjoining parish with which it has the longest common boundary; and every accretion from the sea, whether natural or artificial, and the part of the seashore to the low water mark, shall for the same purposes be annexed to and incorporated with the parish to which such accretion or part adjoins, in proportion to the extent of the common boundary.

A. L. Smith, for the company.—The pier is not an accretion, because the low water mark remains

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where it always was. Before the recent statute, even the land down to low water was not always rated:

Reg. v. Musson, 8 E. & B. 900;

Bridgewater v. Bootle-cum-Linacre, L. Rep. 2 Q. B. 4. For all local purposes the part of the pier in question is out of England:

Reg. v. Kehn, L. Rep. 2 Ex. Div. 63.

W. G. Harrison, for the Union.

LORD COLERIDGE, C.J.—The pier is carried upon piles some 500ft. beyond low water mark, and therefore it is beyond the realm of England, unless Parliament has expressly brought it within our jurisdiction. The second part of the 27th section of the Act referred to is that which is applicable to this case. The pier is not an accretion, that is it is not an uprising of new land where the tide has heretofore flowed. We are not called upon to decide whether it would be such if the pier were of solid masonry, which it is not, for it is only a deck carried on piles, which does not affect the ebb and flow of the sea. The fact that the licensees described themselves as of Blackpool does not alter the question.

GROVE, J. concurred, and added that the pier head was not an extra-parochial place within the meaning of the first part of the section, because it was a place wholly beyond the jurisdiction.

Rate ordered to be amended.

Solicitors for the appellants, *Gregory, Rowcliffe, and Co.*

Solicitors for the respondents, *Pitman and Lane.*

Jan. 22 and 31, 1877.

RUMSEY v. NICHOLL.

Exchange of livings—Deed of resignation—Ejectment—Escrow.

An exchange of livings was commenced by the execution of a deed of resignation by one of the parties, but subsequently fell through. One of the livings was in the meantime filled up by the patron. The late rector brought ejectment against the new rector.

Held that it would not lie.

DEMURRER to statement of claim. The plaintiff alleged that he, whilst duly filling the rectory of Llandough, in Glamorganshire, obtained permission from his patron to exchange livings with some clergyman to be approved by his said patron; that the plaintiff submitted the name of one Pinckney, who was duly approved both by the patron and the Bishop of Llandaff, whereupon the patron promised to do all things necessary to enable the exchange to be carried out; that the plaintiff, relying on such promise, executed a deed of resignation of the living of Llandough, and delivered it into the hands of the registrar of the diocese, at the same time explaining to him the object in view; that the deed was accepted by the registrar to be held for the purpose of an exchange only; and that, notwithstanding his promise, the patron presented to the rectory his own son, the defendant, who entered into possession, and now fills the living.

The defence was, that the deed of resignation was an unconditional one; that the living being vacant, the defendant was duly presented; that if any such promise as alleged was made by the patron, it had been waived by the plaintiff, and

that the dispute had already been referred to arbitration.

W. G. Harrison for the demurrer.—The deed of resignation was absolute. The temporal courts cannot interfere in this matter. How can they eject a rector from his living? The court can only deal with the fact that the rectory is full.

McOlymont, for the plaintiff, contended that the deed was conditional, and the condition not having been fulfilled, the deed was no more than an escrow in the hands of the registrar.

The facts and arguments appear more fully in the judgment.

DENMAN, J.—This was a demurrer to the statement of claim. The plaintiff claimed possession of a certain house and glebe lands, and 4000*l.* for mesne profits from Nov. 1867 until possession should be given. If the statement of claim had merely been confined to allegations that the plaintiff had been duly presented, instituted, and inducted to the rectory and living in question, and that the defendant had broken and entered the rectory house and glebe lands and expelled the plaintiff from his possession thereof, there can be no doubt that the statement of claim would have been perfectly sufficient, and would have made it incumbent upon the defendant to plead facts showing his right to the possession of the rectory house and glebe. That ejectment will lie for a rectory house and glebe by the person duly instituted and inducted, even as against a tenant under notice to quit at a future time from the last previous incumbent, appears from the case of *Doe dem. Kerby v. Carter* (Ky. & Moo. 237). See also *Cook v. Elphin* (5 Bligh N.S. 103). But the statement of claim in the present case contains allegations which the defendant's counsel contends are sufficient to prove that the plaintiff, upon his own showing in that statement, is not entitled to maintain ejectment, and on that ground he demurs to the statement of claim. The statement of claim, in addition to the allegations which would be necessary, and if unaccompanied by more, sufficient to make out a case in ejectment, contains other allegations so intermixed with them, that it is not on the face of the whole statement easy to say what the case of the plaintiff is. But upon careful perusal of it as a whole, I think it is sufficiently clear that it intends to admit that the defendant is in actual possession, not only of the rectory house and glebe, but of the living itself, which can only be by presentation, institution, and induction; and it does not, in my opinion, state any facts which, if that be the case, would give the plaintiff a right to sue the defendant in ejectment. The statement of claim, after stating the plaintiff's presentation, institution, and induction to the rectory and living, contains four paragraphs (Nos. 2-5) upon which the plaintiff's counsel relied as amounting to a statement that the plaintiff still remained in possession of the living until the patron, in violation of an agreement of exchange assented to by himself, the bishop, and the plaintiff, falsely claiming an absolute right to present by reason of a deed of resignation which was only conditionally delivered by the plaintiff, presented the defendant to the living. It was contended that, under the circumstances set out in these four paragraphs, the alleged resignation amounted to no resignation at all, the exchange contemplated not having been effected; and Watson's Clergyman's Law, and 2 Burn's

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Ecclesiastical Law, p. 242, and *Holt and Glover v. Bishop of Lichfield and Coventry* (Hob. 152), were cited as establishing the proposition that if a resignation deed is executed, resigning a living into the hands of the ordinary with a view to an exchange, and the exchange fails before the institution and induction of both incumbents into their new livings, the resignation is void. No doubt this is recognised as the law, at least to the extent of holding the deed to be defeasible where one of the parties dies before the change is completed (see *Downes v. Craig*, 9 M. & W. 176, per Parke, B., and p. 177, per Rolfe, B.); but I can find no authority for saying that, as between an incumbent who has resigned his living by deed with a view to an exchange and a new incumbent, the mere fact of that exchange having failed will enable him to sue in ejectment the actual incumbent, even if unconsciously presented by the patron, in a case where he is in full possession of the living by institution and induction. In such a case I apprehend that the remedy of the incumbent who should have so resigned would be against the patron, and not against the new incumbent. In the present case, however, the statement goes on, in paragraph 6, to state that the defendant, "in full knowledge of all the premises," and "pretending right therefrom," accepted the presentation, and expelled the plaintiff from his possession of (amongst other things) the living; and I am not prepared to say that if I had thought that the four preceding paragraphs of the statement of claim had clearly shown facts which would have rendered it unconscientious in the defendant to have accepted the presentation, and to have applied for institution and induction, I should not have thought that he should be called upon to answer. But in the statement of claim, I only find what appears to me to amount to no more than this, viz., that at some time between January 1867 and the date of the writ (January 1876), all parties were willing and agreed that one Robert Pinckney should be presented to the living, and that the plaintiff executed and delivered the deed to the registrar of the bishop with that intention, and for that purpose only. But there is a total absence of all explanation of the circumstances under which Pinckney was not presented; and it is perfectly consistent with the statement of claim that Pinckney may for good cause have had no desire to be presented to the living; and that owing to intermediate proceedings the deed, though originally delivered with a view to an exchange, being an absolute resignation on the face of it, may have been well understood by all parties to have remained in the hands of the bishop without any condition at all long before the presentation of the defendant. This would indeed appear from the words in the statement of claim, "and at the time of execution and delivering the said deed, and before and after such execution and delivery," unaccompanied by any words showing that the original intention and understanding spoken of in paragraph 4 continued down to the time of the presentation of the defendant, and his taking possession of the living. I am, therefore, of opinion that, even if paragraph 6 of the statement of claim so far as it refers to the knowledge of the defendant were made out, it would not prevent the defendant from relying on the presentation alleged; and inasmuch as the latter

part of that paragraph states him to be in possession, not only of the rectory house and glebe, but of the living itself, he is for the reasons given above not liable in ejectment upon this statement of claim.

Judgment for the defendant with costs.

Solicitors for the plaintiff, *Maples, Teesdale, and Co.*

Solicitors for the defendant, *Lee and Pemberton.*

Friday, April 20, 1877.

GAY v. CADBY.

APPEAL FROM INFERIOR COURT.

Metropolis Local Management Act 1855 (18 & 19 Vict. c. 120)—Construction of sects. 125, 126, 127, 128, and 129—"Refuse of any trade, manufacture, or business"—Ashes from steam engine employed as motive power in a factory.

The Metropolis Local Management Act 1855 directs (s. 125) that vestries or district boards shall contract with a scavenger for the removal of refuse at the expense of the rates; but (s. 128) in case the scavenger be required by the owner or occupier of any house or land to remove "the refuse of any trade, manufacture, or business," he shall be paid an extra sum for so doing.

The ashes of coals consumed by a steam engine used as a motive power in a pianoforte manufactory are "refuse" within the meaning of sect. 128.

Semble, the ashes of coals consumed in an hotel or bakery are "refuse" within the same section.

CASE stated by one of the magistrates for the Metropolitan Police District of Hammersmith, under the 20 & 21 Vict. c. 43, for the opinion of the court upon a question of law.

The question depended upon the construction of sects. 125, 126, 127, 128, and 129 of the *Metropolis Local Management Act 1855*, which are as follows:

Sect. 125. It shall be lawful for every vestry and district board, and they are hereby required, to appoint and employ a sufficient number of persons, or to contract with any company or persons, for the sweeping and cleansing of the several streets within their parish or district, and for collecting and removing all dirt, ashes, rubbish, ice, snow, and filth, and for, &c., within their parish or district, and such company or persons are hereinafter referred to as scavengers; and such scavengers, or their servants, shall, on such days, &c., sufficiently execute and perform all such works and duties as they respectively are employed or contract to execute or perform; and if such company or persons fail in any respect properly to execute or perform, &c., they shall for every such offence forfeit a sum not exceeding 5*l*.

Sect. 126. Any occupier of any house or land, or other person who refuses or does not permit any soil, dirt, ashes, or filth to be taken away by the scavengers, &c., shall for every such offence forfeit and pay a sum not exceeding 5*l*.

Sect. 127. All dirt, dust, night soil, ashes, and rubbish collected as aforesaid, shall be the property of such vestry or board, &c.

Sect. 128. In case any scavenger be required by the owner or occupier of any house or land to remove the refuse of any trade, manufacture, or business, or of any building materials, such owner or occupier shall pay to the scavenger a reasonable sum for such removal, such sum, in case of dispute, to be settled by two justices.

Sect. 129. If any dispute or difference of opinion arise between the owner or occupier of any such house or land, and the scavenger required to remove such refuse, as to what shall be considered as refuse, it shall be lawful for any two justices, upon application made to them by either of the parties in difference, to determine whether the subject-matter is or is not refuse of trade, manufac-

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ture, or business, or of any building material; and in every such case the decision of such justices shall be final and conclusive.

The appellant was a scavenger within the meaning of the 125th section.

The respondent was a pianoforte manufacturer, occupying for the purposes of his manufacture extensive works within the parish.

The respondent used a 25-horse power steam engine, which consumed about one ton of coals a day. The ashes from these coals had been kept in a separate ashpit, and not mixed with any other materials. They had never been removed during the respondent's occupation, he refusing to pay for such removal, whilst the appellant required him to do so under sect. 128.

The steam engine was used for the purposes of respondent's business as manufacturer, as a motive power.

The respondent contended that the ashes were not refuse within the meaning of sects. 128 and 129, which refuse must consist wholly or in part of the things consumed in the manufacture or business.

The appellant contended that the words included all refuse of any trade, manufacture, or business.

It was admitted that the ashes of coal burnt in bakers' ovens had always been removed by scavengers without payment.

The magistrate decided in favour of the respondent, but stated this case, with the consent of the parties, in order to have the decision of the Superior Court, the decisions of the metropolitan magistrates on the point being conflicting.

The question of law for the opinion of the court was: Whether ashes produced in the manner stated in the case are or are not in point of law the refuse of a trade, manufacture, or business, within the meaning of the said Act.

Day, Q.C. and Rose, for the appellant.—The scavenger is bound to remove the ashes, but he is not bound to assist a tradesman to carry on his business by doing so free of expense. The question was decided in *Lyndon v. Standbridge* (26 L. J. 386, Ex.).

Herschell, Q.C. and Ticklell, for the respondent.—The ashes here merely arise from a fire on the premises. The premises stand on the same footing as those of bakers and hotels. Refuse means in the Act refuse of materials worked up in the business, and not refuse of such things as coals, which are destroyed by use. In *Lyndon v. Standbridge* there was no such obligation as here upon the occupier to permit the removal of refuse.

Day, Q.C. in reply.—Hotels and private houses cannot be distinguished. [*Grove, J.*—It is a question of degree. In some trades the refuse of the trade can hardly be distinguished from domestic ashes.] That is the distinction. If the two kinds were kept separate, the scavenger might object to remove the one without payment.

Grove, J.—I am of opinion that the appellants are entitled to our judgment. This is a case *primis impressionis* to some extent, because different opinions have been entertained on the subject by police magistrates, which is not to be wondered at. I think that these ashes come within the 128th section. The reason and object of the Act is that the refuse of the town is to be removed by the vestry or district board, or by persons contracting with them. The words of sect. 125 are,

"all dirt, ashes, rubbish, ice, snow, and filth," &c. that is, the general refuse of the town, shall be removed by the scavenger at the expense of the rates. No doubt, questions of degree might occur in the case of ordinary houses. The refuse of one house might, for various reasons, be greater than the refuse of another. Then comes sect. 128, the object of which seems to be this, that whereas persons in trade, manufacture, or business, create what may be termed substantial refuse, independent of domestic refuse, that shall not be thrown on the scavenger to be removed gratis. Such persons create the refuse for their own profit, and may cause it to be a nuisance to their fellow inhabitants, therefore it is right that they should pay for its removal. The word "refuse," in sect. 128, means all that is created by the trade itself, as distinguished from the ordinary refuse of the household. Then, looking at the facts of this case, I think the ashes are "the refuse of a trade or business." Of course, logically, there can be no refuse of a business, but only of something produced in or by the process of manufacture. I cannot see why refuse should be less applicable to the ashes caused in the operation than to the residuum or cast off portions of the materials. It appears to me that the refuse of coals used in producing power for a business are fairly within the meaning of the words used and the object of the statute. The scavenger is required to remove all refuse by sect. 126; it is not at his option. But you cannot call upon him to remove this unless you pay him something extra. I have no doubt that in this case the refuse is that of a "trade, manufacture or business" within the meaning of the Act. As to the business of the baker, of which the refuse is removed without charge, there is no decision on record. The liability in that business will have to be settled when it comes to be tried.

LINDLEY, J.—I am of the same opinion, and for substantially the same reasons. If we look at sect. 125 alone, it is clearly the duty of the scavenger to remove all ashes, and the inhabitants might call upon him to do so. But sect. 128 shows that, whatever is the true meaning of the word "refuse" there, it is something a scavenger is bound to remove under sect. 125. Then what is the just and reasonable construction of sect. 128? It is obvious that there are two classes of refuse contemplated—that which falls within the scavenger's contract, and certain extras, as it were, for which when removed he is entitled to be paid. Again, the refuse of any trade, manufacture, or business may include two classes of matter. First, the refuse of the thing manufactured; and this is all the magistrates thought was intended by the section, though I think their construction of it too narrow. Secondly, the refuse of coal used for the purpose of the manufacture, which I think as much a refuse as the chips of wood which are thrown away.

Judgment for the appellant.

Solicitors for the appellant, *Watson, Sons, and Broom*.

Solicitors for the respondent, *Tanqueray and Co.*

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DANBY v. WATSON.

[O.P. Div.]

Feb. 1 and 12, 1877.

DANBY v. WATSON.

APPEAL FROM INFERIOR COURT.

Inclosure Act—Award—Rates for inclosure purposes
—Remedy by distress or action.

A private inclosure Act gave the commissioners power by their award to direct by whom and in what manner certain necessary drainage works were to be made and maintained. The commissioners having directed by their award that the expenses of the said works should be paid by a rate to be levied and recovered by certain surveyors in the same manner as parish rates were by law recoverable in the parish,

Held, that the rate must be recovered by distress and not by action.

This was an appeal from the County Court of Lincolnshire, who decided that the rate mentioned in the head note was properly recoverable by distress only.

Case, Q.C. and Horace Smith, for the plaintiff, a surveyor.—Though an action will not lie for a poor-rate, yet where a statute imposes a duty, an action will lie for the breach of it: (*Underhill v. Ellicombe*, McC. & Y. 450.) Where a local Act empowered commissioners to detain a ship for non-payment of tolls, the right of action was not taken away: (*Goody v. Penny*, 9 M. & W. 687.) Again, where certain duties were required to be paid by ship-owners, and on non-payment the ships were to stand charged with payment of the same, a remedy was allowed either by action or distress: (*Shepherd v. Hills*, 11 Ex. 55.) An action is the common law remedy where no other is provided:

Wolverhampton Waterworks Company v. Hawksford, 28 L. J. 242, C. P.

They cited also

Saint Pancras v. Batterbury, 2 C. B., N. S. 477;

Atkinson v. Newcastle &c. Waterworks Company, L. Rep. 6 Ex. 404;

Ross v. Ruggs Price, 34 L. T. Rep. N.S. 535; L. Rep. 1 Ex. D. 269;

Addison on Torts, p. 35.

Kingsford for the defendant, a ratepayer.—The rate is to be levied as a parish rate, for which no action will lie: (*Stevens v. Evans*, 2 Burr. 1152; 1 Wms. Black 284.)

Case, Q.C. in reply, cited *B. v. Cottingham* (6 T. Rep. 20.)

GROVE, J.—In this case an action was brought in the County Court to recover the amount of a rate made under an award of commissioners purporting to be in pursuance of powers given by an Act of 36 Geo. 3, for inclosing certain fields, &c., in the Lordship of Hibaldstowe, Lincolnshire. By that Act, p. 20, the commissioners were "empowered and required by their said award to order and direct by whom, at whose expense, at what time, and in what manner the said brooks, ditches, drains, water-courses, tunnels, water-gates, banks and bridges shall be made, and thereafter repaired, cleansed, scoured and maintained." By their award the commissioners provided that such cleansing, repairing, maintaining, &c., should be paid by a rate to be made by two surveyors (elected in manner provided for), and should "be levied and recovered by such ways and means as parish rates or assessments are by law recovered within the said parish." It was contended on behalf of the defendant that as a mode was pointed out by the award of enforcing the provisions in question, viz., in the same way as parish rates,

i.e., by distress, no action would lie (*Stevens v. Evans*). For the plaintiff it was contended *contra* that, as the commissioners had no power given them by the Act to direct how the payment of rates was to be enforced, that portion of the award, if not more, was void and inoperative, and that therefore a remedy by action for breach of a statutory duty would lie. The judge held that, another mode of enforcing payment being provided by the award, an action would not lie, and non-suited the plaintiffs. I am of opinion that the non-suit was right. Though the words "in what manner the brooks, ditches, &c., shall be made and repaired," do not, grammatically construed, confer any power for prescribing how the rates for that purpose are to be enforced, it may, I think, not unreasonably be contended that the clause providing that the commissioners may order "by whom, and at whose expense, the said brooks, &c., are to be repaired and maintained," gives by a necessary implication a power to direct how their order is to be enforced. This argument receives some support from the sense in which the word "manner" is used in other parts of the statute. Thus at page 13 (the clauses are not numbered), where provisions are made for roads, it is said "the same," i.e., public bridle roads and footways, &c., "shall be made and erected, and at all times thereafter repaired, maintained, and kept in repair, either by a parochial rate or assessment, or by such person, or in such manner as the said commissioners shall direct and appoint." Here, the statute uses the words "in such manner" as alternative to the words "either by a parochial rate and assessment," obviously, as it seems to me, including in the word "manner" the manner in which the expenses shall be provided. But irrespective of this argument, or rather in addition to it, I am of opinion that the powers given to the commissioners at page 28 of the Act, where the provisions of the award are stated, and where the statute says it "shall also contain proper orders and directions for and concerning the laying out and making the public roads, and the breadth thereof, and for and concerning the laying out, making, maintaining, cleansing, and keeping in repair, of the private roads and ways, fences, ditches, banks, drains, bridges, gates and stiles hereby directed to be made; and by this Act mentioned, directed, required or authorised to be made or established, and such other orders, regulations, matters and things as shall be necessary or proper, conformably to the time, tenor, and meaning of this Act, for the more early, convenient and effectual execution thereof, and for the preventing all difficulties and disputes in relation to the matter herein contained." In this clause it appears to me the words "private roads" are only used in contradistinction to "public roads" mentioned in the previous sentence, and the words, "ways, fences, ditches, &c., are used generally for those provided for in the Act; if so, these words, and the words "such other orders, regulations, matters and things as shall be necessary or proper conformably to the true tenor and meaning of this Act, and for the more early, convenient, and effectual execution thereof," seems to me, taken as applied, to the previous provisions in respect to these same matters, to give ample power to the commissioners to direct by their award the means of enforcing payment of rates, the making of which they have undoubtedly the power of ordering. If so, the

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mode prescribed in the award is within the power given by the Act, and excludes the remedy by action. I do not enter into any criticism of other portions of the Act and award not necessarily bearing upon the question before us, as the only point we have to decide is whether or not an action will lie. I do not dissent from my brother Denman's view that the rate being a creation of the award, and no action being authorised by the award, an action will not lie, but I prefer to rest my judgment on the ground above stated. We agree in the conclusion, viz., that the decision of the county court judge be affirmed.

DENMAN, J.—In this case the question left to the court by the County Court judge is whether an action will lie for a drainage rate assessed by surveyors elected under an award of 36 Geo. 3, for inclosing lands in the lordship of Hibaldstowe, in Lincolnshire. I think it is quite a sufficient answer to the contention of the appellant that the whole authority of the surveyors (that is, the plaintiffs in this case), whether to make or to levy a rate, is derived from the award. This is a part of the machinery provided by the award itself for carrying into effect the purposes of the Act, so far as the drainage is concerned. It has no existence from the mere provisions of the statute itself. This being so, I think it would be impossible to give effect to any act of theirs coming within the provisions of the award as to their power, except it be done in the mode pointed out by the award itself. The award, after directing that the drains, &c., shall from time to time, and at all times, be maintained by the surveyors to be elected annually by a majority of the proprietors and occupiers of land in Hibaldstowe respectively, proceeds as follows: "But such maintaining, &c., to be made by means of a rate, &c., which said rate shall be made by two surveyors so to be annually elected for the time being, and be levied and recovered by such ways and means as parish rates or assessments are by law recovered within the said parish." I think it impossible to give effect to the award, so far as to hold the surveyors entitled to make a rate, and at the same time to reject that part of the award which provides the only mode pointed out in the award by which that rate is to be recovered, viz., in the manner in which parish rates are by law recovered, that is, by distress. On the argument of the case other points were suggested besides that left to us by the learned County Court judge. Some of them are not free from difficulty, but I think it better to express no opinion upon them beyond this—that after an usage of seventy-four years from the date of the award I should feel it to be the duty of any court to be reluctant to hold, without conclusive reasons, that the commissioners had exceeded their power by such very reasonable provisions as those contained in the award as to the election of the surveyors, the making of the rate, and the provisions as to its recovery. As at present advised I see no ground for questioning the power of the surveyors to make a rate, and levy it by distress; but I wish only to be understood as deciding that the award must be taken as a whole, or that the same provision of it which creates the plaintiffs themselves as the persons to carry the Act into effect, gives them their powers subject to the restriction that the money required for their exercise is to be raised by a rate, and that rate levied by distress, and not by action.

On this ground I think the judgment of the learned County Court judge ought to be affirmed.

Solicitors for the plaintiffs, *Varley and Toynbee*.
Solicitors for the defendant, *Rogerson and Ford*.

CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, April 21, 1877.

(Before COCKBURN, C.J., MELLOR, GROVE, LINDLEY, and HAWKINS, JJ.)

REG. v. J. F. BULL.

False pretences—Master and servant—Obtaining payment of wages due, by fraud.

The prisoner, on entering the service of a railway company, signed a book of rules, a copy of which was given to him. One of the rules was, "No servant of the company shall be entitled to claim payment of any wages due to him on leaving the company's service until he shall have delivered up his uniform clothing." On leaving the service he knowingly and fraudulently delivered up, as part of his uniform, to an officer of the company, a great coat belonging to a fellow servant, and so obtained the wages due to him.

Held, that he was properly convicted of obtaining the money by false pretences.

CASE stated for the opinion of this Court by the chairman of the Second Court of the Surrey Sessions.

At the general quarter session of the peace, holden by adjournment at St. Mary, Newington, in and for the county of Surrey on Wednesday, the 7th day of March 1877, John Frederick Bull was tried before me in the second court upon the following indictment.

Surrey. The jurors for our Lady the Queen upon their oath present that John Frederick Bull, on the 13th Dec. in the year of our Lord 1876, unlawfully and knowingly did falsely pretend unto Samuel Clark, a station master in the employment of the London, Brighton, and South Coast Railway Company, that the great coat which he the said John Frederick Bull then handed to the said Samuel Clark, was the same great coat and part of the uniform clothing which had been supplied to him the said John Frederick Bull by the said company. By means of which said false pretences the said John Frederick Bull did then unlawfully obtain from the said Samuel Clark one pound in money with intent to defraud. Whereas, in truth and in fact, the said great coat was not the same great coat, nor did it form part of the uniform clothing which had been supplied to him the said John Frederick Bull by the said company, against the form of the statute in such case made and provided.

The evidence adduced by the prosecution was as follows:

Albert Stuart.—I am clerk in the traffic manager's office of the London, Brighton, and South Coast Railway Company at London Bridge Station. It is part of my duty to give out books of our rules and regulations to persons on entering the company's service. I produce an application for a copy of the rules and a receipt for them, signed by the defendant and countersigned by myself. One of those rules is that no servant of the company shall be entitled to claim payment of any wages due to him on leaving the company's service until he shall have delivered up his uniform clothing. That rule is not one of the company's bye laws. Defendant entered the company's service 10th May 1875.

Samuel Clark.—I am station master at the Norwood Junction Station of the company, at which station the defendant is employed as a shunter at weekly wages. On the 22nd Dec. defendant gave me notice in writing of his intention to leave the service on the 29th. On the morning of the 30th he brought a portion of two suits of

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old uniform, consisting each of a jacket, vest, and trousers. I said, "Where's the greatcoat?" He replied, "Perhaps it may have been stolen" or words to that effect. He then went away, and returned in a few minutes with the coat produced. I asked him for his rule book, and he said he had never had one. I remarked it was very strange that a person who had been two years in the company's service should not have a rule book, and told him he must produce it before I paid him. He went away again, and in a few hours returned with the rule book, and believing all to be as he stated, I paid him his wages, amounting to 1l. It was owing to his having brought in his uniform and rule book, as I believed, that I paid him the 1l. The coat issued to the defendant has not been returned to me.

Samuel Hanmore.—I am a labourer in the company's service at Norwood Junction. On 30th Dec. I went into the lobby at breakfast time about eight, and seeing Bull there, said to him, "So, you're off this morning." He said, "Yes, but the governor won't pay me." I asked him, why? and he replied, "Because I haven't got all my clothes to send in," and I understood him to say he had lost his coat. He then picked up the coat produced, saying, "I'm not going to lose my wages for a coat, I shall take this," and he took it, adding that he had lent his own to some one at New Cross. He then went away. I can't say whose coat he took, but I have since heard that one was missing.

James Southwick.—I am a shunter at Norwood Junction, and had a coat issued to me as part of my uniform about ten months ago. I had it last on the 29th Dec. when, it being wet, I left it in the lobby to dry. Next morning I missed it and reported the loss. The coat produced is the one; it is numbered twelve.

This was the whole of the evidence for the prosecution.

The defendant, who was not represented by counsel, called

William Cayer, who proved that he was a shunter at Norwood Junction, and that some time before the defendant left, but the witness could not say how long, he told witness that some one had taken his dry coat out of his locker and put a wet one in its place, but that he never told the witness the number of his coat, and the witness did not know the number.

Upon this evidence I left the four following questions to the jury, viz.:

1. Did the defendant hand over the coat to the station master, knowing that it was not the coat supplied to him by the company?

2. Did he do so for the purpose of obtaining his wages from the station master, knowing it was necessary to do so before the wages could be obtained?

3. Did the station master believe that the coat was the one supplied to the defendant, and was it in consequence of that belief that the station master gave the wages to the defendant?

4. Did the defendant intend to defraud the railway company? And I directed them that if their answers to all four questions were in the affirmative, they ought to find the defendant guilty; but that if they answered any one of them in the negative, they should acquit him.

The jury returned a verdict of guilty; but as the defendant was undefended by counsel, and as I doubted whether my direction to the jury was right in point of law, I respited judgment, and allowed the defendant to go at large on bail, and I now state this case for the opinion of this honourable Court, whether on the above evidence the defendant was rightly convicted of obtaining money by false pretences.

If the Court should be of that opinion, the conviction is to be affirmed; if not, it is to be quashed.

(Signed) WM. FREDK. HARRISON, Chairman
of the Second Court.

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No counsel appeared for the prisoner.

B. L. Moseley appeared for the prosecution.

COCKBURN, C.J.—It is not necessary in this case to call on the counsel for the prosecution. It appears that the prisoner was in the service of the London, Brighton, and South Coast Railway Company, and that it was one of the rules of that company, which were signed by the prisoner, that no servant of the company should be entitled to claim payment of any wages due to him on leaving the company's service until he should have delivered up his uniform clothing. The prisoner signed the rules, was aware of this rule, and in fact delivered up his copy of the rules on leaving the service. He gave notice to leave, and went to the station master, and gave up part of his uniform. The station master then asked him for his great coat. He went away, and some time afterwards brought one, and so obtained his wages. It turned out that the great coat belonged to another servant of the company, as the prisoner well knew. I take it that this was not an act of theft, but that he took it for the purpose of obtaining his wages. Now we must take it that it was part of his contract with the company that he was not to be entitled to the wages due to him on leaving the service until he had returned to the company all the articles of uniform that he received from the company. It is clear that the prisoner perpetrated a fraud on the officer of the company, and so got from him the money due to him; in other words, he obtained the money by the false pretence that the great coat he produced to the company's officer was the one he had received from them. The conviction will therefore be affirmed.

The rest of the Court concurred.

Conviction affirmed.

Saturday, April 21, 1877.

(Before COCKBURN, C.J., MELLOR, J., GROVE, J., LINDLEY, J., and HAWKINS, J.)

REG. v. G. RICHARDS AND J. RICHARDS.

Accessories after the fact—Indicted with the principal—Murder—Manslaughter.

Four prisoners were indicted together for murder, and the indictment went on to charge two other prisoners with having, well knowing the other four to have committed the said murder, afterwards feloniously received and harboured them. On the trial the prisoners charged with murder were found guilty of manslaughter only, and the other two guilty of having been accessories after the fact to manslaughter.

Held, on motion in arrest of judgment, that the other two were properly found guilty upon this indictment as accessories after the fact to manslaughter.

CASE reserved for the opinion of this court by Cockburn, C.J.

The prisoners were tried before me at the last assizes for the county of Somerset, on an indictment, which after charging one George Baker, and three persons named George Hutchings, the elder, Giles Hutchings, and George Hutchings, the younger, with the wilful murder of one Nathaniel Cox, went on to charge the two prisoners George and James Richards with having, well knowing the said George Hutchings the elder, Giles Hutchings, and George Hutchings the

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younger, to have committed the said murder, afterwards feloniously received, comforted, harboured, assisted, and maintained them.

On the trial the prisoners charged with murder were found guilty of manslaughter.

The two Richardses were found guilty as accessories after the fact.

Whereupon it was objected in arrest of judgment that the prisoners being charged in the indictment as accessories after the fact to murder could not be found guilty of having been accessories after the fact to manslaughter.

I was of opinion that as according to the established law, the offence of manslaughter is involved in that of murder, and a person indicted for murder may be convicted under such an indictment of manslaughter, so a person charged as accessory to murder may be found guilty on such an indictment of having been accessory to manslaughter. But as the point appeared to have never before presented itself for decision I reserved it for the consideration of this court, and request their decision upon it.

A. E. COCKBURN.

H. T. Cole, Q.C., for the prisoners. It is submitted that the conviction cannot be sustained. The point has not been expressly decided, but there are some old cases bearing on the subject. *Goff v. Byby and others* (Cro. Eliz. 540), was the case not of an indictment but of an appeal for murder against divers persons, one as principal and the rest as accessories. The principal was found guilty of manslaughter only. The court held that the accessories before the fact ought to be discharged, for the verdict for the principal found that there was not any precedent intent to kill, but that the accessories after the fact should answer. [MELLOR, J.—Did not the declaration in appeal for murder set forth the indictment?] No, but as appears from *Ashforth v. Thornton* (1 B. & Ald. 405), it used similar terms. The case of *Goff v. Byby* as far as it goes is in favour of the prisoners. It was not until the recent statute 24 & 25 Vict., c. 94, s. 3, that an accessory after the fact could be indicted along with the principal. Sect. 3 enacts:

Whosoever shall become an accessory after the fact to any felony, whether the same be a felony at common law or by virtue of any act passed or to be passed, may be indicted and convicted either as an accessory after the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon; or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may thereupon be punished in like manner as any accessory after the fact to the same felony, if convicted as an accessory, may be punished.

But for that enactment the Richardses could not have been indicted along with the principal. In *Rez. v. Greenacre and Sarah Gale* (8 Car. & P. 35), the two prisoners were indicted together, Greenacre for murder, and Gale, for that she, well knowing that the said Greenacre had committed the felony and murder aforesaid, feloniously did receive, harbour, and assist him. Tindal, C.J. in summing up said: "It will not be necessary in order to find the prisoner Gale guilty of the offence with which she is charged that the prisoner Greenacre should have been guilty of murder, but if he was guilty of another felony, viz., the offence of manslaughter, if she consorted with him, and knowing that he had committed the offence, assisted in any way to screen him from the hand of justice, it will

be sufficient." No doubt the dictum of Tindal, C.J., is against the prisoners, but his ruling was not questioned. Great prejudice may arise to an accessory if he is liable to be convicted of manslaughter when indicted with his principal for murder. If there be a charge of murder against four persons, two of whom are arrested and the other two escape, and all four are included in the same indictment, and another person is also included therein as an accessory after the fact for harbouring the four principals, is the accessory liable to be tried twice, first with the two prisoners who are taken, and then again subsequently when the other two are taken? This seems very hard when the punishment of accessories under the 24 & 25 Vict. c. 100, s. 67, is taken into account. Sect. 67 provides:

In the case of every felony punishable under this Act, every principal in the second degree, and every accessory before the fact shall be punishable in the same manner as the principal in the first degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act (except murder), shall be liable to be imprisoned for any term not exceeding two years, with or without hard labour; and every accessory after the fact to murder shall be liable at the discretion of the court to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and whosoever shall counsel, aid, or abet the commission of any indictable misdemeanor punishable under this Act, shall be liable to be proceeded against, indicted, and punished as a principal offender."

So that not only may an accessory after be tried twice for the one act of harbouring, but he may be convicted and suffer two sentences. [COCKBURN, C.J.—The offence is of harbouring each person. Although the four persons are included in the indictment, the offence is separate as to each, and the accessory is an accessory as to each. [MELLOR, J.—According to your contention two could not be acquitted of the murder and found guilty of manslaughter, but it is on the ground that all are separate offenders, that two may be found guilty of manslaughter, and two of murder.] In such a case could the accessory on the second trial plead *autrefois acquit* or *convict* on the first trial as a bar to the second? [COCKBURN, C.J.—No; for if A., B., C. and D. be indicted for murder, and A. only be in custody, and tried, *autrefois acquit* or *convict* on A.'s trial would be no bar on the trial of B., C. or D.]

J. J. Hooper, for the prosecution, was not called upon to argue.

COCKBURN, C.J.—We are all agreed that the conviction was right, and that the objection taken in arrest of judgment must fail. As to the difficulty of the accessory knowing how to plead upon being put upon his trial a second time, that was disposed of in the course of the argument. The harbouring of several offenders is a distinct offence of harbouring each of them, though the act may be of harbouring all jointly. That being so then comes the question upon which I entertain no doubt. Inasmuch as a man indicted for murder may be found guilty of manslaughter, so I think that an accessory either before or after the fact may be found guilty of being accessory either to the murder or to the minor offence of manslaughter of which the principal may be convicted. Indeed that proposition follows as a corollary. The conviction will, therefore be affirmed.

MELLOR, J.—I am of the same opinion. In this case four persons were jointly indicted for murder,

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and the jury might have found each of them guilty of murder or manslaughter according to the circumstances. It follows that an accessory, according as the case turns out, is liable to be indicted in respect of every offence contained in the charge of murder, and as the offence of manslaughter is included in the indictment for murder, in respect of manslaughter as well as of murder, the offence charged.

GROVE, J., LINDLEY, J., and HAWKINS, J. concurred.

Conviction affirmed.

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

Reported by E. S. ROCKE, Esq., Barrister-at-Law.

Wednesday, Feb. 21, 1877.

(Before JESSEL, M.R., JAMES and BAGGALLAY, L.JJ.)

NEWCOMEN v. COULSON.

Right of way—Award under Inclosure Act—Agricultural uses—Extension of properties.

By a deed of award made in 1760, under an Act for the inclosure of common lands in East Cotham, it was provided that the owners of certain parallel strips, having a common boundary line on the east, should have and enjoy "a way, right, and liberty of passage for themselves and their respective tenants and farmers of the said lands and grounds, as well on foot as on horseback, as with their carts and carriages, and to lead and drive their horses, oxen, and other cattle as often as occasion should require," from their respective allotments to a certain highway at the north-east corner of the lands over the east ends of the allotments "doing as little damage to the soil, or the corn, grass, or herbage," as might be.

The owners of one of the allotments were now converting it into building land, and had begun making a metalled road near the east end of the adjoining plots.

In an action by the adjoining owner for an injunction.

Held (affirming the decision of Malins, V.C.), that the user was not restricted to agricultural purposes, and that the right was not lost by the division of the dominant tenement into parts. The right was a general right of way for all reasonable purposes, and the defendants were therefore entitled to fit it for the purposes for which it was now intended to be used.

This was an appeal from a decision of Malins, V.C. An action had been entered claiming an injunction to restrain the defendants from erecting a bridge across a stream so as to rest upon or otherwise interfere with a piece of land belonging to the plaintiff situate at East Cotham, in the county of York, and from making a road upon the eastern boundary of the said piece of land, and from exercising any rights of ownership thereon, and from using the said piece of land otherwise than in accordance with their rights under an award made on the 23rd April 1760, whereby a right of road solely for agricultural purposes over the plaintiff's

piece of land was given to the owner and owners for the time being of certain lands situate to the south of and adjoining the plaintiff's piece of land, and now occupied by the defendants, and for damages.

By the award of the 23rd April 1760, which was made under an Act of Parliament (32 & 33 Geo. 2) for inclosing and dividing the common fields of East Cotham, the commissioners allotted and assigned to Nathaniel Agar seven acres and four perches of land lying in the common, and the commissioners ordered and awarded that Nathaniel Agar and other persons therein named, and the owner and owners for the time being of the lands thereby allotted to them, should for ever thereafter have and enjoy a way, right, and liberty of passage for themselves and their respective tenants and farmers, of the said lands and grounds, as well on foot as on horseback, as with their carts and carriages, and to lead and drive their horses, oxen, and other cattle as often as occasion should require from the common highway, leading from Redcar to the north-east end of Robert Agar's allotment, and from thence to the old inclosures called West Dyke Closes, in, over, and through the east end of their respective allotments, without interruption or paying any consideration for the same, doing as little damage to the soil or the corn, grass, or herbage as might be; and that in case the said Nathaniel Agar or any of the other persons named, or any of the owner or owners for the time being of their respective allotments, should street out the same way leading through their allotments the same should be made, and for ever remain, eleven yards broad at the least between the quicksets, but such way was not, nor was intended to be, admitted to be a right of way for any other person or persons whomsoever than as aforesaid. The defendants were the purchasers of land called the West Field, being part of the seven acres originally allotted to Nathaniel Agar, and they had recently laid out the said lands for building sites and intended to erect thereon a number of houses, and for the accommodation of such houses it was the defendants' intention to build a bridge over the stream, and to construct a macadamised road or street upon that portion of the land over which the beforementioned right of way was granted by the award.

The plaintiff was the lord of the manor and owner of the land adjoining that of the defendants, and his contention was that such right of way was intended only for agricultural purposes, and could not mean a paved road or street for the convenience of houses erected upon the allotments.

Upon a motion in the court below that the interim injunction, which had been granted, should be continued in the terms of the prayer as far as regarded the right of way, the question as to the right of building the bridge being given up by the defendants for the purposes of the motion;

The Vice-Chancellor considered that this was not like the case of a right of way or easement where there was a dominant and servient tenement, but a right of way over inclosed common land expressly awarded under the powers of an Act of Parliament. The right of the allottees was to use the road for their horses and cattle, carts, and carriages, passing from the common highway to the land in question. At the time of the award the land was used only for agricultural purposes,

but the allottees had full right to build houses, if they thought fit, upon their own land, and their tenants had, as usual, a right to use the road as they had. The award contained nothing about agricultural purposes, but it was a right of way for all purposes for which a road was required, and there certainly was nothing in the award by which the parties using it could be prevented from laying down the most approved materials in modern use for the construction of roads over which horses and carriages were to pass. He, therefore, refused the injunction as to the road, but the interim order would be continued as to the bridge.

The plaintiff appealed.

Higgins, Q.C. and Proctor, for the appellant, contended that the right of way was given solely for agricultural purposes, and that as the land had now been applied to new purposes, and had become severed, the owners of the severed portions could no longer exercise the right of way. Even admitting there was a right of way to each house, still the grant would not extend to entering upon the allotments for the purpose of laying down a metalled road. At all events, assuming the defendants had such a right, they were preparing to make their road before it was required, and were thus interfering with a valuable right of property in the enjoyment of which the plaintiff ought to be protected.

The following cases were referred to:

- Allan v. Gomme*, 11 A. & E. 759;
Bruntton v. Hall, 1 Q. B. 792;
Bower v. Hill, 2 Bing. N. Cas. 339;
Codling v. Higginson, 9 B. & C. 933;
Pomfret v. Bicroft, 1 Saund. 322;
Wood v. Saunders, 32 L. T. Rep. N. S. 363; L. Rep. 10 Ch. App. 582;
Dando v. Kingscote, 6 M. & W. 174;
Roubootham v. Wilson, 2 L. T. Rep. N. S. 642; 8 H. of L. Cas. 348;
Wimbledon and Putney Common Conservators v. Dixon, 33 L. T. Rep. N. S. 697; L. Rep. 1 Ch. D. 362.

Glasse, Q.C. and W. W. Karslake for the respondents, were not called upon.

JESSEL, M.R.—I think that this appeal cannot be maintained. The first question to be considered is what is the effect of the grant. Now, when you come to look at it, though not very artificially worded, you must consider what the nature of the rights of the parties to the grant were. It is, in fact, an old inclosure, and this is the way they carried out the inclosure in former times. All the allottees are parties to the deed, and then we find this: "That the commissioners do order, award, direct and appoint that the allottees"—naming them, beginning with Turner and the rest—"and the owners and owner for the time being of the lands thereby to them respectively allotted in the said upper half acre, shall for ever hereafter have and enjoy the way, right, and liberty of passage for themselves and for their respective tenants and farmers, of the same lands and grounds as well as on foot, as on horseback, as with their carts and carriages, and to lead and drive their horses, oxen, and other cattle as often as occasion shall require"—from one point to another point—"doing as little damage to the soil, corn, grass, and herbage thereof as may be"—that is, the people who use the way. Then there is a power to "stretch out the same way leading through their said respective allotments so that the same shall be made, and ever after remain eleven

yards broad at the least, and every part thereof between these points, but such way is not nor is intended to be admitted to be a right of way for any other person or persons whomsoever than as aforesaid." The first point made was this: It was said, it being a grant to the owners and owner for the time being of the lands, that if the lands became severed, the owners of the several portions could not exercise the right of way. I am of opinion that the law is quite clear the other way. Where the grant is in respect of the lands and not in respect of the person, it is severed when the lands are severed; that is, it goes with every part of the severed lands. That I should have thought was clear and well settled law, and consequently, when you find a grant in this shape, "to the owners and owner for the time being of the lands," it gives a right of way to the owner for the time being of every part of the land. That this is clear on principle I think is obvious to any one who considers the nature of the property. It never could have been imagined for a moment, in the case of an award like this, that the property should not be divided in any shape or way; nor is it to be contended that if a man died and left two or three daughters co-heiresses the right of way was lost, and that their allotments of the estate, which might be behind other allotments intervening between them and the highway, would be for ever deprived of all access whatsoever to the highway. Of course such a proposition is extravagant. But in addition to that I think the case is fairly covered by authority. In the first place there is the case of *Harris v. Drew* (2 Barn. & Ad. 164). That was a grant of a right to a pew by a faculty, and it was granted in this way: "To John Emery and his family for ever, and the owners and occupiers of the said messuage exclusively of all other persons." The plaintiff Harris occupied one room, part of the old house, which he had thrown into the new house; that is, he had converted a summer-house attached to the old house into a house, and had thrown in one room of the old house. But it was held that he had a right of action in respect of his occupation of one room, part of the old house. Lord Tenterden says: "The plaintiff was the occupier of the summer-house and of one room which was part of the old dwelling house. The faculty gave the right to the several persons who should be occupiers of the messuage to use the pew." And then Justice Littledale says: "I am of the same opinion. The plaintiff having a right by the faculty to use the pew, the churchwardens had no right to interfere as they did and were wrongdoers. It may certainly happen that, in consequence of a house being sub-divided, three or four families may become entitled to use the pew belonging to the original messuage." In that case there are the very words, "owners and occupiers." The same point in another shape came before the Court of Queen's Bench in the case of *Codling v. Johnson* (9 Barn. & Cr. 933). The marginal note is: "Where in trespass *quare clausum fregit* defendant prescribed in a *que* estate for a right of way over the *locus in quo*, and it appeared that the defendant's land had within fifty years been part of a large common and afterwards inclosed under the provisions of an Act of Parliament and allotted to the defendant's ancestor, held that, notwithstanding this evidence, the right claimed by the defendant's plea might in law exist, and the jury having found that in fact it did

exist, the court refused to disturb the verdict." Now, Mr. Justice Bayley says this: "It appears by the report that the jury were satisfied of the existence of this immemorial right of way. Suppose this land to have been part of the waste before the inclosure, then the lord might have the right for himself and his tenants to use the way, and then each person having allotments under the inclosure would have the right of way." Though you parcelled out the waste into an immense number of allotments, every allottee would have a right of way. It seems to me, therefore, both on principle and authority, that we must decide against the appellant. The next point made was this: It was said that this must mean a right to use the way only as long as the allotment was used for agricultural purposes. I cannot find anything of the kind here. The right is to "the owner and owners for the time being of the lands." Now, "land," according to English law, includes everything on the soil. You are the owner of the land if you put a building on it, or, as the Lord Justice reminds me, if you sink a coal mine under it. Therefore, it is not the owner even of the thing described as an agricultural field, though it might have been such at that time. Therefore he is still the owner of the land, though he builds a house, or, as it is said here, twenty-six houses on the land, and every owner of each house, with the soil on which it stands, would be an owner of part of the lands; and it is a grant to "the owner and owners thereof for the time being of the lands" allotted, that is, to the owner of every part of the land, and consequently to the owner of the house. I think that disposes of that objection. There is not a word in the grant to restrict it in any shape or way, and it could hardly be contended, irrespective of the technical meaning of the word "land," that in making this award the people imagined that, at no time thereafter, would any man erect on any part of these large allotments (which I see include old inclosures) any labourers' cottages or any house or dwelling of any kind, or even a stable for his horses. Of course such a thing must naturally have been in the contemplation of the parties, and I have no doubt that the word "land" is used advisedly. This being so, it appears to me the right is a general right of way—a right of way to all the houses which may be built on the land in question. Then it is said there are words to say that they shall not do more damage to the soil, corn, grass, &c., than may be. That obviously is put in for this reason. You may use the way without its being set out. There is a clause enabling you to set out—"to street out," it is called in the deed—but if you do not set it out, it means you shall only go from point to point in the shortest way, and as conveniently as may be, and you shall not walk over the field and damage the corn and grass more than is necessary. It appears to me these words by no means limit the right of the grantee to use the way for all reasonable purposes. Then the next point on it was this. It was said, "Admitting you have the right of way even to each house, still you have no right to enter upon the property of the plaintiff and of the allotments over which the right of way is granted for the purpose of laying down a metalled road." Now, as to that, it was conceded that the principle of law is that the grantee of a right of way has a right to enter upon the land of the grantor over

which the way extends for the purpose of making the grant effective—that is, so as to enable him to exercise the right granted to him. That includes not only the right of repairing—that is, keeping the road in repair—but the right of making a road. If you grant to me over a field a right of carriage way to my house, I may enter on to your field, and make into a carriage way such portions of that which was a field as will be sufficient to support a carriage and horses and the ordinary traffic of a carriage way; otherwise the grant would be of no use to me, because my carriage would sink up to the naves of the wheels in a week or two of wet weather in the middle of the field. It cannot be contended that the word "repair" used in such a case is limited to making good the defect in the original soil by subsidence or washing away by the weather; but it must include the right of making it into an effectual road which can be used for the purpose for which it is granted. Therefore I think the defendants have a right to make an effectual carriage way, going, as they are going, by the shortest route, and not interfering to a greater extent in width than the width of the street pointed out by the deed itself. The last point was this: It was said, "Assuming the defendant has such a right, at all events he has not that right now; he has not yet completely built his house or houses; they are only in process of building, and he is preparing to make his road before it is wanted—that is in anticipation of the house being built." As to that it appears to me that you must look at it in a reasonable way. If a man is building a house or houses, and he wants carts or carriages to go along it either to carry bricks and things for the actual building, or even with a view to the use of the inhabitants of the house when built, it is not reasonable to say, he is to wait till the last moment till his house is built and completed and somebody is going to inhabit it, and put them to the intermediate inconvenience of not having the use of the road to drive up to the house door. That does not appear to me to be reasonable. The reasonable thing is, that he may shortly, and by way of anticipation, do that which he would have, according to this agreement, the right to do the moment the house was completed. But there is an additional answer to that argument, and it is this, that it would not be a ground for an injunction. If the man is about completing the house, and it is admitted would have the right to make the road as soon as it was completed, the intermediate damage must be of the most trifling description. It must be the deprivation for that short time, not of the use of the grass because there is a carriage way over it, but of the value of the grass which would grow over the road which was continually traversed by men, horses, and carriages. To say a shilling damage would be too much—would be something, I think, very excessive indeed; and it is certainly not a case in which the court will interfere by injunction at all, nor was it really put on that ground. I must say it was argued that the plaintiff had a right of property—a valuable right of property—to protect, which was being interfered with. For these reasons it appears to me that the judgment of the Vice-Chancellor ought to be upheld.

JAMES, L.J.—I am of the same opinion. As to what was read from the Vice-Chancellor's judgment, about its not being an easement, I think

there must be some mistake in the report, or some slip in it. It is an easement, and our judgment is based on that fact. Those rights which the Master of the Rolls has declared to belong to the defendants (and I fully concur with him), those rights belong to the defendants as the owners of an easement—as the owners of the dominant tenement, as against the owner of the servient tenement. As to forming a substantial carriage road, I agree with the Master of the Rolls. The case is not in my opinion one-tenth part as strong or as difficult as *Dando v. Kingcote*, on which we are told the Vice-Chancellor proceeded.

BAGGALLAY, L.J.—I agree.

Appeal dismissed with costs.

Solicitors for the plaintiff, *Bower and Cotton*, for *Dodds and Co.*, Stockton-on-Tees.

Solicitor for the respondents, *J. Trotter*.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Reported by J. M. LELY and M. W. McKELLAR, Esqrs.,
Baristers-at-Law.

Thursday, April 19, 1877.

REG. v. MIDDLESEX JUSTICES; *Re SLADE*

Mandamus to hear appeal—Conviction quashed on point of form—Whether jurisdiction declined by quarter sessions—"Palmstry or otherwise"—5 Geo. 4, c. 83, s. 4.

By 5 Geo. 4, c. 83, s. 4, "every person pretending or professing to tell fortunes, or using any subtle craft, means, or device, by palmstry or otherwise, to deceive and impose on" any of Her Majesty's subjects, "shall be deemed a rogue and a vagabond" within the true intent and meaning of that Act, and may be committed by a justice of the peace to prison for three months.

S. having been convicted under the above statute, the conviction set out that he had used certain craft, &c., which craft was that he wrote words upon a slate, which he pretended to be written by the spirit of a certain person deceased, to deceive L. and D.; but the conviction omitted the words "by palmstry or otherwise," and was quashed by quarter sessions on that account.

Held, that it was a question for the sessions to determine whether the omission of the words rendered the conviction bad, and a rule for a mandamus to enter continuances discharged.

THIS was a rule calling upon the justices for the county of Middlesex to show cause why a mandamus "should not issue directed to them commanding them to enter or cause to be entered continuances from session to session to the next general quarter sessions of the peace in and for the county of Middlesex, upon the appeal of Henry Slade against a certain conviction under the hand and seal of Frederick Flowers, Esq., a stipendiary magistrate of the Bow-street Police Court, bearing date Oct. 31st, "whereby the said Henry Slade was convicted for that he on the 15th Sept. did unlawfully use certain subtle craft, means, and device to deceive and impose on certain of her Majesty's subjects, to wit, Edwin Ray Lankester and Horatio Bryan Donkin, and at such next general quarter sessions, to hear and determine the merits of the said appeal.

The following is an extract from the statute 5 Geo. c. 83, upon which the conviction was founded:

Sect. 4. "Every person committing any of the offences hereinbeforementioned [i. e. refusing to maintain himself when able, hawking without licence, begging in the public streets, &c.] after having been convicted as an idle and disorderly person; every person pretending or professing to tell fortunes, or using any subtle craft, means, or device, by palmstry or otherwise, to deceive and impose upon any of his Majesty's subjects; every person wandering abroad and lodging in any barn or outhouse, or in any deserted or unoccupied building, or in the open air, or under a tent, or in any cart or waggon, not having any visible means of subsistence, and not giving a good account of himself . . . shall be deemed a rogue and a vagabond within the true intent and meaning of this Act. And it shall be lawful for any justice of the peace to commit such offender to the House of Correction, there to be kept to hard labour for any time not exceeding three calendar months."

The following was the conviction appealed against, and from it will sufficiently appear the nature of the offence charged:

Metropolitan Police District to wit.—Be it remembered that on the 31st of Oct. A.D. 1876, at the Bow-street Police Court, in the County of Middlesex, and within the Metropolitan Police District, Henry Slade is convicted before me, the undersigned, one of the magistrates of the police courts of the metropolis, sitting at the police court aforesaid, of being a rogue and vagabond within the intent and meaning of the statute made in the fifth year of the reign of his late Majesty, King George IV., intituled an Act for the punishment of idle and disorderly persons and rogues and vagabonds in that part of Great Britain called England (that is to say). For that the said Henry Slade, on the 15th of Sept. 1876, at No. 8, Upper Bedford-place, in the county and district aforesaid, did unlawfully use certain subtle craft, means, and device, which subtle craft, means, and device were that the said Henry Slade did then and there write on a certain slate then and there produced by the said Henry Slade, certain words purporting to be, and which he intended to represent to Edwin Ray Lankester and Horatio Bryan Donkin as being words written on the said slate by the spirit of a certain person then deceased, to wit, Alice, the alleged deceased wife of the said Henry Slade, to deceive and impose on certain of Her Majesty's subjects, to wit, the said Edwin Ray Lankester and Horatio Bryan Donkin, then and there being, and for which said offence the said Henry Slade is ordered to be committed to the House of Correction at Coldbath Fields, in the County of Middlesex, there to be kept to hard labour for the space of three calendar months.

The following notice of appeal had been duly given:

Take notice that Henry Slade, of 8, Upper Bedford-place, Russell-square, in the county of Middlesex, gentleman, intends to enter and prosecute an appeal to the next general sessions of the peace to be holden at Westminster, in and for the county of Middlesex, against a certain conviction dated on or about the 31st day of October, 1876, and made by Frederick Flowers, Esq., one of Her Majesty's Justices of the Peace of the said county of Middlesex, whereby the said Henry Slade was convicted of having committed such offence as in the said conviction when drawn up shall or may appear. And further, take notice that the grounds of the said appeal are that the said Henry Slade is not guilty of the said offence, and also that the said magistrate had no jurisdiction in the said case, and also that the substance of the information or complaint was not stated to the defendant, nor was he asked if he had any cause to show why he should not be convicted, and also that the said Henry Slade was convicted without proper evidence having been heard after the said defendant was called upon to plead to the said charge.

At the hearing before the stipendiary magistrate he went fully into the facts and convicted the defendant as above set forth. But when the appeal came on to be heard the Assistant Judge ruled that the conviction was bad in law, inas-

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much as the words "by palmistry or otherwise" were omitted. An offer by the court to amend the conviction by the insertion of the words was refused by the counsel for the prosecution and an application by the counsel for the prosecution for a special case was refused by the court; and, without evidence having been heard on the facts, the Assistant Judge delivered a judgment in open court, to which the other magistrates made no objection, to that effect.

Massey for the defendant (*Beesley* with him), now showed cause. — In the first place there is no conviction in existence, in consequence of the decision of the stipendiary magistrate having been reversed on appeal. If, therefore, this rule should be made absolute, there would be nothing upon which the *mandamus* could operate. The order of justices reversing the conviction ought to have been brought up on *certiorari* and marked, as a preliminary step to the *mandamus* :

Reg. v. Dayman, 7 E. & B. 673 ;

Reg. v. Brown, 7 E. & B. 757 ;

Reg. v. Worcestershire Justices, 3 E. & B. 477 ;

Reg. v. Monmouthshire Justices, 7 D. & E. 334.

[*PER CURIAM*.—This rule for a *mandamus* might have been granted in the alternative; in any case we have the power to amend it, and should be disposed to do so if necessary.] Secondly, the justices have in fact exercised their jurisdiction, and this being so, their decision, whether right or wrong, cannot be questioned by this court. [For this he further cited the cases above.] There is no precedent to be found in the books of the court granting a *mandamus* in circumstances similar to these. And, however great the amount of evidence which might have been taken, the decision of the justices would have been the same on the point of law. Thirdly, the decision of the justices was right. [Upon this point he was stopped by the court.]

Staveley Hill, Q.C. (with him *Cooper*), in support of the rule, argued that the matter upon which the justices decided was preliminary only to the exercise of their jurisdiction. If this be so, all the authorities show that this court will grant a *mandamus* to hear and determine :

Reg. v. Carnarvonshire Justices, 2 Q. B. 325 ;

Reg. v. Yorkshire Justices, 5 B. & Ad. 667.

[*PER CURIAM*.—About the rule there is no doubt, but we cannot see the application of it to the present case.] He then proceeded to urge that the decision was not the decision of the majority of the Court of Quarter Sessions, but

Herschell, Q.C., who appeared for the Assistant Judge, objected that the point was not open, as it had been one of the grounds upon which the rule was applied for, but the rule had been refused so far as that ground was concerned. [MELLOR, J.—Until I looked at the statute (a) I was of opinion that the assistant-judge had a greater power than the statute gives him. By the statute,

(a) 7 & 8 Vict. c. 71. By this Act, sect. 8, the Crown has power to appoint a person being a serjeant-at-law or barrister-at-law of not less than ten years' standing, and in the commission of the peace for the county, to be the "assistant-judge" of Middlesex Sessions, "which said assistant-judge shall preside at the hearing of all appeals, and at the trial of all felonies and misdemeanours." By sect. 9 "the presence of another justice of the peace shall not be essential to the formation of the court in those cases in which it is directed by the Act that the assistant-judge shall preside; but nothing in the Act contained shall lessen the jurisdiction of the justices at the said sessions."

however, he presides, and delivers judgment as a matter of convenience, and if the other members of the court do not object to the judgment which he delivers, that judgment must be taken to be the judgment of the whole court. LUSH, J.—The same rule obtains with the judgment of this court.] That may be, because the judgments of this court cannot be reviewed on such a point, whereas it might be otherwise in the case of judgments of an inferior court.

MELLOR, J.—I have come to the conclusion that this court cannot interfere with the decision of the justices by granting a *mandamus* to rehear the appeal. The rule has been clearly stated in the argument to be that a *mandamus* will be granted to justices where, having jurisdiction, they decline to exercise it on a preliminary point, but that no *mandamus* will be granted unless the jurisdiction be declined. Now in this case there was no declining of jurisdiction. The objection was made that the conviction was bad, because it did not disclose an offence within the statute 5 Geo. 4, c. 84. At that point, no doubt, the magistrates might have amended the conviction, and I think that they were wrong in not doing so. However, they deliberately declined to amend, and gave judgment, quashing the conviction as it stood, coming to the conclusion, erroneous as I am inclined to think, that the conviction was wrong. The prudent course would have been to grant a case for the opinion of this court, but they refused to do so, and for this refusal they are not amenable to our jurisdiction. They simply come within the rule that, having exercised a jurisdiction of their own, we cannot, looking to the authorities on the point, review their decisions, whether by *certiorari*, *mandamus*, or otherwise.

LUSH, J.—I am of the same opinion. I own I arrive at this conclusion with great reluctance, as I am not sure that the judicial mind was applied to the substantial question in this case. I do not think that the omission of the words "by palmistry or otherwise" made any difference. If they had been inserted, the question would still have arisen whether an offence within the terms of the statute, as the means set out in the conviction as having been used cannot be said to be comprehended in the term palmistry, or to be of the nature of palmistry. However, the assistant judge has decided that the conviction was bad on the face of it, and this decision must be taken by us to have been concurred in by the court over which he presides, and cannot be reviewed by us. This rule, therefore, must be discharged.

Rule discharged.

Solicitors for the prosecution, *The Solicitors for the Treasury*.

Solicitors for the defendant, *Munton and Morris*.

Saturday, April 14, 1877.

REG. v. LAWRENCE.

False pretences—Spiritualism—Existing fact—
24 & 25 Vict. c. 96, s. 88.

Defendant was convicted of attempting to obtain money upon the false pretence that he had power to communicate with the spirits of deceased and other persons, although such persons were not present in the place where he then was; and also

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that he had power to produce and cause to be present, such spirits as aforesaid in a materialized or other form; and also that divers musical instruments, by the sole means of such spirits so caused to be present, produced musical and other sounds.

Held, upon a writ of error, that the defendant was thereby charged with falsely pretending an existing fact; and that the indictment so alleging the false pretence was good and valid within the statute 24 & 25 Vict. c. 96.

THIS was a writ of error upon an indictment for false pretences against Wm. Lawrence, who was convicted of an attempt to obtain the prosecutor's money under the second count, and sentenced to three months' imprisonment at the Middlesex Sessions, before Mr. Edlin, Q.C., the Assistant-Judge, and other justices.

The first count of the indictment was as follows:

Middlesex to wit. The jurors of our lady the Queen, upon their oath, present that Wm. Lawrence, on the 15th Oct. A.D. 1876, unlawfully, knowingly, and designedly, did falsely pretend to one, James Brooks Hulbert, that he, the said Wm. Lawrence, then had power to communicate with the spirits of deceased and other persons, although such persons were not present in the place where he, the said Wm. Lawrence, then was; and also that he, the said Wm. Lawrence, had power to summon, produce, and cause to be present in the place where he, the said Wm. Lawrence then was, such spirits as aforesaid in a materialised or other form; and also that divers musical instruments, to wit, tambourines and banjos, and divers bells, by the sole means of such spirits, summoned, produced, and caused to be present by him, the said Wm. Lawrence's power, produced musical and other sounds, by means of which said false pretences the said Wm. Lawrence did then unlawfully obtain from the said James Brooks Hulbert the sum of 1s. of the moneys of the said James Brooks Hulbert, with intent to defraud. Whereas in truth and in fact the said Wm. Lawrence had not power to communicate with the spirits of deceased and other persons, although such persons were not then in the place where he, the said Wm. Lawrence, then was; and whereas, in truth and in fact, the said Wm. Lawrence had not power to summon, produce, or cause to be present in the place where he, the said Wm. Lawrence then was, in a materialised, or other form, such spirits as aforesaid. And whereas, in truth and in fact, the said musical instruments and bells did not by the sole means of spirits of such persons summoned, produced, and caused to be present by him, the said Wm. Lawrence's power, produce musical and other sounds, as he, the said Wm. Lawrence, well knew at the time he so falsely pretended as aforesaid, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

The second count similarly alleged the same false pretence on the 20th Oct. 1876, whereby the said William Lawrence attempted to obtain the sum of one shilling from the said James Brooks Hulbert with intent to defraud.

The third and fourth counts alleged conspiracies to defraud, which were quashed by the court of quarter sessions.

Ignatius Williams argued for the defendant.—The objection to this indictment is that the pretence alleged is a mere matter of opinion, about which it is impossible to obtain proof. There must be a false pretence of a present or past fact; a promissory pretence to do some act is not within the statute. The pretended power to produce the spirits of deceased and other persons not present in a materialized or other form is a matter of general controversy, and has not yet been shown to be impossible by demonstration. Evidence was submitted that many persons doubted

about the cause of the results admittedly produced by the defendant.

Cooper appeared for the prosecution.

COCKBURN, C.J.—It is not necessary to hear any argument in support of the indictment, for it seems to me to be a perfectly clear case. The pretence alleged is that the defendant then had power to communicate with the spirits of the deceased and other persons, although such persons were not present in the place where the defendant then was, and also that the defendant had power to produce and cause to be present such spirits as aforesaid in a materialized or other form, and also that divers musical instruments, by the sole means of such spirits so caused to be present, produced musical and other sounds. The jury have found that the pretence of having this power was false, and with the evidence, facts, or other findings we have nothing whatever to do. The only question for us is whether the indictment can be sustained, and we have no doubt that the pretence as alleged is one within the statute. It would be very mischievous if it were supposed that money could be obtained upon such pretences as these, and that there could be a doubt about the remedy.

MELLOR, J.—I am of the same opinion. Mr. Williams' point is that the offence charged is not within the enactment in 24 & 25 Vict. c. 96, s. 88, the false pretence being required to be of an existing fact. The defendant states as a fact that he has power to do these various things, and the jury have found the statement to be false. We are only now on the form of the indictment, and I think it discloses a pretence of an existing fact.

Judgment for the prosecution.

Solicitor for prosecution, *Solicitor to the Treasury.*

Solicitor for the defence, *Hazeldine.*

Jan. 31, Feb. 1, and April 18, 1877.

GRECE (app.) v. HUNT (resp.).

Local board—Expense of sewerage private street—Works of private improvement—Private improvement expenses—Notice of apportionment—Demand of payment—Period of limitation for summary recovery—11 & 12 Vict. c. 43, s. 11; 11 & 12 Vict. c. 63, ss. 69, 90; 21 & 22 Vict. c. 98, ss. 62, 63.

An urban sanitary authority executed sewerage and other works in a street not being a highway, after due notice, as provided by sect. 69 of the Public Health Act 1848, and apportioned the expenses upon the respondent and other owners of the premises adjoining. The notice of apportionment was served upon the respondent on the 12th April 1875, by which the appellant, the clerk to the said authority, gave notice, amongst other things that the amount of the proportion of the expenses to be paid by the respondent, as settled by the surveyor, was 22l. 7s. This apportionment was not disputed by the respondent, and the expenses were never declared to be private improvement expenses. On the 31st July 1875, the appellant requested the respondent to pay the apportioned amount within fourteen days. On the 31st Jan. 1876, the appellant took summary proceedings to recover the amount, but the justices decided that

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the period of limitation for such proceedings was passed.

Held, upon a case stated, that sect. 62 of the Local Government Act 1858 requires a demand of payment not merely for expenses, which are technically private improvement expenses but also for all expenses incurred under the Act of 1848; that a notice of apportionment is not such a demand; and that these proceedings were taken in time, within 11 & 12 Vict. c. 43, s. 11.

This was a case stated by six of Her Majesty's justices of the peace in and for the borough of Reigate, under the statute 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of the court on questions of law which arose before them as hereinafter stated.

1. At a petty sessions holden at the Town Hall, in Reigate, in and for the borough of Reigate, in the county of Surrey, on the 15th May 1876, a complaint preferred by Clair James Grece, the clerk to the Urban Sanitary Authority (hereinafter called the "appellant"), against Henry John Hunt (hereinafter called the "respondent"), under sect. 150 of the Act 38 & 39 Vict. c. 55, charging for that a certain street called the Earlswood-road, not being a highway, was not sewered, levelled, paved, flagged, and channelled to the satisfaction of the mayor, aldermen, and burgesses of the borough of Reigate (being by their council the local board for the said borough), and such board did, by notice in writing to the respective owners of the premises fronting, adjoining, or abutting upon the said street, require them to sewer, level, pave, flag, and channel the same within a time specified in such notice; and that such notice not having been complied with, the said local board did execute the works mentioned or referred to therein, and that the expenses incurred by them in so doing, payable by the respondent according to the frontage of his premises, in such proportion as had been settled by the surveyor, were the sum of 22l. 7s., which sum had been lawfully demanded of the respondent as being such owner before and at the time when the said works were completed, but the respondent had neglected and refused to pay the same, was heard and determined by the said justices, the said parties respectively being then present, and upon such hearing they dismissed the said complaint.

2 and 3. And whereas the said appellant, being dissatisfied with this determination, as being erroneous in point of law, duly applied to the said justices to state and sign a case, they, in compliance with the said application, stated and signed the following case:

4. Upon the hearing of the complaint the said justices found as facts:

The appellants (who appeared by their clerk) are the council of the said borough, being the urban sanitary authority for the district of the borough of Reigate.

The respondent was, in the year 1873, and hath since continued the owner of certain premises abutting upon a private street, within the district aforesaid called Earlswood-road.

That a notice, dated 7th March 1873, was on the 8th March 1873, duly served on the respondent (as well as the other owners of property abutting upon the said street) requiring the owners to level, pave, and sewer the said private street.

That such notice not having been complied

with, the said urban sanitary authority did execute the works mentioned or referred to therein.

That on the completion of such works the surveyor to the said urban sanitary authority apportioned the expenses which had been incurred by the said urban sanitary authority, and a notice of apportionment bearing date 12th April 1875, of which the following is a copy, was duly served on the respondent on the 13th April 1875.

Copy of Notice of Apportionment.

No 87 on plan. To Henry John Hunt, of Station-road, Redhill, in the county of Surrey.

Whereas, the local board for the district of the borough of Reigate, in the county of Surrey, by notices in writing pursuant to the statutes in that behalf made and provided bearing date 7th March 1873, required you and others the owners of premises fronting, adjoining, or abutting upon a certain street called Earlswood-road, within the said borough, to sewer, level, pave, flag, and channel the same within the time and in the manner mentioned and specified in the said notices and according to the plans and sections deposited at the office of the said local board.

And whereas, the said notices not having been complied with by you within the time limited in that behalf, the said local board has executed the works mentioned or referred to therein.

And whereas the expenses incurred by the said local board in so doing amount to the sum of 638l. 1s. 3d.

And whereas, John Henry Cole Bowen Hornbrook, the surveyor to the said local board, has settled the proportions of the said expenses to be paid by the owners in default according to the frontages of their respective premises.

Now, therefore, the said local board hereby gives you notice that the amount of the proportion of the said expenses to be paid by you according to the frontage of of your premises upon the said street as so settled by the said surveyor is 22l. 7s.

Given under my hand this 12th April 1875. By order of the said local board.

CLAIRE J. GRECE,

Town Clerk and Clerk to the said Local Board.

The said justices also found that the respondent did not give written notice to the appellant that he disputed such apportionment within three months from the date of service of the notice of apportionment, as prescribed by the statute in that behalf.

That the said urban sanitary authority did not resolve and declare the said expenses should be private improvement expenses.

That the appellant, on the 31st July 1875, caused a copy of the notice annexed, marked B., being as follows:

Sir.—The apportionment made by the borough surveyor of the costs of executing the works of improvement to the road, of which you have had notice, having now become binding and conclusive, I have to request you to pay £ , the sum assessed upon you, to the treasurer, Mr. Wm. Stenning, of Brighton-road, Redhill, within fourteen days from this day, whose receipt will be your discharge.—I am, sir, your obedient servant,

CLAIRE J. GRECE,

Town Clerk.

Redhill, Surrey, 31st July, 1875.

To

to be served on the respondent, his name, and the amount due from him being filled in in accordance with the apportionment of expenses made by the surveyor.

That the respondent failed to pay the amount assessed upon him, and the appellant, on the 31st Jan. 1876, made the complaint hereinbefore referred to before Sir Valentine Fleming, Knight, one of Her Majesty's justices of the peace for the said borough.

5. It was contended, on the part of the respondent, that Jervis's Act (11 & 12 Vict. c. 43), s. 11,

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governed this case, and that the complaint was not made within six calendar months from the time when the matter of such complaint arose.

That if a notice of demand was necessary the said notice of apportionment served on the respondent on the 15th April 1875, was a sufficient demand.

That, at the expiration of the three months within which time the respondent could dispute the apportionment, viz., on the 13th July 1875, the matter of such complaint arose, and that the six calendar months allowed began to run from that date, and that, inasmuch as the complaint was not made by the appellant until the 31st Jan. 1876, it was too late, and that it must be dismissed.

It was also contended by the respondent that assuming a demand was necessary, and that the notice of apportionment was not a sufficient demand, and that the notice dated the 31st July 1875, served on the respondent on that day, was a sufficient and only demand by the appellant, and that the matter of such complaint only arose on the service of such notice, and began to run from such date; then that such complaint was not made in due time, because the notice having been served on the 31st July, and the complaint having been made on the 31st Jan. 1876, it was not within six calendar months as prescribed by Jervis's Act.

In support of his first contention respondent relied on the case of *Jacomb v. Dodgson* (32 L. J. Rep. 113, M. C.).

It was also contended by the respondent that inasmuch as the local board had not declared the said expenses to be private expenses, no notice of demand for payment was necessary, and that the only intimation the respondent was entitled to was the notice of the apportionment by the surveyor and the amount payable by the respondent.

6. On the part of the appellant it was contended that a notice of demand was necessary, that the notice of apportionment served on the respondent on the 13th April 1875, was not a demand, but that the notice served by the appellant on the 31st July 1875, was the first and legal demand.

That the matter of complaint did not begin to run from and after the expiration of the three months within which the respondent could dispute the apportionment, but from and after the service of the notice of the 31st July 1875.

That although such notice was served on the 31st July 1875, and the complaint was not made until 31st Jan. 1876, it was made within the six calendar months prescribed by Jervis's Act.

The appellant also relied on the 62nd section of the Local Government Act (21 & 22 Vict. c. 98).

The said justices, however, being of opinion that inasmuch as the local board had not declared the said expenses to be private improvement expenses, a demand for payment of the proportion was unnecessary; and that if any demand were necessary the notice of apportionment served on the respondent on the 13th April 1875, was a sufficient notice of demand, and being also of opinion that the matter of such complaint arose at the expiration of the three months after service of the said notice of apportionment, within which the respondent could dispute such apportionment, found that the complaint had not been made within six calendar months prescribed by Jervis's Act. And they being also of opinion that if a demand

were necessary, and if such notice of apportionment were not a sufficient demand, but the notice of the 31st July 1875, was the legal demand, they found that the complaint had not been made within the six calendar months prescribed by the Act aforesaid, and accordingly gave their determination against the appellant in the manner and on the grounds before stated. In coming to the above determination the said justices were guided by the case of *Jacomb v. Dodgson* (3 B. & S. 461), *Eddleston v. Francis* (7 C. B., N.S., 568), *Wilson v. Mayor of Bolton* (L. Rep. 7 Q. B. 105).

8. The questions of law arising on the above statement for the opinion of this court, therefore, are—

First. Whether, as the local board had not declared the said expenses to be improvement expenses, a demand was necessary, and if necessary whether the notice of apportionment was a sufficient notice of demand in point of law.

Secondly. Whether the matter of the complaint arose at the expiration of the three months after the service of the said notice of apportionment, or upon the service of the notice of 31st July 1875, and whether in either case the complaint was made within the time prescribed by 11 & 12 Vict. c. 43 s. 11.

9. And the court is humbly solicited according to the power vested in the court by the said statute 20 & 21 Vict. c. 43, to remit the case to the said justices, with the opinion of the court thereon, or to make such other order as to the court may seem fit.

Brown, Q.C. (with him *Glen*), argued for the appellant.—The expenses, which were duly incurred in this case under sect. 69 of the Public Health Act 1848 (11 & 12 Vict. c. 63), "may be recovered from the last mentioned owners (i.e. owners in default) in a summary manner, or the same may be declared by the order of the said local board to be private improvement expenses, and be recoverable as such in the manner hereinafter provided." Sect. 90 provides for the recovery of expenses "which by this Act are, or by the said local board shall be, declared to be private improvement expenses," from the occupiers by instalments over any period not exceeding thirty years. By sect. 63 of the Local Government Act 1858 (21 & 22 Vict. c. 98), in cases under the Act of 1848 where expenses are payable by owners, "and such expenses have been settled and apportioned by the surveyors as payable by such owner, such apportionment shall be binding and conclusive upon such owner, unless within the expiration of three months from the time of notice being given, by the local board or their surveyor, of the amount of the proportion so settled by the said surveyor to be due from such owner, he shall by written notice dispute the same." The question raised by this case is whether these expenses, although admittedly not technically private improvement expenses, must not be subject to the provision in the previous sect. 62 of this Act of 1858. "In all summary proceedings by a local board for the recovery of expenses incurred by them in works of private improvement, the time within which such proceedings may be taken shall be reckoned from the date of the service of notice of demand." If a notice of demand be necessary in this case, the appellant further contends that the notice of apportionment, which merely gives the contributors an opportunity of disputing the

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amounts claimed from them, cannot be such a notice of demand as this section refers to *Jacob v. Dodgeon* (3 B. & S. 461), is an authority that the six months' limitation of summary proceedings does not begin to run until after the expiration of three months from the notice of apportionment, and in that case a demand was made after the three months had concluded. No case treats a notice of apportionment as a demand for payment.

Labalmondiere v. Addison, 1 E. & E. 41;
Eddleston v. Francis, 7 C. B., N. S. 568;
Wilson v. Mayor of Bolton, L. Rep. 7 Q. B. 105.

Thesiger, Q.C. (with him *Fullarton*), for the respondents.—None of the cases touch this particular point, but they are all consistent with a distinction between private improvement expenses and those which are payable by the owners. There is, too, no form of demand given in any of the statutes, and it may well be that this notice of apportionment should satisfy the demand for payment required by the 62nd section of the Act of 1859. It contains all the necessary words, as much as the account in *Wilson v. Mayor of Bolton*, which Lush, J., considered a demand of payment.

Brown, Q.C., in reply. *Our. adv. vult.*

April 18.—FIELD, J. delivered the judgment of Mellor, J. and himself.—This is a case stated by justices of the peace for the borough of Reigate, for the purpose of obtaining the opinion of the court on certain questions of law. The appellants are the council of the said borough, being the urban sanitary authority for the district. The respondent is the owner of property within the district abutting upon a private street, not being a highway, called Earlswood-road, which street was not sewered, levelled, paved, flagged, and channelled to the satisfaction of the appellants. The appellants, on the 7th March 1875, in pursuance of the 69th section of the Public Health Act of 1848, gave notice to the respective owners of the premises fronting such street, requiring them to sewer, level, pave, flag, and channel the same within a specified time. Such notice not having been complied with by such owners, the appellants executed the works referred to therein, the expenses incurred in so doing amounting to the sum of 638*l.* 1*s.* 8*d.*, and on the completion of the works the appellants' surveyor, in accordance with the same section, duly apportioned the expenses which had been so incurred between the several owners in default, according to the frontage of their respective premises; and on the 12th April 1875, the appellants served upon the respondents a notice of such apportionment as required by the 63rd section of the Local Government Act 1858, by which they gave him notice that the amount of the proportion of the said expenses to be paid by him, according to the frontage of his premises, was 22*l.* 7*s.* The respondent did not give any notice to dispute the apportionment within the three months limited by the 63rd section, the effect of which was that the apportionment became binding and conclusive upon him. On 31st July 1875, the appellants, who have never declared that the said expenses should be private improvement expenses, served upon the respondent a notice requesting him to pay the said 22*l.* 7*s.* as assessed upon him to the treasurer within fourteen days, and the respondent not having paid the amount so assessed, the appel-

lants, on the 31st Jan. 1876, preferred the present complaint, by way of summary proceeding, for the recovery of that sum. The complaint came on to be heard before the justices on the 15th May 1876, when they dismissed the same, but submitted to us the following questions of law: First, whether, as the local board had not declared the said expenses to be private improvement expenses, a demand was necessary, and if necessary, whether the notice of apportionment was sufficient notice of demand in point of law; secondly, whether the matter of the complaint arose at the expiration of the three months after the service of the said notice of apportionment, or upon the service of the notice of the 31st July 1875; and whether in either case the complaint was made within the time prescribed by the 11 & 12 Vict. c. 43 s. 11. Upon the argument before us it was contended by Mr. Brown, on the part of the appellant, that a demand was necessary, and that the complaint was preferred in due time, as being within six months from the time of the service of the demand of the 31st July; and in support of this contention he relied upon the latter part of the 62nd section of the Local Government Act of 1858, which enacts that "in all summary proceedings by a local board for the recovery of expenses incurred by them in works of private improvement, the time within which such proceedings may be taken shall be reckoned from the date of the service of the notice of demand," which he contended applied to the complaint preferred. On the part of the respondent Mr. Thesiger admitted that if a demand was necessary, and if the notice of the 7th April was not (as he contended it was) a demand within the meaning of the statute, the complaint was duly preferred within six months from the time of the service of the demand of the 31st July, according to the general rule with regard to the computation of the time within which an act is to be done; and as we are of that opinion, we answer that assuming that the matter of complaint arose from the service of that notice of demand, the complaint was preferred in due time. Mr. Thesiger, however, denied that the latter part of the 62nd section was applicable to the present case, which he said was governed by the general enactment of the 11th section of the 11 & 12 Vict. c. 43; and he further contended, that even if a demand was necessary, the notice of apportionment of the 12th April amounted to such a demand, and that the period of limitation ran therefore from that date. Before stating the reasons which have induced us to come to a conclusion in favour of the appellant, upon the true construction of the 62nd section of the Act of 1858, it is advisable to refer to the general policy and provisions of the statutes bearing upon the questions standing for our decision. One of the principal objects of these statutes is to promote the public health by means of securing the execution of the works upon private property, calculated to render them healthy in themselves and innocuous to the public health; and the statutes, consequently, provide for the execution of such works in the first instance by the owners or occupiers of the property upon which they are to be executed, and in their default by the local authority. But inasmuch as these works, at the same time they subserve the public health, also improve the property upon which they are executed, the Legislature provides means for recouping to the public autho-

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ity the expenses thus incurred. In a case like the present, where the works are executed under the powers conferred upon the local authority by the 69th section of the Public Health Act 1848, there are two modes provided for recovering such expenses, first, the total amount of expense is apportioned amongst the owners of the premises supposed to be improved and benefited by the works, according to their several frontages, and then the amount so apportioned is to be recovered by summary proceedings taken by the local authority against such owners; secondly, by declaring the expenses to be private improvement expenses. The result of the first mode is to throw the expenses either in one sum or by instalments (sect. 146) upon the owners; that of the second is to throw the expenses in any event over a period of years (sect. 90), and so throw a portion of the expense upon the occupier or person having a less interest than the whole fee simple (sect. 91). The course of proceeding when the first mode is adopted is as above mentioned for the surveyor to apportion the total expenses of the execution of the works amongst the different owners of the land presumed benefited by their execution, according to frontages, and such apportionment is conclusive upon each owner at the expiration of three months from the service of a notice of the apportionment upon him: (Sect. 63 of the Act of 1858). The course of proceeding when the expenses are either by enactment private improvement expenses (sect. 76), or are declared by the local authority to be such, is for the authority to make a rate for the amount of expenses upon the occupiers of the premises in respect of which they have been incurred, called a private improvement rate, sufficient to discharge such expenses (sect. 90, Act of 1848), and to enforce the payment of the sum assessed in default of payment, "when due, and for fourteen days after demand in writing," by proceedings before a justice: (sect. 103). These being the general provisions of the statutes in question, the question upon which our judgment is asked arises, viz., Whether the latter part of the 62nd section of the Act of 1858 applies to the summary proceedings against the owners referred to in the 69th section of the Act of 1848, so as by implication to make a demand necessary, from notice of which the period of limitation is to be reckoned, or whether it is limited to the second mode of recovering the expenses incurred, viz., when they are declared to be private improvement expenses, and a rate is made upon the occupier. Now the present complaint is undoubtedly a summary proceeding, and in the language of the 62nd section the expenses are sought to be recoverable in a summary manner, and the only question can be whether the next following words in the 62nd section, viz., "incurred in works of private improvement" are used in the general sense of works executed upon private property, and tending to improve them, or are to be limited to expenses declared to be private improvement expenses, and for which a private improvement rate has been made. Now it must be observed that if the narrower sense is put upon these words, this branch of the 62nd section would be rendered superfluous: for as already pointed out by the express language of the 103rd section of the Act of 1848, proceedings cannot be taken to recover the sum assessed in a rate made for private improvement expenses, until

fourteen days after it has been lawfully demanded in writing, and as such a demand is therefore necessary to make the "matter of complaint" complete, the six months limitation provided by the 11 & 12 Vict. c. 43, applies to that, and the enactment of the 62nd section, if so limited, was therefore unnecessary. We think, therefore, we are well warranted in holding that when the Legislature says that the time is to be reckoned as in the 62nd section in "all" summary proceedings, their object was to extend the demand to proceedings like the present, in order that the owner liable might have a distinct written demand before he could be compelled to pay. It is no doubt true that in the 69th sect. a provision is made for giving the owner a notice of the apportioned sum which he is alleged to be liable to pay; but no such provision is found in sects. 49, 51, 54, 58, and 60, in which similar summary proceedings are provided for recovery of similar expenses, and without a demand the party liable would be exposed to proceedings the moment the works were completed, without having any means of knowing the amount of his liability, or that it had in fact accrued. We think, therefore, that the Legislature has designedly made use of the larger words, "works of public improvement," instead of the narrower ones, "expenses declared to be private improvement expenses." No doubt some little difficulty arises in this construction from the concluding language of the 62nd section, which, in speaking generally of the service of "notice of demand" as of a known and existing requisite, instead of specifically enacting that a demand shall be made, seems to imply the existence of some prior specific legislative enactment requiring a demand; but it is to be observed that in the 103rd section the demand is introduced in somewhat the same language of condition, and we do not think that this difficulty (if it be one) is sufficient to outweigh the course of reasoning which induces us to answer the first question put to us by saying that a demand is necessary, from which the six months in the 11th & 12th Vict. c. 43, s. 11, is to be reckoned. In the course of the argument various cases were referred to by one side or the other in support of their contention. The case of *Jacomb v. Dodgson* (3 B. & S. 461), which was first cited, is clearly an authority for holding that, at all events, the period of three months from the notice of apportionment, which is the period given to the owner within which he may dispute the apportionment, is to be excluded from the computation of the six months within which the complaint is to be made; but as in that case there was a demand made at the expiration of these three months, the decision does not appear to be in opposition to the conclusion at which we have arrived upon principle. The principle upon which the case of *Addison v. Labalmondiere* (1 E. & E. 41) is decided is in accordance with our decision; and the case of *Eddleston v. Francis* (7 C. B., N. S., 568), although at first sight apparently an authority to the contrary, is not so really, for although the case was decided after the passing of the Local Government Act of 1858, the proceedings in question in that case had taken place before its passing, and the court, upon that ground, declined to apply the 62nd section of the Act to proceedings commenced before its passing. This being so, the question then arises, whether the notice of apportionment of the 12th April was a sufficient demand, within

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the 62nd section, and we answer that question in the negative. Our reasons for this are that notice of apportionment is designed to fulfil a very different office from the notice of demand. It is a step in the machinery provided for the purpose of ascertaining the liability of the owner; there is not at the time it is served any liability to pay the apportioned sum, nor can there be until the lapse of three months afterwards, and in the event of the owner successfully disputing the apportionment, that sum so apportioned will never become due. What we think the 62nd section requires is such a document as shall bring clearly and pointedly to the mind of the person in default that he is then required to pay the sum which has been in some way found to be due from him. With these answers, therefore, we remit this case to the justices for further adjudication.

Judgment for appellant.

Solicitors for appellant, *Nicol, Son, and Jones.*

Solicitors for respondent, *Morrison, for G. Carter Morrison, Reigate.*

Solicitor for the justices, *J. Merrick Head.*

COMMON PLEAS DIVISION.

Reported by S. HARR, Esq. Barrister-at-Law.

Monday, April 23, 1877.

SOPER v. MAYOR OF BASINGSTOKE AND OTHERS.

Municipal election—Objection to nomination paper—Situation of qualifying property of seconder—Immaterial misdescription—Municipal Elections Act 1875 (38 & 39 Vict. c. 40).

Sub-sect. 2 of sect. 1 of the Municipal Elections Act 1875 requires that at any municipal election every candidate shall be nominated in writing subscribed by two enrolled burgesses of the borough or ward for which the election is held as proposer and seconder, and by eight other burgesses as assenting to the nomination. The first schedule to the Act provides a form of nomination paper, to which is appended a foot-note to the effect that "the number on the burgess roll of the burgess subscribing, with the situation of the property in respect of which he is enrolled on the burgess roll," must be added.

The situation of the property in respect of which a seconder of a candidate subscribed a nomination paper was entered as "High-street." The name had recently been changed to "Winchester-street." There was no dispute as to the identity of the seconder. The nomination paper was objected to as irregular, and the mayor allowed the objection, when the other candidates were returned without a contest. Upon appeal it was

Held that the misdescription was immaterial, and that the election was therefore void.

JOHN BURGESS SOPER presented a petition under the Municipal Elections Acts 1872 and 1875, to the court to the following effect. He stated that he was a candidate for the office of councillor of the borough of Basingstoke, at the election held on 1st Nov. 1876; that he was duly nominated by a nomination paper, subscribed by two enrolled burgesses of the said borough as proposer and seconder, and by eight other burgesses; that an objection was taken to his nomination paper before the mayor of the said borough, upon the ground that the situation of the property in respect of which his seconder

was enrolled on the burgess list was improperly described upon his nomination paper as being "High-street," whereas the property is described on the burgess roll as being "Winton-street;" that High-street is the name by which the street in question was and is generally known, its name having been very recently changed to Winchester or Winton-street; that no one could be misled by its being called High-street, and that the Mayor gave his decision allowing the objection, whereby the petitioner lost his election. The petitioner prayed that the election might be determined to be void. A special case was subsequently ordered to be stated for the opinion of the court, pursuant to 35 & 36 Vict. c. 60, s. 15, sub-sect. 6, and rule 37 of Michaelmas Term 1872.

The special case stated the facts above-mentioned, and set out the subscription of the seconder of the nomination paper as follows: "649, John Owen, of High-street." It added that the name painted upon the street in question is "Winchester-street." The question, therefore, left for the opinion of the court was, Whether the objection was good in substance? Should the court be of that opinion, judgment was to be given for the respondents; if otherwise, for the petitioner. Costs were to be in the discretion of the court.

Charles, Q.C. and Lord, for the petitioner.—The seconder was sufficiently described. In *Knowles v. Brooking* (2 C. B. 226), an objector's place of abode being wrongly described on the list of voters, he, in the signature to his notice of objection, gave his true place of abode, and not the abode mentioned in the register, and it was held that the notice was correctly signed. They cited

Bear v. Jones (a).

Crump, for the respondents.—The question is whether any address other than that on the burgess roll can be subscribed by a person nominating another for a municipal office. The burgess roll is the only document by which the mayor can be guided. In a large town it is impossible for the mayor to know every one, and in a small town he is not called upon to make use of what private knowledge he has. Under 5 & 6 Will. 4, c. 76, nominations were oral and not written, and the persons nominated could be identified. Sect. 142 of that Act provided for inaccuracies in voting papers. The Act which afterwards introduced nomination papers made no provision for inaccuracies in them, although it continued the saving clause of the earlier Act: (*Mather v. Brown*, L. Rep. 1 C.P. 659; 34 L. T. Rep. N. S. 869). So long as there is any inaccuracy it is immaterial in what part of the paper it is. The description must strictly comply with the requirements of the Act.

Reg v. Plenty, L. Rep. 4 Q. B. 346.

Calver v. Roberts, 25 L. T. Rep. N. S. 751.

(a) In *Bear v. Jones, Docwra, and Papillon*, a case heard in the Common Pleas Division on Jan. 20, 1877, the petitioner was nominated as a candidate for election to the office of councillor of the borough of Colchester; and it was objected to his nomination paper that his "place of abode" was entered as of "St. Botolph's House," whereas against his name on the burgess roll was entered "St. Botolph's House, Magdalen-street." The defendant Papillon, who was then mayor, allowed the objection.

Lord COLERIDGE, C.J. and GROVE, J. held that, taking a common sense view of the case, the place of abode was sufficiently described, there being no assertion that it did not sufficiently designate the residence of the candidate; and overruled the objection, with costs against all the respondents except the mayor.

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DENMAN, J.—Judgment must be for the petitioner, who says that High-street is the name whereby the street was and still is generally known, in which the property of his seconder is situate, that the name of the street has only very recently been changed from High-street to Winchester or Winton street, and that no one in fact was or could be misled by the description thereof as High-street, instead of Winchester or Winton-street; which facts are admitted by the respondents. The actual question is whether a person who signs a nomination paper as a seconder of a candidate for election to a municipal office, and uses his own name and number on the burgess roll, adding as his residence the house in which he really resides, but naming the street in which it is situate by a name which it recently bore, complies with the provisions of the Municipal Elections Act 1875. Our decision turns upon the construction of sub-sect. 2 of sect. 1 of that Act, which requires that every candidate for a municipal office shall be nominated in writing, and his nomination paper subscribed by two burgesses as proposer and seconder, and by eight other burgesses assenting to the nomination. It is not objected that the names and places are not mentioned, but that the descriptions vary from the form No. 2 by the first schedule to the Act required to be followed, at least in substance, by the sub-section above. But there is a foot-note to the exemplar signatures, "G. H., of . . ." &c., in the form requiring the addition of "the number on the burgess roll of the burgess subscribing, with the situation of the property in respect of which he is enrolled on the burgess roll." This provision, relating to the situation of the qualifying property, is the one upon which the dispute has arisen. It cannot be necessary that the description of a burgess upon a nomination paper should be exactly the same as that upon the burgess roll. There are many cases in which there may be a fairer description. For instance, a sub-division of a street may have taken place. A High street may have been divided into several streets, terraces, places, or crescents. No. 6, High-street, may have become No. 10, Gladstone-terrace. In that case the latter address would be more accurate than the former. All that is required by the Act is that the person should be identified, which is to be done by his name, his number upon the burgess roll, and the situation of the property in respect of which he is enrolled, being set out. Is there any authority to the contrary? The case of *Mather v. Brown*, which was cited by the respondents' counsel, is rather an authority against them, because the principle upon which the court there proceeded was that the case fell within the letter of the Act which it was bound to construe strictly. The mis-description there was about a matter as to which there could not be two things true, that is, as to the name of the candidate. His name was entered as "Robert V." for "Robert Vicars," and the ground of decision was that although "Will." or "Willm." are recognised at law as "William," the letter "W." alone is not; and therefore that "V." could not be recognised as "Vicars," that is, as the Christian name required by law to be set out. The subject matter also of that case is different from that of the present one. The other cases cited also differ. In them the person had changed his residence. I think the description "High-street" true in every material sense, because no

one could be misled; and that therefore the Mayor ought not to have held the nomination an improper one.

LORES, J.—I do not adopt the view that the description at the foot of the nomination paper should be actually identical, or in precisely the same words, as the description upon the burgess roll. The seconder should be so described that he may be identified. That he can be so here is not disputed.

Judgment for the petitioner, with costs against all parties except the Mayor.

Solicitor for the petitioner, *G. Mayor Cooke*.

Solicitor for the respondents, *Scott*, for *W. H. Bayley*, Basingstoke.

April 26 and 27, 1877.

CALDOW v. PIXELL. (a)

The Ecclesiastical Dilapidations Act 1871 (34 & 35 Vict. cap. 43), sect. 29—Surveyor's report—Provision as to time directory or imperative.

Sect. 29 of the Ecclesiastical Dilapidations Act 1871 requires the bishop of a diocese, within three months after the avoidance of a benefice, to direct the ecclesiastical surveyor to inspect and report upon dilapidations:

Held, that this requirement is, as to time, directory and not imperative, and that the right of action for them is not lost to an incoming incumbent by the bishop's delay.

An action was brought by the plaintiff to recover 117l. 16s. 6d. for dilapidations in respect of the benefice of Skirwith, in the diocese of Carlisle, claimed as due on an order alleged to have been made under the provisions of the Ecclesiastical Dilapidations Act 1871. After a demurrer by the plaintiff to the defendant's statement of defence had been set down for argument, by an order of court, a special case was ordered to be stated for the opinion of this Division.

The case set forth the following facts: The defendant resigned the said benefice on 3rd July 1874, and was succeeded by the plaintiff, who was admitted on 6th Jan. 1875.

On the 10th Nov. 1874, the Bishop of Carlisle directed the diocesan surveyor to inspect the buildings of the benefice of Skirwith, and to report to him, in accordance with the provisions of the above Act, what sum (if any) was required to make good the dilapidations for which the late incumbent was liable; and to send copies of the report to both incumbents; and to certify the dispatch of such copies. On 11th Jan. 1875, the surveyor inspected the said buildings, and reported that the sum of 118l. was required to make good such dilapidations. The buildings are situated in a position much exposed to high winds and bad weather. They remained unoccupied and unrepaired from 3rd July 1874 until 11th Jan. 1875, and the surveyor did not see them until the latter date. The defendant objected to the report on the ground that the inspection was not made within three months from the avoidance of the benefice, as required by sect. 29 of the above Act, but was delayed till after six months. The surveyor, being called upon to report the amount of repairs which might have become necessary during the six months after avoidance,

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certified the sum of 3s. 6d., which reduced the sum of 118l. to 117l. 16s. 6d., the amount sued for. On 31st March 1875, the bishop made an order stating at the above sum the amount for which the defendant as such late incumbent was liable.

The question for the consideration of the court was whether the plaintiff could recover from the defendant the said sum of 117l. 16s. 6d. This turned upon whether the words of sect. 29, namely, "within three calendar months after the avoidance of any benefice," are directory or imperative.

Gibbs, for the plaintiff.—The time is directory only.

Gleaves v. Marriner, L. Rep. 1 Ex. Div. 107; 34 L. T. Rep. N. S. 496;

Wright v. Davies, L. Rep. 1 C. P. Div. 638; 33 L. T. Rep. N. S. 858;

Rochester v. The Queen, E. B. & E. 1024;

Reg. v. Ingalls, L. Rep. 2 Q. B. Div. 199; 35 L. T. Rep. N. S. 552.

The court must consider the balance of convenience.

Staveley Hill, Q.C. and *J. Edge*, for the defendant.

—The cases cited refer to delay in the performance of public duties, and not of private ones. They quoted

Cripps' Law of the Clergy, 318;

Howard v. Boddington, decided 27th Feb. 1877, by Lord Penzance.

Faus v. Vollans, 4 B. & Adol. 525;

Bowman v. Blyth, 7 E. & B. 26.

Sect. 33 requires that the incumbent shall send in to the Bishop his objection to the surveyor's report within a month, but the Bishop may receive an objection transmitted at a later period. There are no such qualifying words as to time in sect. 29.

DENMAN, J.—In this case judgment will be for the plaintiff. The question is one which is thrown out as doubtful, and not decided, by Bramwell and Amphlett, BB., in the case of *Gleaves v. Marriner*. Our attention has been called to a short statement by them in that case, in which they expressed a kind of doubt whether the section upon which this case turns is only directory. Is sect. 29 then directory, or imperative, so far as regards the first four words, "within three calendar months?" It has been held in *Gleaves v. Marriner*, that, so far as any rate as the surveyor is concerned, there is no fixed time within which he is bound to inspect and report; but it is now contended that the clause as to time must be strictly construed as against the bishop, and that if he gives his direction to his surveyor to report a day too late the whole transaction will become null and void; and the order of the bishop one upon which no action can be brought. Now sect. 53 enacts that without such an order no sum shall henceforth be recoverable in respect of dilapidations, and it is contended by the defendant that this section prevents any action from being brought which is not supported by an order made strictly under the provisions of this Act. But I think that is putting too narrow a construction upon the words used in that section, "unless the claim for such sum be founded on an order made under the provision of this Act." They are capable of a milder construction, and there are many analogous cases upon the construction of Acts of Parliament in which strong words directing particular acts to be done under their provisions have been held to mean acts done substantially in pursuance of an intention to follow the provisions of such Acts.

Such cases would not, certainly, be authorities for giving the words of this Act a loose construction; but in my opinion they are sufficient to enable us to hold that an order may be made by the bishop, which would not be vitiated by delay in giving directions to the surveyor, and that we should construe sect. 29 to be directory only. Upon this question, whether the words of sect. 29 are imperative or directory, so far as I can find, it would not be easy to lay down a stricter rule than that laid down by Lord Campbell in the case of *Liverpool Borough Bank v. Turner* (2 D. F. & J. 502; 3 L. T. Rep. N. S. 474), mentioned by Sir Peter Maxwell in his work upon the construction of statutes, who says (p. 331), "When a statute commands that something shall be done, or done in a particular manner, the important question arises, when the statute is silent respecting it, whether the command is to be considered as a mere direction or instruction of no obligatory force, and involving no invalidating consequences for its disregard; or as imperative, with an implied nullification for disobedience. No rule can be laid down for determining this question beyond the general one, that it depends on the scope and object of the enactment. Though a command to do a thing in a particular way does not necessarily imply a prohibition to do it in any other way, it would, nevertheless, clearly imply it, if, without it, the command would be nugatory, and the aim and object of the Legislature defeated." In the same work a number of authorities are cited, and two or three other observations are worthy of mention, because they fairly sum up the doctrines of law upon the subject. At page 333 the author says, "A strong line of distinction may, in general, be drawn between cases when the provisions affect a public duty, and those which relate to a privilege or power. When powers and privileges are granted, subject to compliance with certain regulations or conditions, it seems, in general, not contrary to justice or policy to exact a rigorous observance of them, and it is therefore probable that such an observance was deemed essential by the Legislature. But when a public duty is imposed, and the statute requires that it shall be performed in a certain manner, or within a certain time, it is difficult to believe that the Legislature intended the injustice and inconvenience to others which would result if the act to be done were of no legal validity, unless the directions of the statute were strictly observed. In general, then, it seems where a statute confers a privilege or a power, the regulative provisions which it imposes on its acquisition or exercise are essential and imperative." A broad line of distinction is drawn further on, at page 337, "On the other hand, where the prescriptions of a statute relate to the performance of a public duty, they seem to be generally understood to be merely instructions for the guidance and government of those on whom the duty is imposed, or directory only. The neglect of them may be punishable, indeed, but it does not affect the validity of the act done in disregard of them. To give them that effect would often lead to serious inconvenience and absurdity." The author proceeds to give illustrations, and then adds, at page 340, "In all cases, however, the question as to the Legislature intending a provision to be imperative or directory, in the sense above-mentioned, whether it arises in respect of a power or duty, or otherwise, is to be determined by

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weighing the consequences of either view. Where the Legislature has expressed no intention on the point, that intention should be imputed to it which is most probable; and it must be that which is most consistent with reason, and a due regard to convenience and justice." Applying these principles, which we are warranted in doing upon the cases which are cited in the work, on every ground the words of the enactment before us must be held to be directory, and not imperative. In the first place, the statute is not one which for the first time confers a power or a privilege. It deals with the existing right of recovering for dilapidations, but says that they shall be recovered in a different way. It gives an action to the actual incumbent, both for his own benefit and for the benefit of the living, and imposes upon the bishop the duty of setting the proceedings in motion; and there is an appeal against the order of the bishop when it is made upon the surveyor's report. Then, this is a statute imposing a public duty upon the bishop for public purposes, that is, for enabling proper steps to be taken to compel payment of money, due from an outgoing incumbent, or his estate, for repairs required to be done to the buildings of his benefice, into Queen Anne's Bounty Fund; and it only makes the plaintiff the instrument of carrying out the previously existing rights. The bishop, having thus a public duty to perform, the mere fact that he neglects to perform it at the proper time, does not render the provisions of the Act void; and on this ground it is reasonable to assume that the section was intended to be directory and not imperative. Upon both grounds, therefore, that this is not a statute conferring a power or a privilege, but one which imposes a public duty, the section must be held to be directory. But there is also a higher ground, namely, that of convenience and justice. There are no words making the clause imperative. If we were so to hold it, we should in effect take away the right of action for dilapidations in the event of the bishop delaying for one day only to direct the surveyor to inspect. The whole right of an incoming incumbent to recover against an outgoing incumbent would be gone, and the latter would be free from all liability at law. This would give rise to grave inconvenience, and defeat the intention of the Act. If, on the contrary, we hold the section to be directory only, we should not prevent the bishop for acting, even if he were to be so far wrong as not to comply with the requirements of the Act as to time; and if he acted unfairly there would be an appeal, bringing with it a review of the report of the surveyor and of the order of the bishop. Here the defendant has had all the benefit of an appeal, although he neglected to take advantage of his right to require a re-survey because he thought the words of the section imperative. Mr. Gibbs has cited many cases before us. They all relate to the non-appointment to office—mostly of persons who are to act in public capacities in relation to the poor—and are open to the observation that where a large number of the public are concerned things would come to a stand-still if provisions relating to time were imperative; and the Court of Queen's Bench has so decided, and has given a remedy for a delay by way of *mandamus*. This case is not of such general importance, but I cannot measure a public duty by degrees. The case cited by Mr. Stavelly Hill, on the other

side, to support his contention, is the recent one before Lord Penzance. That case is not like the present. It was under the Church Discipline Act, and the whole jurisdiction was of a criminal nature, and depended upon the movers in the matter giving their opponent notice. It is not, in fact, so strong as the case of the non-observance of time to appeal. It is founded upon the previous decision in *Vaux v. Volland*, a (proceeding also of a penal nature under 57 Geo. 3, c. 99, s. 40, in which notice is required to be given before action in certain cases), and decided that there was no *locus standi* to sue for a penalty unless certain preliminary proceedings were taken. After carefully considering the cases, I can recognise the distinction between a power or a privilege, or a procedure given by an Act subject to condition or to time, and the case of a pre-existing duty for public purposes in the performance of which a public officer is not limited as to time.

LOPES, J.—This is an important case, and I have had doubts upon it during the course of the argument; but upon the whole I think the plaintiff ought to succeed. I shall not repeat what my learned brother has so fully gone into, but I agree with him that sect. 29 is directory and not imperative. The scope, object, and intention of the Act of Parliament was to strike a balance of inconvenience between the action of the old incumbent becoming null and void, and the injury and delay caused to the new incumbent.

Judgment for the plaintiff, with costs.

Solicitors for the plaintiff, *Gray and Mounsey*.

Solicitors for the defendant, *Miller and Smith*.

CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, April 21, 1877.

(Before COCKBURN, C.J., MELLOR, GROVE, LINDLEY, and HAWKINS, JJ.)

REG. v. J. S. SCOTT.

Indictment—Perjury—Averment of materiality.
An indictment for perjury stated that an action was brought in the Chancery Division, in which the prisoner was the plaintiff and W. the defendant, that it came on for hearing before the Vice-Chancellor, that the prisoner did appear as a witness, and did falsely swear that he never did employ O. and H. as his solicitors, and that he never executed any mortgage or deed relating to the property claimed in the action, and that the allegation in the statement of defence in the action that he executed the deeds in the statement of defence mentioned was untrue, "and the said false statements so upon oath made by the prisoner were material to the matters then in issue before the Court."

Held, upon motion in arrest of judgment, that the indictment was good, and that the averment of the materiality of the perjury assigned was sufficient.

To prove that the action was pending, the copy of the writ of summons filed under the rules of the Judicature Act, and a copy of the pleadings in the action, and the order dismissing the action, were produced.

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Held sufficient without the original writ of summons. CASE reserved for the opinion of this Court by the Recorder of the City of London.

At a session of the Central Criminal Court on Monday, the 9th April 1877, James Stanford Scott was tried before me on an indictment of perjury, of which the following is a copy :

Central Criminal Court to wit: The jurors for our lady the Queen upon their oath present that heretofore an action was brought in the Chancery Division of the High Court of Justice, in which James Stanford Scott was the plaintiff, and William Wood, John Wood, and others, were defendants, and the said action came on for hearing upon the 16th Feb. 1877, before the Hon. Sir James Bacon Knight, one of the Vice-Chancellors of the Chancery Division of the High Court of Justice, at his court at Lincoln's Inn, in the county of Middlesex, and that the said James Stanford Scott did upon the said 16th Feb. aforesaid appear as a witness upon the hearing of such action, and was duly sworn to give true evidence therein, and the said James Stanford Scott did then upon his oath so taken as aforesaid falsely, corruptly, knowingly, maliciously, and willingly depose and swear, amongst other things, in substance and to the effect following, that is to say, that he, the said James Stanford Scott, never did in any way employ or consult as his solicitors Messrs. Overton and Hughes, who carried on business as solicitors at 25, Old Jewry; that he never executed any mortgage or deed relating to the property claimed by him in the said action, and that the allegation in the statement of defence in such action that he executed the deeds in such statement of defence mentioned was an untrue statement, and that he did not execute any of such deeds. Whereas in truth and in fact the said James Stanford Scott did employ and consult the said Messrs. Overton and Hughes as his solicitors, and did execute divers mortgage and other deeds relating to the property claimed by him in such action, and the said allegation in the said statement of defence was a true statement, and the said James Stanford Scott did execute some or all of such deeds, and the said false statements so upon oath made by the said James Stanford Scott were material in the matter then in issue before the court, and the said James Stanford Scott did thereby commit wilful and corrupt perjury against the peace of our lady the Queen, her crown and dignity.

There were three other counts in the indictment also objected to, but as the court expressed no opinion upon them, it is unnecessary to set them out.

To prove that the action mentioned in the indictment was pending, and was tried as alleged, the documents annexed to the case were tendered in evidence. No. 1, which is the copy (filed under the Rules) of the original writ of summons. No. 2 is a copy of the pleadings in the action. No. 3 is the original order to dismiss the action. Nos. 1 and 2 were produced from the Record and Writ Clerks' office, and No. 3 was produced by the solicitor for the defendants in the action.

It was objected by counsel for the prisoner that the original writ of summons in the action was the necessary, and in fact the only evidence receivable to prove that any action was pending, and that as there was no evidence that it was lost, and no notice to produce the original writ had been given to the prisoner, who was the plaintiff in the action, the document produced was no evidence, even if it had been signed according to rule 7; and it was also objected that it was not so signed.

It was also objected that the other documents produced, viz., Nos. 2 and 3, were in the absence of the writ not receivable in evidence as proof of the pending or trial of any action.

I received the evidence tendered, and the jury found the prisoner guilty.

Thereupon the prisoner's counsel moved in arrest

of judgment upon the ground that the indictment was bad, because upon the authority of the case of *Reg. v. Goodfellow* (Carr. & Mar. 589) the allegation of the materiality of that which the prisoner swore was bad. Secondly, because even if held sufficient to allege the materiality in such a manner the indictment was defective and bad, for the allegation in the first count alleged that the false statements of the prisoner were "material to the matter then in issue before the court," and the count did not allege what issue or matter was then before the court.

For the purposes of the day I held the indictment to be sufficient, but I respited judgment, and ordered the prisoner to remain in gaol unless he entered into recognizance in 500*l.*, with two sureties in 250*l.* each for his appearance to receive judgment, and reserved for the Court for the Consideration of Crown Cases Reserved the questions :

First, whether the evidence of the pending and trial of the action was lawfully and properly received by me.

Secondly, whether the indictment was good upon motion for the reasons aforesaid in arrest of judgment.

If the evidence was properly received by me, and the indictment is sufficient, the conviction is to be affirmed. If the evidence was not properly received the conviction is to be reversed, or if the indictment is insufficient, judgment is to be arrested.

(Signed) RUSSELL GURNEY.

Willis, Q.C. (Gill with him) for the prisoner.—The indictment is defective. The averment in the count, "the said false statements so upon oath made by the said J. S. Scott were material in the matters then in issue before the court" is insufficient, for it cannot be collected from that what the issue was. The ordinary and usual form of pleading is to allege first, that there was an action pending, and then that it became and was a material question in such action, setting out the material question. The effect of the authorities is this, that the indictment must contain an allegation that a question (stating what it was) became material, that the statements deposed to by the defendant were false; and that they were material to the question in issue. The averments must be such that the court may be able to judge from them whether the answers were material to the issue. The question of materiality is one for the court, not for the jury to determine. Suppose a defendant had falsely sworn that he had not been convicted of felony, the indictment must state that it became a material question whether the defendant had been convicted of a felony. In 3 Russ. on Crimes, 62 (edit. 1865), it is thus stated: "It is necessary that it should appear on the face of the indictment that the oath taken was material to the question depending. But it is not necessary to set forth in the indictment so much of the proceedings of the former trial as will show the materiality of the question on which the perjury is assigned, and it will be sufficient to allege generally that the particular question became a material question." [MELLOR, J.—In Roscoe on Criminal Evidence, 826 (edit. 1874) it is stated: "It must either appear on the face of the facts set forth in the indictment that the matter sworn to and upon which the perjury is assigned was material, or there must be

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an express averment to that effect." In *Reg. v. Bennett* (2 Den. C. C. 240, and 20 L. J. 217, M. C.) the indictment averred "that upon the trial of the said indictment, the following questions became and were material," and then it stated the questions. All that this indictment avers is at the conclusion, that the false statements of the prisoner were material to the matters then in issue. In *Reg. v. Goodfellow* (Oar. & Marshman 569), it was held that in an indictment for perjury an averment "that it became and was material to ascertain the truth of the matter hereinafter alleged to have been sworn to and stated by the said J. G. upon his oath" was not a good averment of materiality. In that case, Patteson, J., after consulting with Cresswell, J., said: "As to the allegation of materiality, I am of opinion that that allegation is clearly bad; it seems to me to be quite absurd to say that it became material to ascertain the truth of what the witness stated. The witness's statement itself must be given to ascertain the truth of something which has become material to the inquiry before that statement has been made. Therefore, if the materiality of the evidence did not appear from the other allegations of the count, I should hold the allegation to be quite insufficient. I am inclined to think the materiality does so appear, but it is unnecessary to decide that question, since the first objection is of itself fatal to the count." In *Res v. Nicholl* (1 B. & Ad. 24), Bayley, J. said: "In the case of perjury the indictment must shew either by a statement of the proceedings, or by other averments that the question to which the offence related was material." That was a writ of error, and Bayley, J. said: "We know nothing of the merits of the case except from the indictment." In *Reg v. Dowlin* (5 T. R. 311), it was held that the averment "that at and upon the said trial it then and there became and was made a material question whether," &c. was a sufficient averment of materiality, but in the present indictment there is nothing equivalent to such an averment. In *Lane's case* (Oro. Eliz. 148) the prisoner was "indicted for perjury for that upon an issue in such a matter between parties he did falsely depose, &c., but showed not how the issue was, nor how the deposition trenching to the point of the issue, and he was discharged." For all that appears the prisoner in this case may have executed a deed which may have been altogether immaterial to the issue. *Reg v. Aylett* (1 T. R. 63), shows the proper way in which the averment of materiality should be framed, "that it then and there became and was a material question on the hearing of the said complaint before, &c. whether the said A. was taken and arrested." *Reg. v. Cutts* (4 Cox C. C. 435), was also cited upon this point. The second question is whether the evidence of the pending and trial of the action was sufficient. It was insufficient, as the original writ was not produced.

Gorst, Q.C. for the prosecution.—The statement of claim in the action, which was in evidence, states the writ to have been issued on such a day.

Cockburn, C.J.—We must assume everything up to the trial to have been regular unless the contrary was proved. But here we have all the proceedings and cannot fail to see that an action was pending.

Gorst, Q.C. (*E. Clarke* with him) for the prosecution was not called upon to argue.

Cockburn, C.J.—I am of opinion that the first

count is sufficient, and that the conviction must be affirmed. In all the counts it is alleged that the false statements so upon oath made by the prisoner were material in the matter then in issue before the court. It has been contended before us that that averment is not sufficient, and that it must appear on the record that the false statements were material to the matter in issue by showing what the matter in issue was, so that the court, in case of a demurrer, should have the means of judging whether such false statements were material or not. There is a distinction between the first count and the three other counts. In the first count I think that the proposition of law for which Mr. Willis has contended is satisfied, and that there is enough on the face of that count to show what the issue was before the Vice-Chancellor, and how far the evidence of the prisoner was material to that issue. My judgment is not founded on the last three counts, which it is unnecessary to consider, as I think that the first count is good. The first count is free from difficulty, as we can gather from it what the issue before the Vice-Chancellor was, and form our opinion as to the materiality of the prisoner's false evidence upon it. Now I gather from the first count that the prisoner was plaintiff in an action before the Vice-Chancellor, and that he sued therein to recover certain property, and that he had executed a mortgage relating to that property; and I further infer from the count that the answer to the action was that he had executed some deed by which he had divested himself of the present right to that property; and that on being asked, when giving his evidence in the action, whether he had ever executed such a deed, and employed Messrs. Overton and Hughes as his solicitors, to prepare such deed, he swore that he had not, and that that evidence was false and untrue, and that it was material to the issue. That appears to be the substance of the defence to the action, and the prisoner by his evidence negatived the fact of his having executed the deed. That evidence was material to the issue, and, therefore, I think that sufficient appears in the first count of the indictment, though it is stated in an inartificial way. As to the second question reserved for our opinion, that was disposed of in the course of the argument.

Mellor, J.—I am of the same opinion. It must not be forgotten that this objection was taken in arrest of judgment and after the verdict. Upon the whole, I think that sufficient appears in the first count to show that there was an action in the Vice-Chancellor's Court in which the prisoner was the plaintiff, and claimed certain property, and was a witness, and that he deposed to the following effect, that he never employed Messrs. Overton and Hughes as his solicitors, and that he never executed any mortgage deed relating to the property claimed by him, and that the allegation in the statement of defence in such action that he did employ Messrs. Overton and Hughes as his solicitors, and did execute the deeds therein mentioned, was an untrue statement, and that he did not execute any of such deeds. The count then negatived the truth of the prisoner's evidence, and contains an averment that the said false statements were material to the matters then in issue. The count seems to me to contain all the necessary elements, though it is to be regretted they are alleged in an inartificial form.

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GROVE, J.—I am of the same opinion.

LINDLEY, J.—I am of opinion that the first count of the indictment is sufficient. The objection is that the count does not show with sufficient certainty for the court to judge whether the untrue statements of the prisoner were material to the issue in the action before the Vice-Chancellor. The count, as I think, says first that the prisoner was plaintiff in an action; secondly, that in the action he claimed certain property; thirdly, that it was intended to set up by way of defence to the claim that certain deeds were executed by him; fourthly, that the prisoner denied on his oath that he executed any such deeds; fifthly, that such denial was untrue; and, sixthly, that such denial was material to the issue. The statement that he executed certain deeds, which the prisoner denied, was the very thing relied on in support of the defence.

HAWKINS, J.—I am of the same opinion.

Conviction affirmed.

Saturday, April 28, 1877.

(Before COCKBURN, C.J., MELLOR, GROVE, LINDLEY, and HAWKINS, JJ.)

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Skating rink—Music licence—25 Geo. 2, c. 36, s. 2. A skating rink, in London, was open to the public on payment of 1s. each person and 6d. for the use of skates. A band of six musicians performed in the evening from 7 p.m. to 10 p.m.

Held, that a music licence was required by the 25 Geo. 2, c. 36, s. 2, and that the person who kept the rink without such licence was subject to an indictment for keeping a place for public music and for public entertainment of a like kind to dancing.

At the general Quarter Session of the Peace holden at St. Mary, Newington, in and for the county of Surrey on Tuesday the 2nd Jan. 1877, John Mann and Robert Tucker were tried on an indictment of which the following is a copy:

Surrey to wit: The jurors for our lady the Queen upon their oath present that John Mann and Robert Tucker, on the 1st Oct. 1876, and on divers other days between that day and the day of taking this inquisition in the Blackfriars-road, in the parish of Saint George the Martyr, Southwark, in the said county of Surrey, and within twenty miles of the cities of London and Westminster, unlawfully did keep and maintain a certain place for public dancing and music, situate in the said road and parish aforesaid, and within twenty miles of the cities of London and Westminster, without a licence had for that purpose from the last preceding Michaelmas Quarter Sessions of the Peace for the county aforesaid signified under the hands and seals of four or more of the justices there assembled at such sessions according to the directions of the statute in such case made and provided; the said dancing and music not being lawfully exercised and carried on under or by virtue of any letters patent, or licence of the Crown, or licence of the Lord Chamberlain of Her Majesty's household, to the great damage and common nuisance of all the liege subjects of our said lady the Queen contrary to the form of statute in such case made and provided and against the peace of our lady the Queen, her crown, and dignity.

Second count. That the said John Mann and Robert Tucker, on, &c., and on divers other days between that day and the day of taking this inquisition in the Blackfriars-road, &c., unlawfully did keep and maintain a certain place for public music without a licence had for that purpose from the last preceding Michaelmas Quarter Sessions of the Peace holden for the said county in which the said place is situate as aforesaid.

Third count. And the jurors aforesaid upon their oath aforesaid do further present that the said John Mann and Robert Tucker on the 1st Oct. 1876, and on divers other days between that day and the day of taking this inquisition in the Blackfriars-road in the parish of Saint George the Martyr, Southwark, in the said county of Surrey, and within twenty miles of the cities of London and Westminster, unlawfully did keep and maintain a certain place for public entertainment of a like kind to an entertainment for public music and dancing, without a licence had for that purpose from the last preceding Michaelmas Quarter Sessions of the peace holden for the said county, in which the said place is situate as aforesaid, to the great damage and common nuisance of all the liege subjects of our lady the Queen, contrary to the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown, and dignity.

Fourth count.—That the said John Mann and Robert Tucker on, &c., and on divers other days between that day and the day of taking this inquisition in the Blackfriars-road, &c., unlawfully did keep and maintain a certain room for public dancing, music, and other entertainment of a like kind, without a licence had for that purpose, from the last preceding Michaelmas Quarter Sessions of the peace holden for the said county in which the said room is situate as aforesaid.

Fifth count.—That the said John Mann and Robert Tucker on, &c., and on divers other days between that day and the day of taking this inquisition in the Blackfriars-road, &c., unlawfully did keep and maintain a certain house for public music and dancing and other entertainment of a like kind, without a licence had for that purpose, from the last preceding Michaelmas Quarter Sessions of the peace holden for the said county in which the said place is situate.

Sixth count.—That the said John Mann and Robert Tucker on, &c., and on divers other days and between that day and the day of taking this inquisition in the Blackfriars-road, &c., unlawfully did keep and maintain a certain ill governed and disorderly house and place for public music and other entertainment, and in the said house and place for his own lucre and gain did cause and procure divers persons as well men and women of evil fame and name and of dishonest conversation to frequent and come together to the great damage and common nuisance, &c.

From the evidence it appeared that the defendant Tucker kept a skating rink in the Blackfriars-road, in the parish of Saint George the Martyr, Southwark, in the county of Surrey, and therefore within twenty miles of the cities of London and Westminster as defined by the 2nd section of the 25 George 2, c. 36, intituled "An Act for the better preventing thefts and robberies, and for regulating places of public entertainment, and punishing persons keeping disorderly houses" without a licence from the last preceding Michaelmas Quarter Sessions of the peace for the said county for "public dancing, music, and other public entertainment of the like kind," or by virtue of letters patent or licence of the Crown, or the licence of the Lord Chamberlain.

The rink was inclosed by a high wall, and was partly covered by a canvas roof and was partly open to the air.

An orchestra was built, and there was a band of six persons who performed upon two violins, a harp, a double bass, a cornet, and a flute. Selections of operatic and dance music were played while the people skated on Plimpton's roller skates.

The rink was open to the public for some hours during the day, and also at night for 7 p.m. to 10 p.m. No music was played during the day; but at night the band played between 7 and 10 p.m.

About fifty persons were present, some of whom were skating, and some were sitting around the rink.

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Each person was charged 1s. on admission, and 6d. for the use of the skates.

The following handbill was distributed inside and outside the building :

SOUTH METROPOLITAN SKATING RINK,
Temperance Hall, Blackfriars-road, next to Pea-
body's Buildings,

Now Open

From 10.30 a.m. to 1 p.m., 2.30 to 5.30, and from 7 to 10 p.m.

Admission 1s.

Plimpton's skates, 6d.

LONG'S SURREY BAND

will be in attendance each evening, and discourse some of the choicest selections of operatic and dance music, including the celebrated Shadow Dance, so suitable for the skating rink.

There was no case against the defendant Mann, and I therefore directed the jury to acquit him.

It was contended by counsel that the music was not a main part of the entertainment, but only subsidiary to the skating (*Guagliemi v. Matthews*, 34 L. J. 116, M. C.); that skating was not dancing within the statute, nor did the entire performance in any sense come within the words of the above statute, as being a "public entertainment of the like kind," i.e., to public dancing or music.

On the part of the prosecution, the case of *Hall v. Green* (9 Ex. 247; s. c. 23 L. J. 15, M. C.) was relied on as showing that the music need not be a principal or essential part of the entertainment.

In explaining the indictment to the jury, I left it to them to say whether music was the main part of the entertainment, or only subsidiary thereto, whether skating with music in the manner described by the witnesses, and in the published handbill, was or was not dancing and music within the meaning of the statute, or if not, whether it was or was not a public entertainment of the like kind to public dancing or music.

The jury found the defendant guilty on the first and third counts of the indictment.

Counsel on behalf of defendant objected that skating was not dancing, and that the evidence did not disclose any entertainment within the meaning of the statute.

Judgment was respite for the purpose of taking the opinion of the Court for the Consideration of Crown Cases Reserved on these objections.

If the court shall be of opinion that the objections of counsel for the defendant are valid, the conviction will be quashed, if not the conviction will be affirmed.

The defendant was admitted to bail on his own recognizances in the sum of 100l.

(Signed) WM. HARDMAN,

Chairman of the Court of Quarter Sessions.

Lane for the defendant.—The indictment is framed upon the 25 Geo. 2, c. 36, s. 2; which enacts "that any house, room, garden or place kept for public dancing, music, or other public entertainment of the like kind in the cities of London and Westminster, or within twenty miles thereof, without a licence had for that purpose from the quarter sessions, &c., shall be deemed a disorderly house or place . . . and every person keeping such house, room, garden, or other place, without such licence, shall forfeit the sum of 100l. to such person as will sue for the same, and be otherwise punishable as the law directs in case of dis-

orderly houses." It is conceded that the statute must be construed distributively, and that a person keeping a house, &c., either for public dancing or public music, is within the statute. In this case the defendant was acquitted upon the third count, which charged him with keeping a place for public music without a licence. To bring a person within the statute for keeping a place for public music, the music must be a principal and independent part of the entertainment. In *Guagliemi v. Matthews*, the appellant kept a circus constructed of wood for equestrian and gymnastic performances, including tight rope dancing. There was a brass band of six performers, which played the usual circus music, and waltzes, polkas, quadrilles and galops. The local act upon which the appellant was proceeded against was in the same terms as the 25 Geo. 2, c. 36, s. 2, and Cockburn, C.J., said, "There are ample facts upon which the magistrates can arrive at a conclusion one way or the other; but from the way they have stated and left the case to the court, I doubt whether they have not proceeded to convict on an erroneous view of the statute. There can be no doubt that this was a public entertainment, but the magistrates have not found whether the music was merely subsidiary or formed a substantial part of it. Although there was some music or dancing, if it was merely subsidiary they ought not to have convicted; but if it was a principal or essential part of the entertainment, the conviction would be right." [COCKBURN, C.J.—If this place is not kept for public music, it will make no difference that the music played happened to be dance music.] The principal and main purpose of this rink was that people might come and skate. [MELLOR, J.—The expense is greatly increased by having a band, which was no doubt intended as a means of attracting persons to come to the rink.] But the music is not the main thing, it is subservient to the skating, and was intended to facilitate and aid persons in using the skates. In a circus it may be said that the music is an additional attraction equally as much as in a skating rink. The case of *Hall v. Green* was not a decision upon the point, and the observation of Parke, B. amounts to no more than a *dictum*. As to the words in the 25 Geo. 2, c. 36, s. 2: "other entertainment of a like kind," they are very general words, and if this case is not within the words "music or dancing," it would be difficult to bring it within those general words.

Bealey (*Tickell* with him) for the prosecution.—The offence is for keeping a house or place for public dancing, music, or other entertainment of a like kind. The cases suggested of music at a public dinner or in a barrack yard, and similar cases are not within the Act, as the place is not kept for public music. It is now settled that the words of the Act for public dancing, music, or other public entertainment of a like kind are distributive, and that the justices may, if they think fit, grant a licence for music only. If the place is kept for the performance of public music, the number of performers is not material. In *Bellis v. Beal* (2 Esp. 592) the defendant kept a tavern, and had a large tea room in which was an organ, and the evidence was, that one Lowndes, an organist, usually played upon it, but that other persons were permitted to play if they chose. It was contended that there was no offence against the 25 Geo. 2, c. 36, s. 2, and that the music was but

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a secondary consideration. Lord Kenyon, C.J., who tried the case, said: "The construction ought to correspond with the intention of the Legislature; it is not like the case of an inn or place of that description. Here there was a regular opening of the room from Easter to Michaelmas; there was an organist who attended regularly, whether he was paid or not makes no difference. The true construction of the Act of Parliament is, that this is a room for musical entertainments, and the defendant is therefore subject to the penalty." In *Gregory v. Tuffs* (6 Car. & P. 271) a man was seated on an elevated seat in the tap room of the defendant's house, and persons danced, but no money was taken for admission. This occurred on more than twelve different nights between the 1st July and the 21st Sept. In summing up the case to the jury, Lyndhurst, C. B. said: "I agree that the mere occasional or accidental use of a room for the purpose of music or dancing is not within this Act of Parliament, but the case cited does not apply, as the room there was hired by a gentleman of the Jewish persuasion for the use of his friends during the Passover, and it was therefore, for the time, his private room. I am of opinion, that to bring a case within this Act of Parliament it is not essential that the room should be used exclusively for this purpose, nor is it necessary that money should be taken for admission. One can easily understand that a person keeping a public-house would find it to his interest to have an attraction to draw persons in great numbers to his house, as it would remunerate him without his receiving moneyspecially for admission into the room . . . The case comes to this, are you satisfied that this room was kept by the defendant for the purpose of public dancing?" In *Gregory v. Tavernor* (3 Car. & P. 280) there was a room in the defendant's public-house, from 40ft. to 50ft. long, with a bar at one end, and about fifty persons were dancing on eleven different nights, the music consisting of two violins and a bass, the musicians being seated on elevated seats. Gurney, B., in summing up, said: "It is not by any means necessary that the room should have been kept for the purpose of music or dancing only. If it was continually used for those purposes it will be for you to consider whether it was not kept for them. A room may be kept for drinking, music, and dancing, but if music was one of the purposes for which it was kept it is a case within the Act of Parliament." In *Hall v. Green* (9 Ex. 247) an action against the proprietor of Evans's Hotel, Covent Garden, to recover a penalty for keeping a room for public music and other entertainments without a licence, Parke, B. said, "My present impression is, if the jury had been merely instructed that if they should be of opinion that the principal object for which the place was kept open was to supply refreshments, the musical entertainment being only accessory thereto, then the case would not fall within the meaning of the Act of Parliament. If there be musical entertainment regularly carried on in a house to which the public have admittance, my present opinion is that such a place is within the Act of Parliament, although the place be used principally for supplying meat, drink, and so forth, and the musical entertainment is merely collateral to that purpose." *Frayling v. Messenger* (16 L. T. Rep. N. S. 332), and *Garrett v. Messenger* (*ibid.* 414) were then cited. In *Brown v. Nugent* (L. Rep. 6 Q. B. 693) it was held that

under the 25 Geo. 2, c. 36, ss. 2, 3, justices may grant a licence for music only, and that such licence will not extend to dancing. Upon the authorities it is submitted that a licence was required, as the place was kept for the purpose of music as well as skating. Secondly, rinking is clearly an entertainment of a like kind to dancing.

COCKBURN, C.J.—Whatever may be our opinion as to the merits of this piece of legislation, we must interpret and apply it as we find it. According to the Act every house, room, garden, or other place should be licensed if kept for public dancing, music, or other entertainment of a like kind in the cities of London or Westminster, or within twenty miles thereof. Now, the jury have found the defendants guilty of keeping a place for public dancing and music as charged in the first count, and of keeping a place for public entertainment of a like kind to an entertainment for public music and dancing without a licence within the prescribed limits. Rinking may or may not assume the form and character of dancing, but there is nothing stated in the case to show what was the course pursued in this particular rink. Rinking in itself, I think, is not dancing, unless it is converted into dancing by the persons engaged in it. I think, therefore, that the conviction cannot be sustained on the first count, on the ground that there is nothing to show that dancing was carried on at this rink, the first count charging that the defendant kept a place for public dancing and music. The jury, however, may have thought that rinking was dancing, and therefore returned their verdict against the defendant on the first count. But then there is this difficulty, the jury have acquitted the defendant on the second count, which charges the defendant with having kept a place for public music without a licence, and the first count, as I have said, is for keeping a place for public dancing and music. I am of opinion that they ought to have found the defendant guilty upon the second count for keeping a place for public music without a licence, and acquitted him upon that count which charges him with keeping a place for public dancing and music without a licence. If the music was an independent part of the entertainment it is within the statute which prohibits the keeping of a place for public music within the limits of the Act without a licence. We do not, by our decision, overrule the decision in *Guaglieni v. Matthews*, for it is not necessary for the present case either to affirm or question that decision which proceeded on the ground that if music was not a thing for which the place was kept open, but was altogether a subordinate thing that was not within the contemplation of the Legislature in this statute. But that does not apply when music is an integral part of the entertainment, and if it is so, it is then within the statute. Looking at the facts stated in the case I do not find that the music was subordinate to skating, or necessary to assist it. Music was resorted to as a means of attracting people to the rink, and as an inducement to them to pay for admission, and that being so the case is within the statute. The jury having found the defendant not guilty of keeping a place for public music I should not like to uphold the conviction upon the first count, which is inconsistent with the acquittal upon the other, inasmuch as rinking is not necessarily dancing, and there is nothing to show that rinking as carried on in the present case

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was of that character. But, as to the third count, which charges the defendant with keeping a place for public entertainment of a like kind to an entertainment for public music and dancing, the entertainment must be of a like kind to dancing or music. If rinking is analogous to either it is within the statute. It certainly is not analogous to music, but it is said to be analogous to dancing. If the skates are used for dancing, and the music is subsidiary to it, then rinking is analogous to dancing. If you want music to facilitate persons while rinking to imitate dancing, then it assumes the character of dancing, and if the place is kept open for such entertainment from 8 p.m. to 10 p.m., or any other hours, it is within the mischief of the Act. In this case music was resorted to as something in addition to rinking.

MELLOR, J.—I agree in almost all that has been said by the Lord Chief Justice; but at the same time, having regard to the rule applied to the construction of indictments, I do not see why the conviction may not be sustained on the first count, if the defendant has been guilty of keeping a place for either public dancing or music without a licence. I agree that, in order to sustain the conviction on the third count, the entertainment must be of a like kind to public music or dancing. Here the rinking was accompanied by music, which affects the action we are told, and it was, therefore, analogous to dancing. I also think that the music had independent attractions in this case. I, therefore, think the conviction may be sustained both on the first and third counts of the indictment.

GROVE, J.—I also am of opinion that the conviction may be sustained upon the first count as well as upon the third count. Rinking, *per se*, may be more analogous to dancing than skating. At first rinking was merely skating on roller skates, but by degrees it has come to bear a close proximity to dancing. It can be performed on boards, and quadrilles, waltzes, &c., are now performed on skates with rollers to assist the motion. We must look to the nature and character of the entertainment. Rinking to music on an asphalt surface or boards seems to me more analogous to dancing than to skating on ice. If the first count had stood alone I should have thought the conviction good, as the words of the statute are in the disjunctive, though in the indictment they are put in the copulative. If the defendant was guilty of keeping a place either for public music or dancing he was guilty of the offence created by the statute. It is said there is a difficulty in sustaining the conviction on the first count, as that would be inconsistent with the verdict of acquittal on the count which charges the defendant with keeping a place for public music only. That seems to me to have arisen from some misapprehension by the jury of the direction to them. Technically, however, I think the conviction was right on the first count.

LINDLEY, J.—I agree that the conviction was right on the third count if not also on the first count. The statute prohibits the keeping without licence, within certain limits, three classes of places (1) for public dancing, (2) for public music, (3) for entertainments of a like kind with public dancing or music. As to the first count, if the jury thought that rinking was dancing in skates on wheels, the conviction might be upheld. But the finding of the jury on the first count may be taken distribu-

tively, and the conviction upheld if the defendant was guilty of keeping a place either for public dancing or music.

HAWKINS, J.—I agree with the Lord Chief Justice.
Conviction affirmed.

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT WESTMINSTER.

Reported by F. B. HUTCHINS and W. ARFLETON, Esqrs.,
Barristers-at-Law.

Wednesday, April 11, 1877.

(Before Lord COLERIDGE, C.J., and BRAMWELL and BRETT, JJ.A.)

DUKE OF DEVONSHIRE v. HEMATITE STEEL COMPANY (LIMITED).

Rating of iron mines—Deduction from royalties—Reservation in lease—Liability of lessor—The Rating Act 1874 (37 & 38 Vict. c. 54), s. 8.

By sect. 8 of the Rating Act 1874, where the lessee of a mine was before the Act exempt from being rated to any poor or other local rate, he may (unless he has specifically contracted to pay such rate in the event of the abolition of the said exemption), deduct from any rent, royalty, or dues payable by him, one half of any such rate paid by him.

The plaintiff and defendants contracted in a lease of iron mines that the rent and royalties payable by the defendants, the lessees, should be free and clear of and from all rates, taxes, tithes, rent-charges, expenses and deductions whatsoever, parliamentary, parochial, or of any other nature. The defendants deducted from their royalties half of the rates paid by them under this Act, and the plaintiff brought this action to recover the deduction.

Held (affirming the judgment of the Queen's Bench Division), that this section of the statute overruled the reservation in the lease, and that the defendants were not liable for the half of the rates which they had deducted.

APPEAL by the plaintiff from the judgment of the Queen's Bench Division (Cockburn, C.J., and Lush J.), reported 35 L. T. Rep. N. S. 474, where the special case and the material sections of the Rating Act 1874 (37 & 38 Vict. c. 54), are set out.

C. Bowen (Muir Mackenzie with him), for the plaintiff.—The construction put upon 37 & 38 Vict. c. 54, s. 8, by the court below would produce injustice and inequality, for it would affect lessors and lessees of mines differently, according to whether the mines were let on longer or shorter leases. If the Legislature had intended to make existing contracts of no avail, they would have used clear language for that purpose, as in the Property Tax Act (5 & 6 Vict. c. 35), s. 73. He referred to

Brewster v. Kitchell, 1 Lord Raymond 817.

A. Wille, Q.C. and Edwyn Jones, for the defendants, were not called on.

Lord COLERIDGE, C.J.—This seems a very clear case. I am of opinion that the judgment of the Queen's Bench Division was a perfectly

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proper judgment. I wish to adopt the reasons given by Cockburn, C.J., and to decide in favour of the defendants on the same grounds.

BRAMWELL and BRETT, J.J.A. concurred.

Judgment affirmed.

Solicitors for both parties: *Currey, Holland, and Currey.*

Feb. 2 and 31, 1877.

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Libel—Report of proceedings of board of guardians—Privilege—Public interest.

A newspaper report, containing libellous matter, of proceedings at a meeting of a board of guardians is not privileged.

At the meeting of a board of guardians of a poor law union, the conduct of the medical officer of the union was discussed, and accusations of neglect of duty were made against him. A reporter for a local paper belonging to the defendants was present, and the defendants published in their paper a full account of the proceedings at the meeting. The plaintiff thereupon brought an action for libel against the defendants.

Held (affirming, but on different grounds, the judgment of the court below), that the defendants were liable, as the report, although it might be of a matter of public and general interest, contained libellous statements made "ex parte" against the plaintiff, and no rule of privilege applied to protect the publishers of it.

APPEAL from a decision of the Common Pleas Division.

The action was for libel.

Statement of claim.

1. The plaintiff was at the time of committing the grievance hereinafter mentioned, and still is, a physician and surgeon practising at Knutsford, in the county of Chester, and was and is also the duly appointed medical officer of the Knutsford Workhouse at Knutsford, which said workhouse is within the Altrincham Union for the administration of the laws for the relief of the poor.

2. The defendants were at the time of the committing of the grievance hereinafter mentioned, and still are, the printers and publishers of a daily newspaper called the *Manchester Courier and Lancashire General Advertiser*, printed and published at Manchester, and having a wide circulation, in particular in Lancashire and Cheshire.

3. The defendants, being such printers and publishers as aforesaid, on the 30th Dec. 1875, falsely and maliciously printed and published of and concerning the plaintiff, and of and concerning him in his said profession of physician and surgeon, and of and concerning him in his said office of medical officer as aforesaid, in the said newspaper, the words following, that is to say: "More alleged neglect at Knutsford workhouse. At the fortnightly meeting of the Altrincham board of guardians yesterday, Mr. Fullalove, the chairman of the house committee, reported that a few days ago an inmate of the house, John Oldham, of Bollington, was taken seriously ill, and the master sent a messenger for the doctor (meaning thereby the plaintiff), at about seven o'clock in the morning. He (meaning thereby the plaintiff), did not arrive in forty minutes; the porter went to his (meaning thereby the plaintiff's) house, and told him (meaning thereby the plaintiff) that the

man was dying, and that he should walk about the front of his (meaning thereby the plaintiff's) house until he (meaning thereby the plaintiff) came. On the visit of the porter, the doctor (meaning thereby the plaintiff) went to the bedroom window. When the doctor (meaning thereby the plaintiff) did arrive the man was dead. The chairman (Mr. J. Ambler) observed that, if the doctor (meaning thereby the plaintiff) had come when first desired, he would probably have seen the man alive. Mr. Fullalove said that when the porter went to fetch him (meaning thereby the plaintiff) he was in bed. Mr. Taberer, the master of the house, said that that was the third time the doctor (meaning thereby the plaintiff) had served him like that. On a recent occasion, a man was brought in a cab from Wilmslow at 12 o'clock at night. The doctor (meaning thereby the plaintiff) was sent for, but he (meaning thereby the plaintiff) did not come until a quarter-past two; he (meaning thereby the plaintiff) kept five of them waiting up two hours for him. Mr. Green, Wilmslow, said that that was perhaps the most serious charge which had been brought against the doctor (meaning thereby the plaintiff). A man was found to be dying, where upon a boy was despatched for the doctor (meaning thereby the plaintiff), and told him (meaning thereby the plaintiff) that a man was very poorly. Subsequently the porter went; and the doctor (meaning thereby the plaintiff) paid little attention to him, although he stated that the man was dying. The fullest inquiry should be made. The case assumed a very serious aspect; and, if the case were good, the doctor (meaning thereby the plaintiff) ought to be called upon to resign." The board decided to hold an inquiry into the charges preferred against the doctor; meaning thereby and imputing to the plaintiff thereby that the plaintiff had been and was guilty of gross misconduct in his profession of physician and surgeon as aforesaid, and in his office of medical officer as aforesaid, and had acted in his said profession and in his said office negligently, improperly, and with great cruelty; whereby the plaintiff had been and was greatly prejudiced and injured in his credit and reputation, and his profession of physician and surgeon as aforesaid, &c. The defendants admitted the allegations contained in paragraphs 1 and 2 of the plaintiff's statement, that the words set forth in paragraph 3 of the plaintiff's statement were printed and published by them, but they denied the other allegations in that paragraph contained. The defendants alleged that they were public journalists, and that the said words were printed and published by them as such public journalists, in a public journal, *bonâ fide*, without malice, and for the public benefit, and not otherwise, and were and are a correct, fair, impartial, and honest report and account of proceedings of public interest and concern. Issue joined.

At the trial before Brett, J., at the Spring Assizes of 1876 at Manchester, a verdict was by consent entered for the plaintiff, damages 40s. (with certificate), leave being reserved to move to enter a verdict for the defendants if the court should be opinion that the publication was privileged, it being admitted to be *bonâ fide*, and a correct account of what passed at the meeting described.

May 16, 1876.—*Edwards, Q.C.* moved accordingly to enter judgment for the defendants.

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PURCELL v. SOWLER.

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C. Russell, Q.C. and Bigham showed cause.

The Court (Brett, Archibald, and Lindley, JJ.) reserved judgment.

Brett, J. delivered the judgment of the court on the 28th June 1876, giving judgment for the plaintiff on the ground that the proceedings of the board of guardians at Knutsford were not of general public interest, and that the publication of the report was, therefore, not privileged.

The defendants appealed from this decision.

Edwards, Q.C. for the defendants.—This is a *bond fide* report of what took place at a meeting of a board of guardians. It is privileged as being a report of proceedings of general public interest. In *Davis v. Duncan* (30 L. T. Rep. N.S. 464; L. Rep. 9 C. P. 396), which was an action for libel contained in a newspaper report of some proceedings at a parliamentary election meeting, the occasion was held privileged. A meeting of the persons charged with the administration of the poor law of a district is of still more importance to the public. In *Kelly v. Turling* (13 L. T. Rep. N. S. 255, L. Rep. 1 Q. B. 699) a dispute between an incumbent and his churchwarden as to the use of the church was held matter of public interest. He also cited

Henwood v. Harrison, 26 L. T. Rep. N. S. 838; L. Rep. 7 C. P. 606;

Wason v. Walter, 19 L. T. Rep. N. S. 409; L. Rep. 4 Q. B. 78; 38 L. J. 40, Q. B.

O. Russell, Q.C. and Bigham for the plaintiff.—The report is not privileged. This is not criticism but comment. The meeting was not a public meeting, although reporters were admitted, and it is not because the meeting was convened to discuss a matter of public interest, that a publication of slanderous matter would be privileged. A statement like that about the medical officer in this case may be a perfectly proper one to be made in the board room of the guardians at Knutsford, but a newspaper has no right to publish it *ex parte* to the world. The privilege of reports is confined to (1) all judicial proceedings, because the public have a right to be in all the courts of justice; (2) to parliamentary proceedings because the public are present by their representatives. It is now sought to extend the privilege to reports of the proceedings of public bodies. Up to the decision in *Wason v. Walter* (*ubi sup.*) judicial proceedings only were within the privilege. The principle in *Wason v. Walter* should not be extended, although that case is perfectly distinct from this. All the authorities show that no such general principle of privilege on the ground of public interest, as is contended for for the defendants exists; a newspaper has no exceptional privilege. *Davison v. Duncan* (26 L. J. 104, Q. B.; 7 E. & B. 229) is directly in point in favour of the plaintiff. [COCKBURN, C.J.—The meeting in that case was an open one.] Yes, and that makes the case stronger than the present one. The cases cited for the defendants do not apply here. The real question is, are the proceedings of boards of guardians protected by the same privilege as applies to proceedings in courts of justice and in parliament? That question cannot be answered by enquiring whether the matter complained of was of public interest.

Edwards, Q.C. in reply.

COCKBURN, C.J.—I am of opinion that the judgment of the court below should be affirmed, and I am very anxious to have it distinctly understood that that opinion is not based upon the grounds

upon which the court below went. That judgment proceeded upon the ground that the subject matter of the present action, which is for libel contained in a report of the proceedings of a board of guardians relating to the conduct of the medical officer of the poor law union, was not a matter of public general interest. In that view I am unable to concur, and for these reasons: It appears to me that the administration of the poor law is matter of great national concern. The court below seem to have drawn a distinction between the administration of the poor law in general as a matter of public concern, and the administration of the poor law in a particular district. It seems to me that whatever is matter of national concern in the administration of any department of the government, is also matter of national concern in the local district in which that government is administered. It is one of the characteristic features of the government of this country that, instead of being centralised, very important matters of administration are submitted to the consideration of local authorities for conduct and management; there is the business of counties, and of municipal bodies in cities and boroughs, and these are, to a great extent, managed by local governments. It is not because the matter immediately under consideration is one affecting, in its immediate consequences, a particular locality only, that therefore it is not a matter of public general interest. It may be of national concern. The administration of the poor law with respect to the medical attendance of the poor is a matter of infinite moment, and, therefore, the conduct of the medical officer of a union may be of vast importance, as he has the care of the poor. I therefore do not agree with the Common Pleas Division in thinking that this matter is not one of public general interest. It is now settled law that a report of judicial proceedings is privileged. It is also settled that reports of the proceedings of the great national council, the Houses of Parliament, may be privileged, although those reports affect the credit of private persons; but the question here is whether in this case, although the proceedings generally were of public interest, the particular accusation was privileged. There are many intermediate cases which might be put. The proceedings by the corporation or the common council of the city of London, or of county magistrates at quarter sessions sitting to transact county business, and in many other cases, might reflect upon the character of a private individual, but I should be very sorry to lay down a hard and fast line that proceedings of that description might not be fully reported, although reflecting upon the conduct of some particular person. It is not necessary to lay down any such rule in this case. We are dealing here with a body of limited jurisdiction, and one to whose proceedings it is certainly not essentially necessary either by law or usage that publicity should be given. It is quite clear that the proceedings of a board of guardians are not necessarily public. They might, if they pleased, refuse to admit the reporters, and close their doors while they transacted their business, and I think that it would be the proper course to take when matters affecting the conduct of a particular person are being discussed. Here one of the newspapers was represented, and the proceedings were published. Was that publication privileged? I

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think there is no doubt that it was not privileged; and I think there can be no doubt whatever that if the matter had been brought before the central authority in London—the Poor Law Board—and the private character of a particular individual had been assailed, and a report published in the newspapers, that report would have been privileged. Clearly not. I think the board ought to exercise a proper discretion in conducting a discussion like this, and that their doors should have been closed. They did not exercise that discretion. The newspaper should not have published that which might be untrue, and was likely to prejudice the medical officer. Therefore, without encroaching in any degree upon the discussion of what I conceive to be a great public principle, I am content to say that that principle does not apply in this case, and I therefore think that the judgment of the court below should be affirmed, though not upon the same grounds as were there given.

MELLISH, L.J.—I am of the same opinion. We are asked here to further extend the law of privilege. In Lord Campbell's time it seems clearly to have been supposed to have been law that the privilege of reporting extended only to the publication of proceedings in courts of law. It was supposed that proceedings in courts of law might be published because all Her Majesty's subjects might, if they chose, be present, and it was said that there was nothing wrong in putting those who were not in the position of those who were present. That rule has in my opinion been properly extended to proceedings in Parliament. The proceedings there may no doubt be distinguished from those in a court of law, because the public are only admitted to the House of Parliament when they are allowed to be present by the House. It is then said that the principle of privilege being already established which applies to protect reports in the courts of law, and the Houses of Parliament, should be extended to a variety of other kinds of bodies. I do not wish to give my opinion whether it ought to be extended to some other bodies or not, but at the same time I feel that we ought to be very careful when we are asked to extend it. I am, however, clearly of opinion that we should not extend it to the present case. The guardians had the power of excluding the public or not; I do not think they ought to be bound by the result of exercising their discretion to admit or exclude the public, but when *ex parte* charges are to be made affecting the character of a public officer I do not see any public convenience in holding that these charges may be made public. Such charges so made are made public I think at the risk of the person publishing them. At law this was clearly libellous. If one of the guardians himself had gone out from the meeting and talked of the charge made against the doctor so as to do him injury, I think the guardian would have been liable to an action of slander. I do not dispute the right of the newspaper to comment upon the doctor's conduct when the facts have been ascertained. Here they had not been ascertained, and it seems to me to be a very different thing from fair comment to publish charges brought against him as these were. I think the judgment of the court below should be affirmed.

BAGGALLAY, J.—I am of the same opinion. I am unable to draw any distinction between the

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circumstance of the present case, and those in the case of *Topham v. Pick* (7 H. & N. 891). Where a report containing a libel was made by a medical officer to a vestry board, and published by the defendant in his newspaper. There it was decided that the publication of the report was not privileged. The same reasoning will apply to the present case, and I do not think that the principles upon which that decision was given are interfered with by the judgment in *Wason v. Walter* (*ubi sup.*), nor do I think those principles are inconsistent with our decision in the present case.

BRAMWELL, J.A.—I am of the same opinion, and I desire to say why. The question of the right of publication in newspapers is one of great importance, because public opinion is to a great extent guided by the press, and especially by the periodical press. I do not quite agree with the reasons given in the Common Pleas Division that proceedings of this kind are not matters of public interest. I think if there had been a discussion on the conduct of the plaintiff, the facts not being in dispute, and the defendant had fairly commented upon it, that comment would be privileged. But that is not the case here. The defendants reported not what was a statement of facts, but what upon the face of it was a report of what had been reported to the guardians, and what was stated against the plaintiff in his absence, with no opportunity given him to contradict it. I think there was no duty of any kind upon the reporter to report this accusation. The guardians could well have excluded, and ought to have excluded, strangers from the room. As they did not do so, the reporter himself should have passed the matter by, but as he has not done so, but has published it to the plaintiff's injury, he must in my opinion bear the consequences.

Judgment for plaintiff. Judgment below affirmed.

Solicitor for the plaintiff, O. W. Dommett for J. R. Barlings, Manchester.

Solicitors for the defendants, Johnson and Wetherell, for Stevenson, Lycett, and Co., Manchester.

Monday, April 30, 1877.

(Before JAMES, BAGGALLAY, BRAMWELL, and BRETT, L.JJ.)

RABBITS v. COX.

Land tax — Exemption — Site of hospital — 4 W. & M. c. 1, s. 5—38 Geo. 3, c. 5, s. 29.

Plaintiff was lessee of land which was the site of a hospital, existing before the Land Tax Acts 1692 and 1798, but removed by decree of the Court of Chancery in 1849, by which the land was discharged from the charitable trust.

The Act of 1692 exempted all sites of hospitals, and by the Act of 1798, s. 29, all lands belonging to any hospital which were assessed in 1692 were to be liable to be charged to land tax, and no other lands then belonging to any hospital or almshouse should be charged to land tax by that Act.

Held (reversing the judgment of the Queen's Bench Division), that plaintiff was exempt from the land tax.

APPEAL from the judgment of the Queen's Bench Division on a special case stated in an action of trespass brought against the defendant, a collector of land tax, for seizing the plaintiff's goods.

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The question for the opinion of the court was, whether the land in possession of the plaintiff is liable to be charged and assessed by the Land Tax Commissioners to the land tax.

If the court should answer this question in the affirmative, judgment to be entered for the defendant with costs.

If in the negative, judgment to be entered for the plaintiff for 227*l.* 5*s.* 10*d.* with costs.

The Divisional Court (Cockburn, C.J. and Lush, J.) gave judgment in favour of the defendant, and the plaintiff appealed.

The material sections of the statutes are set out in the judgment of the court below, and the special case is set out in the report (*ante*, p. 447; 35 L. T. Rep. N. S. 834).

The *Solicitor-General* (Sir H. Giffard, Q.C.), *Lumley Smith* with him, for the plaintiff.—The true effect of 38 Geo. 3, c. 5, s. 29, is that all lands which belonged to hospitals, almshouses, &c., at the time of the passing of 4 W. & M. c. 1, shall be for ever exempt from land tax. This is shown by the use of the word "then." The exemption is applied to the land itself: (*Lord Colchester v. Kewney*, 14 L. T. Rep. N. S. 888; L. Rep. 1 Ex. 308; 35 L. J. 204, Ex.; affirmed 16 L. T. Rep. N. S. 463; L. Rep. 2 Ex. 253; 36 L. J. 172, Ex.) In that case Willes, J. anticipates the present question: (L. Rep. 2 Ex. 257.) Both reason and the exact language of the statute are favourable to the exemption. The judgment of the court below assumes that the policy of the statute was only to relieve the land while it was held for eleemosynary purposes, and omits the consideration that the charity still gets the advantage when the land is disposed of, in consequence of the higher price to be obtained for land exempt from the tax.

E. Clarke and *Lyon* for the defendant.—The reason for the exemption ceased when the hospital was removed, and consequently the exemption itself ought to be held to have ceased. It is clear that a private owner could not claim exemption under 38 Geo. 3, c. 5, s. 25, which provides that nothing in the Act shall extend to charge "any hospital, or in respect of the site of the said hospital," &c., and sect. 29 must be treated as a corollary to sect. 25, as is observed in the judgment of the court below. The intention must have been the same in framing the two sections. The decision in *Novello v. Toogood* (1 B. & C. 554) is an instance of limitation of an exemption, apparently given by the general words of a statute, in a case where the reason of the exemption did not apply. Sect. 26 of 38 Geo. 3, c. 5, by which tenants holding under hospitals are to be assessed, shows that the intention of the Act was to limit the exemption to the hospitals themselves.

The *Solicitor-General* was not called on to reply.

JAMES, L.J.—It appears to me that we must reverse the judgment of the court below. I cannot get over the plain words of sect. 29 of 38 Geo. 3, c. 5, which provides, "That all such lands . . . belonging to any hospital or almshouse . . . as were assessed in the fourth year of the reign of King William and Queen Mary shall be and are hereby adjudged liable to be charged," &c. If the section had stopped there I think there would have been a good deal to be said for the case of the appellant, on the ground that the section meant that those lands only should be

charged which were charged in the fourth year of the reign of William and Mary, and no others. But the section goes on to provide "that no other lands . . . whatsoever then belonging to any hospital or almshouse . . . shall be charged, taxed, or assessed by virtue of this Act . . . anything herein contained to the contrary notwithstanding." This seems to me to be as plain a provision that these lands shall not be charged as could possibly be framed; it charges land that was charged in the reign of William and Mary, and expressly exempts other land, and this is other land than land that was in that reign charged. But it is said on behalf of the respondent that we must read sect. 29 together with sect. 25 of the same Act. I cannot follow that argument, for sect. 29 applies to a new subject and uses additional words. I see no reason why we should depart from the plain words of the Act. The exemption is for the benefit of the charity if the land passes into the hands of a purchaser, and does not apply (as has been decided in *Lord Colchester v. Kewney*, *ubi sup.*) if a new site for a hospital or almshouse is purchased. I am of opinion, therefore, that the land is exempt.

BAGGALLAY, L.J.—I am of the same opinion. I was impressed by the able argument of Mr. Lyon on 38 Geo. 3, c. 5, s. 25, but I cannot follow the argument that sect. 29 is only a proviso intended to qualify the terms of sect. 25. There are intermediate provisions in the Act, and the phraseology of the two sections is distinct. The words of sect. 29 are perfectly general.

BRAMWELL, L.J.—I am of the same opinion.

BRETT, L.J.—I cannot see that these lands are outside the words of sect. 29. I decline to construe an Act of Parliament according to my views of what is right or wrong where the words are plain. The words of the Act clearly comprehend this case. If we look at 4 Will. & M. c. 1, s. 25 and 38 Geo. 3, c. 5, ss. 25 and 29, we may observe an alteration in the frame of the enactments. The last section treats in terms of lands, &c., which had been assessed in the reign of William and Mary, and provides that they shall be charged, and then it goes on to provide by a negative enactment that no other lands shall be charged, and there is no reference to the persons or corporations in whose hands the lands might be. The word "then" is important. Mr. Lyon could not deal with it in his argument, but we must give a meaning to it, and apply it to the time when the statute of William and Mary was passed.

Judgment reversed.

Solicitor for the plaintiff, *C. O. Humphreys*.

Solicitors for the defendant, *Simpson and Palmer*.

Monday, April 30, 1877.

(Before JAMES, BAGGALLAY, BRAMWELL, and BRETT, L.JJ.).

SCOTT v. LEGG.

Metropolitan Building Act 1855 (18 & 19 Vict. c. 122), s. 9; s. 27, r. 4; s. 28, r. 2—*Addition to old building.*

By the Metropolitan Building Act, s. 9, any alteration, addition, or other work made upon an old building is to the extent of such alteration, &c., subject to the provisions of the Act, which does not

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otherwise apply to old buildings. By sect. 27, r. 4, every warehouse containing more than 216,000 cubic feet must be divided by party walls in such manner that the contents of each division shall not exceed such number of feet. By sect. 28, r. 2, "no buildings shall be united, if when so united they will, considered as one building only, be in contravention of any of the provisions of the Act."

The appellant, by taking down one of the external walls of an old building containing more than 216,000 cubic feet, made an addition containing less than 216,000 cubic feet.

Held (reversing the decision of the court below), that the addition was not within sect. 28, r. 2, and need not be separated from the old building by a party wall.

APPEAL from the decision of the Court of Appeal from Inferior Courts on a special case stated pursuant to the Metropolitan Building Act 1855 (18 & 19 Vict. c. 122), ss. 106, 107.

The appellant had built an addition to a brewery, which was an old building erected before the passing of the Act, and contained more than 216,000 cubic feet. The addition contained less than 216,000 feet. A magistrate made an order on the appellant under sect. 46 commanding him to erect a party wall on the ground than two buildings had been united within sect. 28, rule 2, and the whole contained more than 216,000 cubic feet, contrary to sect. 27, rule 4. The Court of Appeal from Inferior Courts (Cleasby, B. and Grove, J.) held that the order was rightly made.

The special case is set out in the report in the court below (*ante* p. 386; 35 L. T. Rep. N. S. 487).

Benjamin, Q.C. (*Glyn* with him) for the appellant.—The court below have placed a wrong construction on the Act. The intention was to apply the Act only to new buildings (sect. 7), but in order to prevent evasion the definition of new buildings was extended by sects. 10 and 11; but in sect. 28, r. 2, it appears from the context (as required by sect. 7) that new buildings are not there referred to, for the provision as to uniting buildings presupposes the previous existence of two separate buildings. This is only an addition to an old building, not the union of two previously existing buildings. [BRAMWELL, L.J. referred to *Sillem v. Thornton* (3 E. & B. 868; 23 L. J. 362, Q. B.)] That was a case of insurance, and the risk was altered.

F. M. White, Q.C. (*Biron* with him) for the respondent.—The case is brought within sect. 27, r. 4, by sect. 28, r. 2, and sect. 9, which makes an addition to an old building subject to the regulations of the Act. According to the construction contended for on behalf of the appellant, the Act could easily be evaded in the manner referred to in the judgment of the court below.

JAMES, L.J.—I am of opinion that the appellant is entitled to judgment. We cannot depart from the plain meaning of the words of the statute, because it may appear that there is a *casus omissus*, and we must remember that the provisions for the public safety contained in the statute were made subject to existing interests. By sect. 9 any alteration, addition, or other work, unless done for the purpose of necessary repair, and not affecting the construction of any external or party wall, is subject to the regulations of the Act; by sect. 27, r. 4, every warehouse or other building used for trade or manu-

facture containing more than 216,000 cubic feet shall be divided by party walls; and by sect. 28, r. 2, no buildings shall be united so that considered as one building only they shall be in contravention of the Act. Now this appears to be as clearly an alteration by way of addition to an existing building as anything could be. If it were held to be a union of two buildings, it would follow that a man might take down a wall on his own premises so as to bring in a few feet of vacant ground and add that much space to his warehouse by rebuilding the wall a little further forward, and be held to have united two buildings. It would be straining the words of the Act in an unwarrantable manner to hold such an alteration as that to be a union of two buildings. If it had been intended to bring the present case within the rule as to party walls the Legislature could have made provision for the purpose. It could have been said in plain words that if the aggregate of the old building and the new part added to it shall be more than 216,000 cubic feet, the building shall be divided by party walls. In my opinion the appellant is entitled to succeed, and the judgment of the court below ought to be reversed.

BAGGALLAY, L.J.—I am of the same opinion. It was the intention of the Legislature to draw a distinction between addition and union, and therefore sect. 9 was framed, which in this case would apply to the addition and to the addition alone. Therefore it is suggested on behalf of the respondent that the building comes within sect. 28; r. 2 of that section is the only one which it is contended can be treated as applicable. It is true that if we can regard this as two buildings which have been united the contents are more than 216,000 feet, but I am of opinion that this is not so, and the rule means two buildings which were existing before.

BRAMWELL, L.J.—I am entirely of the same opinion; but I cannot quite agree with Mr. Benjamin when he says that there might be a new building added to one already existing so that the Act would not apply. I think that here there is not a new building; but if there were, there would be an obligation to have a party wall. It would follow from Mr. White's argument that, if an old wall were taken down and a few feet added to an already existing building, that would be within the Act. But it was intended that additions and alterations might be made without being subject to the provision with regard to party walls, and this is clearly an addition and alteration.

BRETT, L.J.—This case does not come within sect. 28, r. 2, for there were no two buildings which could be united, and it is not within sect. 27, r. 4, because the operation of that rule is confined by sect. 9 to the addition only, and here the addition taken by itself is not large enough to come within the rule.

Judgment reversed.

Solicitors for appellant, *Loxley and Morley*.

Solicitor for respondent, *William Wyke Smith*.

CHAN. DIV.]

LUCKRAFT v. PRIDHAM.

[CHAN. DIV.]

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Reported by J. E. THOMPSON, Esq., Barrister-at-Law.

(Before Vice-Chancellor HALL.)

Tuesday, April 24, 1877.

LUCKRAFT v. PRIDHAM.

Charity—Will—Devise of proceeds of real estate to charity—Mortmain Act—Previous special Act authorising devise of real estate—Retrospective operation of Mortmain Act.

A testator bequeathed the proceeds of the residuum of real and personal estate to the "different charities of Plymouth." The only charity which claimed was the guardians of the poor who were incorporated by an Act of the 6th year of Queen Anne, which empowered them to receive testamentary gifts of real estate.

Held, that this power was taken away by the Mortmain Act (9 Geo. 2, c. 36), and that the principle that the powers and privileges given by a special Act were not taken away by the provisions of a general Act was inapplicable to the present case.

WILLIAM ROBERT PHILLIPS made his will, dated 28th May 1874, whereby, after directing payment of his debts and certain legacies, he devised and bequeathed the residuum of his real and personal estate to Glinn Pridham and William Henry Luke, upon trusts, subject to a discretion vested in them, to convert and to stand possessed of the moneys to arise from such conversion, and then "upon trust, on the realisation of my said estate, I give and bequeath one half of the proceeds thereof to the different charities of Plymouth, the amount and charities to be at the discretion of my said trustees." The other moiety, after the payment of certain pecuniary legacies, he directed to be divided among several persons, of whom the plaintiff, Frederick Luckraft, was one.

The testator died on the 2nd Jan. 1876, and his will was duly proved by his executors, the defendants. The testator was entitled at his death to considerable real and personal estate, which was being administered by the court.

The case now came to be heard on a summons to vary the chief clerk's certificate. The summons was taken out by Mrs. Luckraft, the testator's sole next of kin, and John Phillips, his heir-at-law; and the only question was with reference to the bequest of the moiety of the proceeds of the estate bequeathed to the Plymouth charities. Of all those charities the guardians of the poor alone claimed to be entitled to take lands in mortmain. They were incorporated by an Act of the 6th Queen Anne, by which it was enacted (*inter alia*) that the "guardians of the poor of the town of Plymouth, in the county of Devon . . . shall and may, without licence in mortmain, purchase, take, or perceive any lands, tenements, or hereditaments of the gift, alienation, or devise of any person or persons whatsoever having a right, and not being otherwise disabled, to grant alien or devise the same, who are hereby without further licence enabled to give, transfer, grant, or devise any such lands or hereditaments unto or for the use or benefit of the said corporation." The question was whether this special Act was repealed by

the Mortmain Act subsequently passed—9 Geo. 2, c. 36.

Hastings, Q.C. and Chubb for the plaintiff in the action.

Eddis, Q.C. and F. Webb for the defendants, the executors.

Dickinson, Q.C. and Whiteford for the next of kin and heir-at-law.—This is not a charity in the proper sense of the term. The object of the Act was to provide for that being done which the guardians of the poor, independently of it, were obliged to do. It provides for "receiving donations and for the maintenance of the poor, and for receiving charities for the general purposes of the Act." This case does not come within the description of a charity which is laid down in *Attorney-General v. Corporation of Exeter* (2 Russ. 45 and 3 Russ. 395). It is there laid down that where there are poor in a place who do not claim parish relief, they do not trench upon the incomes of the rich. It is otherwise with those who do claim such relief. And it was held that where the poor of Exeter were provided for by particular donations, those poor only were included who got nothing from the rates. Where a person gives to charities he means only such charities as are independent of the provision which the law makes for the poor, or of any substitute for the same. Next, supposing this so-called charity to be within the description of the legatees intended to take, the question arises whether it can take land, or anything savouring of the realty. The Mortmain Act clearly affects this charity, as is shown by the case of *Queen Anne's Bounty*. It was recognised that the Mortmain Act took away the power of receiving lands from Queen Anne's Bounty, as it was thought necessary to pass a special Act exempting it from the provisions of the Mortmain Act. See *Widmore v. Woodroffe* (Amb. 636). Queen Anne's Bounty was reconstituted by 43 Geo. 3, c. 7. A similar provision applies to the British Museum, which has power to receive land to the extent of 500l. See the case of the *Trustees of the British Museum v. White* (2 S. & S. 594), where a devise to the British Museum was held within the Mortmain Act, as was every devise for a public purpose, whether local or general. What is there to distinguish this from the cases referred to? In the absence of any subsequent Act re-establishing the Act by which this charity was empowered to take lands, that Act must be taken to have been repealed by the 9 Geo. 2, c. 36. See also

Mogg v. Hodges, 2 Ves. sen. 52.

Hemming, Q.C. and Dryden, for the charity.—The general rule, in construing local and private Acts is, that where by a particular statute special and circumscribed powers are given applicable only to the circumstances of that statute, such powers are not taken away by the general provisions of a general public Act. That principle is established by a large number of cases. See *London and Blackwall Railway Co. v. Limehouse Board of Works* (3 K. & J. 123). There Sir Foulke Greville's case is referred to, where it is said: "These last general statutes did not repeal the said statute. . . for it is a special statute," and "*generalia specialibus non derogant*." To the same effect, on p. 129, Lord Cottenham's judgment is referred to in *A. G. v. Eastern Counties Railway Co.* (2 Rail. Co. 823). So, too, in *Thorpe v. Adams* (L. Rep. 6 C. P. 125, 135), Bovill,

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C.J. says: "But the general principle to be applied to the construction of Acts of Parliament is, that a general Act is not to be construed to repeal a previous particular Act, unless there is some express reference to the previous legislation on the subject, or unless there is some necessary inconsistency in the two Acts standing together." The principle is even more broadly stated in the recent case of *Taylor v. Corporation of Oldham* (35 L. T. Rep. N. S. 696; L. Rep. 4 Ch. D. 395), where the Master of the Rolls says that the rule applies not only when the general and the special provisions are in different Acts, but even when they are in the same Act; the special provisions must be taken as exceptions. In our Act there are not only negative words, excluding other Acts, but positive powers to receive. If the Mortmain Act had recited that whereas certain charities (naming them) are now enabled to take lands, and whereas it is desirable they should no longer be so—(the Act reconstituting Queen Anne's Bounty was not passed because difficulties arose about its receiving lands, but for other causes which are mentioned in the Act)—if that had been the difficulty it would have been specially mentioned. The Act practically says, "The powers now existing and conferred by Queen Anne, are continued." According to the other side, it ought to be, "the powers conferred by Queen Anne, and since taken away by 9 Geo. 2, c. 36, are re-created." The purpose of the Act was to clear up any doubts, *ex abundanti cautela*, just as private Acts have been procured to give powers of sale to persons already possessing them. [HALL, V.C.—But *Middleton v. Olitheron* (3 Ves. 734), decided that bequests to Queen Anne's Bounty were void, because the money was to be laid out in land.] That was in consequence of the rules made after the Mortmain Act by the governors of Queen Anne's Bounty; by those rules, which of course were subject to the Mortmain Act, though the Act itself was not, the society could only lay out its money in lands. That does not prove that the Mortmain Act repealed the Queen Anne's Bounty Act. Besides, the Act of Geo. 3 may have been passed because testators might be deterred from devising lands to the Bounty from the mistaken opinion that it was subject to 9 Geo. 2, c. 36. See also *Lyn v. Wyn* (Bridg. C. P. 122, 127), referred to in *Thorpe v. Adams* (*sup.*).

HALL, V.C.—I am of opinion that the two charities are unable to take the benefit of this gift. The question is one which, as it appears to me, depends upon whether the Statute of Mortmain (9 Geo. 2), ought or ought not to be restricted in its construction to cases in which there has not been provision made in some previous Act of Parliament for testators bequeathing or devising property for the benefit of some specific charities. It appears to me that the statute of 9 Geo. 2 is a general law which was meant to apply to all his Majesty's subjects in reference to making dispositions in favour of charities such as are there described. The law was applicable to everybody, whether they selected one charity or another. It is a law for all, and not a law only for those testators who intended or desired, when the charities were languishing and so forth, to give their property to this or that particular charity or others in the same position; they were meant to be protected generally against those dispositions,

whether fettered by any specific charter or by any particular Act of Parliament passed long before when a different view was taken by the Legislature, and a different policy was guiding the Legislature with reference to the law generally. That being my view, the case seems to me to be entirely without the scope of the general reasoning and argument which has been addressed to me upon the construction of statutes, that where there is a statute giving particular privileges to a particular body, and so forth, you shall construe a subsequent statute as not embracing under general provisions that which would detract and take away from the special privileges given before. So, in like manner, when you have a particular statute applicable to merchants or a particular class, and then a general law which would embrace those persons taken as part of the public generally, there being a specific law as to those particular persons answering a certain description, you will not apply subsequent legislation to them, unless, from the nature of the subsequent legislation, they fairly come within the scope of the object and purpose of the Act of Parliament. As I said before, all his Majesty's subjects came under the provisions of the statute of Geo. 2. in reference to the protection given to them against their improvident and improper disposition of property. That being so, it seems to me the case is clearly within the Act of Parliament. But it is said that the case is varied by reason of the provisions of the subsequent Acts relating to this corporation. Now, I do not take that view at all of the effect of these subsequent Acts. The first of the subsequent Acts—that of the 32 Geo. 2—is an Act to explain and amend the former Act, which, after reciting the former Act, and not reciting this particular clause enabling testators to give, states certain inconveniences about the mode of raising the moneys which were necessary, and which had been found to exist in practice. Then it provides the mode of management by its officers, and then it recites that there was an Act of Parliament lately passed, making provision for amending certain laws relating to rogues and so forth, and then it proceeds thus: "Therefore, for providing proper relief and redress in the premises, he it enacted" first of all, that the guardians of the poor are to be empowered to raise 2000*l.*, and then it gives directions as to the application of that money. Then it contains provisions to meet the other particular difficulties which I have pointed out, and having dealt with those and the directions as to rating, it proceeds to provide this: "And be it further enacted, that the said former Act of Parliament of the said sixth year of her late Majesty Queen Anne, and all and every the clauses, powers, articles, matters, and things therein contained, and not hereby varied, altered, or otherwise explained, shall be, and the same are hereby continued, and shall be and remain in force as fully and effectually as if this Act had not been made, and shall be executed with respect to the matters herein contained as fully and amply as if such clauses, powers, articles, matters, and things were with such alterations or variations herein re-enacted with respect to this Act." That is to say, those former powers and articles and things are to be "executed with respect to the matters herein contained" there being no "matter herein contained," which in any way

enables testators to give anything which they could not by the law, as I construe it, then give. There is nothing of the kind, and therefore this is merely applying the working machinery and provisions of the former Act to the new provisions and the new machinery created by this Act. It does not re-enact the clause so as to bring it down to that date. Then the next Act of Parliament to which I will refer is the Act of the 53 Geo. 3. The titles of all these Acts do not point to doing any such thing as is here contended for. But passing away from the mere title of the Act, we get a recital of the rates, and so forth: that the number of poor have increased, that provisions are dearer, and that "it is found that the sum of 1500*l.*, or so much thereof as hath been or could be levied and raised under the provisions of the said recited Acts, together with the annual income of the real and personal estate entrusted to and vested in the said guardians of the said poor, is greatly insufficient to answer the purposes for which the same were intended, so that large additional rates and assessments are annually wanted to carry the purposes of the said Acts into execution," and so forth. Then there is a recital that they have been obliged to borrow money, and that it is expedient that the powers and provisions of the former Act should be altered and amended. Then it recites that "it would tend to the equalisation and better collection of the said rates, if additional powers were given to the said corporation for assessing and collecting such rates; and it is also expedient that the said corporation should be enabled to discharge their present debt, and that additional powers should be given to them for employing, maintaining, regulating, and managing the poor under their care agreeably to the purport and intent of the said recited Acts, and that they should be empowered to levy and raise such further yearly sum or sums of money as are hereinafter mentioned," for the purpose of carrying the Act into execution. Then it recites that "such beneficial purposes cannot be effected without the aid and authority of Parliament." Then comes the enactment authorising them to assess, levy, and so forth, and then you have got the clause as in the former Act (I have passed on to the last Act instead of to the next), which Mr. Dryden has attempted to make out to be more favourable to him; but it is substantially the same. I think I must read the clause in reference to the other provisions of the Act, and all that the Act says is, that the old Act and its provisions "shall be of full force and effect, and shall be as good, valid, and effectual to all intents and purposes whatever, for carrying this Act into execution, as if the same had been repeated." So that it is merely keeping that on foot for the purpose of carrying into effect the new Act of Parliament. Now with regard to the intervening Act, which I have not read, it is not necessary to go through it, because it is substantially the same as the first; that is to say, the new Act and the provisions in the old Act are to be executed with respect to the matters therein contained, as if the clauses were with the alterations therein contained inserted with respect to this Act. It appears to me that these provisions do not at all assist the decision in this case, and it was never intended by a side wind to alter what was the general law, so as to enable all testators to give whatever they thought

proper to these charities contrary to the general law. Then, in addition to that, it appears to me that *Wigmore v. Woodroffe* (Ambler's Reps. 636), and the case of *Middleton v. Olitherow* (3 Vesey), and the cases there referred to, are authorities specially applicable to this case—for this reason, that it seems to have been taken for granted, and decided over and over again, with regard to Queen Anne's Bounty, that the power of their taking land under the first Act of Parliament had become inoperative by reason of the statute of Geo 2, and therefore they got a new Act of Parliament to enable them to take and hold property in the manner specified in the new Act. The consequence is, that this fund must be distributed on the footing of the invalidity of these charitable gifts.

Solicitors: *Dean, Chubb, and Co., for Pridham, Woolcombe, and Pridham, Plymouth; Hare and Fell.*

QUEEN'S BENCH DIVISION.

Reported by J. M. LEE and M. W. McKELLAR, Esqrs.,
Barristers-at-Law.

Monday, April 23, 1877.

REG. v. TRIMBLE.

Nuisance—Order to abate—Premises of another person—38 & 39 Vict. c. 55, ss. 94 and 96.

By an order of justices under the Public Health Act 1875, it was found that on land the property of a certain person named a nuisance existed, viz., a foul ditch, caused by refuse water and offensive liquid from an adjoining brewery, and that this nuisance was caused by the act or default of the defendant as owner and occupier of the brewery, and it was ordered that the defendant, within three months, should abate the nuisance, and for that purpose should execute such works and do all such things as might be necessary so that the same should no longer be a nuisance or injurious to health,

Upon a rule for certiorari, on the ground that the defendant was not the occupier of the premises on which the nuisance was proved to exist, and that he had no power or authority from the owner to enter on the premises for any purpose whatever.

Held, that the order must be quashed.

A RULE nisi had been obtained on behalf of the defendant, Mr. Edward Trimble, to bring up by certiorari the order of two justices of the County of Cumberland.

The following was the order:

To Mr. Edward Trimble, the owner and occupier of a certain brewery and brewery premises situate at Dalston, in the District under the Public Health Act 1875, of the Carlisle Union Rural Sanitary Authority.

Cumberland to wit.—Cumberland Ward.—Whereas, on the 11th Nov. 1876, complaint was made before Thomas William Prevost, Esq., one of Her Majesty's justices of the peace acting in and for the county of Cumberland, by George Mounsey, of Carlisle, in the said county of Cumberland, clerk to the Carlisle Union Rural Sanitary Authority, on behalf of the said Rural Sanitary Authority, that in and upon certain land the property of John Richardson, situate at Dalston in the District under the Public Health Act 1875, of the Carlisle Union Rural Sanitary Authority.

The following nuisance then existed, viz., a foul ditch caused by an accumulation of washings from beer barrels and other refuse water and offensive liquid, which was then a nuisance or injurious to health, and that the said nuisance was caused by the act or default of Edward

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Trimble of Dalston, aforesaid, as owner and occupier of certain brewery premises there situate and adjoining thereto. And whereas Edward Trimble, the owner and occupier of the said brewery premises within the meaning of the said Public Health Act 1874, hath this day appeared before us, two of Her Majesty's justices of peace acting in and for the Petty Sessional Division of Cumberland Ward in the said county of Cumberland, to answer the matter of the said complaint. Now, on proof here had before us that the nuisance so complained of doth exist on the said premises, and is injurious to health; and that the same is caused by the act or default of the said Edward Trimble, the owner and occupier of the said brewery premises. We, in pursuance of the said Act, do order the said Edward Trimble, the owner and occupier of the said brewery premises, and being the person by whose act the said nuisance is caused, within three months from the service upon him of this our order, or a true copy thereof, according to the said Act, to abate the said nuisance, and for that purpose to execute such works, and to do all such things as may be necessary, so that the same shall no longer be a nuisance or injurious to health as aforesaid."

The following was the affidavit of Edward Trimble upon whose application the rule for *certiorari* was granted upon the justice who made the before mentioned order:

I am not the occupier of the premises on which the said nuisance mentioned and referred to in the order of justices made in this matter, dated the 2nd Dec. 1876 (a copy whereof is exhibited to my affidavit sworn by me in this matter on the 4th inst.), was proved to exist, and I have no power or authority to enter on the said premises for any purpose whatsoever; and the said order cannot be carried out except by my entering upon and executing certain works on the said premises which I am not authorised to do by John Richardson, the owner thereof, or his tenant.

By the Public Health Act 1875 (38 & 39 Vict. c. 55), s. 91, amongst other things: (2) Any pool, ditch, gutter, watercourse, privy, urinal, cesspool, drain, or ash-pit so foul or in such a state as to be a nuisance or injurious to health"; (4), "Any accumulation or deposit which is a nuisance or injurious to health, shall be deemed to be a nuisance liable to be dealt with summarily in manner provided by this Act."

By sect. 94:

On the receipt of any information respecting the existence of a nuisance, the local authority shall, if satisfied of the existence of a nuisance, serve a notice on the person by whose act, default, or sufferance, the nuisance arises or continues, or if such person cannot be found, on the owner or occupier of the premises on which the nuisance arises, requiring him to abate the same within a time to be specified in the notice, and to execute such works and do such things as may be necessary for that purpose: Provided (first) that where the nuisance arises from the want or defective construction of any structural convenience, or where there is no occupation of the premises, notice under this section shall be served on the owner; (secondly), That where the person causing the nuisance cannot be found, and it is clear that the nuisance does not arise or continue by the act, default, or sufferance of the owner or occupier of the premises, the local authority may themselves abate the same without further order.

By sect. 95:

If the person on whom a notice to abate a nuisance has been served makes default in complying with any of the requisitions thereof within the time specified, or if the nuisance, although abated since the service of the notice is, in the opinion of the local authority, likely to recur on the same premises, the local authority shall cause a complaint relating to such nuisance to be made before a justice, and such justice shall thereupon issue a summons requiring the person on whom the notice was served to appear before a court of summary jurisdiction.

By sect. 96:

If the court is satisfied that the alleged nuisance exist or that, although abated, it is likely to recur on the same premises, the court shall make an order on such person requiring him to comply with all or any of the requisitions

of the notice, or otherwise to abate the nuisance within a time specified in the order, and to do any works necessary for that purpose; or an order prohibiting the recurrence of the nuisance, and directing the execution of any works necessary to prevent the recurrence; or an order both requiring abatement and prohibiting the recurrence of the nuisance. The court may, by their order, impose a penalty not exceeding five pounds on the person on whom the order is made, and shall also give directions as to the payment of all costs incurred up to the time of hearing or making the order for abatement or prohibition of the nuisance.

Crompton showed cause.—The justices recite, as a fact, in their order, that the nuisance complained of "is caused by the act or default of the said Edward Trimble," and then order him to abate the nuisance; the order may well be read to direct him only to do so much towards abating the nuisance as, by remedying his own act or default, he can accomplish. An order under these sections was set aside in *Mayor of Scarborough v. Rural Sanitary Authority of Scarborough* (L. Rep. 1 Ex. Div. 344, on the ground that the defendants were not occupiers of the field where the nuisance collected, and could not be required to do what might be illegal; but it was clear, on the face of the order in that case, that the occupiers of the field were the only persons who could obey it; the words were "within one calendar month from the date of their order, or a true copy thereof, to abate the nuisance by covering over or disinfecting the deposit, or so much thereof as then remained in the field, so that the same should no longer remain a nuisance or injurious to health." [MELLOR, J.—That order also prohibited the recurrence of the nuisance, and the court held that so far it was good and valid. Why was not this order so framed under the 96th section?] COCKBURN, C.J.—Or why was it not made upon the owner of the premises?

J. Paterson appeared to support the rule, but was not heard.

Per CURIAM (Cockburn, C.J., and Mellor, J.)—The rule must be absolute to quash the order.

Judgment for defendant.

Solicitors to the complainant, *Gray and Mounsey*, for *George Mounsey*, Carlisle.

Solicitors for the defendant, *Sharp and Ullithorne*.

Saturday, June 2, 1877.

SOUTHAMPTON GASLIGHT AND COKE COMPANY (apps.) v. SOUTHAMPTON GUARDIANS OF THE POOR (resps.).

Costs of reference on appeal to sessions—Award made judgment of court—Taxation of costs out of sessions—12 & 13 Vict. c. 45 (Baines' Act), s. 13.

Where the parties consent to a reference at quarter sessions under Baines' Act, and it is one of the terms of the reference that the arbitrator shall have power over costs, it is an implied term of the reference that the costs may be taxed out of sessions, if such be the usual practice.

By s. 13 of Baines' Act, a court of quarter sessions may order, with consent of parties, the matter of an appeal to be referred to an arbitrator, whose award may be "entered as the judgment of the court, and shall be as binding and effectual as if given by the said court."

An appeal against a poor-rate was ordered to be referred to an arbitrator, whose award should be entered as the judgment of the court, and in

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whose discretion the costs of the appeal and reference and award should be. The arbitrator awarded that the rate be affirmed, and the costs paid by the appellants. At the next sessions judgment was entered accordingly, but nothing was said as to the taxation of costs. The costs were taxed out of sessions, that being the usual practice:

Held, that the taxation was regular, and a rule to quash the order of sessions, that the award be entered as a judgment, and the costs paid by the appellants, discharged.

THIS was a rule to quash an order of the Court of Quarter Sessions for the Borough of Southampton and county of the town of Southampton, whereby it was ordered that the award of an arbitrator appointed under 12 & 13 Vict. c. 45. s. 13, in the matter of an appeal against a poor-rate, should be entered as the judgment of the court, and that certain costs should be paid by the appellants to the respondents.

The following was the order of reference, which was made at the Epiphany Sessions 1876:—

At this court the several appeals entered at the last general quarter sessions of the peace holden in and for the borough and county of the town of Southampton, on the 5th day of July, in the year of our Lord 1875, coming now before this court consolidated as one appeal, and the matter of the said appeal having been in part argued and debated by Mr. Barrow, Mr. Castle, Mr. McCalmont, of counsel for the appellants, and Mr. Matthews, Q.C., Mr. Bullen, and Mr. Temple Cook, of counsel for the respondents, it is ordered, by consent of the counsel for the respective parties, that this appeal be further respited, and that the same be referred to arbitration to George Fownall, Esq., with power to the arbitrator to state a special case for the opinion of the Queen's Bench Division of the High Court of Justice, on any point on which he may be required by either party so to do. And that the award of the arbitrator be entered as the judgment of the court at the first practicable sessions after the meeting thereof, or after the decision on such case (if any). The costs of the appeal and reference and award to be in the discretion of the arbitrator, and the costs of the case (if any) to be in the discretion of the Queen's Bench Division of the High Court of Justice. The appellants undertaking to give inspection of all accounts and books, with power to take copies.

By the Court, ED. COXWELL.

The arbitrator by his award dated 10th July 1876, awarded that the rate be affirmed, and that the costs of the appeal and the reference be paid by the appellants. At the Michaelmas Sessions, 1876, the court was moved on behalf of the appellants to further respite the appeal to the Epiphany Sessions in order to obtain the decision of the High Court on a point of law raised before the arbitrator, but the court refused this motion. An order in the following terms (after reciting the reference and subsequent proceedings) was then drawn up:

It is ordered on the motion of Mr. Bullen that the award of the said arbitrator be entered as the judgment of this court, and that the said rate and assessment be affirmed, and that the costs of the said appeal and reference, and of the said award, and all costs incurred by the respondents consequent on the motion now made by Mr. MacCalmont on behalf of the appellants, and the opposition thereto by Mr. Bullen on behalf of the respondents (*the said costs amounting together to the sum of 563l. 7s. 4d.*) be paid by the appellants to the respondents.

The words in italics were added in the amended order afterwards drawn up and served.

From the affidavit of one of the managing clerks of Messrs. Birchain, the solicitors for the appellants, it appeared that this order was sealed and

served by the respondent's solicitors on the appellant's solicitors after the court of quarter sessions had ceased to be sitting, or to hold legal sessions, or to be in any way acting. The costs were taxed on the 22nd Feb. 1876, when the sessions were not being held, and there was a protest, on the part of the appellants, against such taxation. An amended order, obtained on the 15th March 1877 (which differed from the former order in mentioning the amount of costs), was drawn up by the Clerk of the Peace without any further proceedings having been previously had before the court itself. No objection had been made in court on the part of the appellants, to a taxation out of sessions, and there was some evidence that such a taxation was the usual practice of the sessions.

The following sections of Baines' Act (12 & 13 Vict. c. 45) are material:—

5. Upon any appeal to any court of general or quarter sessions of the peace, the court, before whom the same shall be brought, may, if it think fit, order and direct the party or parties against whom the same shall be decided to pay to the other party or parties such costs and charges as may, to such court, appear just and reasonable, such costs to be recoverable in the manner provided for the recovery of costs upon an appeal against an order or conviction by an Act passed in the twelfth year of Her Majesty's reign, intituled "an Act to facilitate the Performance of the Duties of Justices of the Peace out of Sessions within England and Wales with respect to Summary Convictions and Orders."

13. It shall be lawful for any court of general or quarter sessions of the peace, before which any appeal (except against a summary conviction, or an order in bastardy, or any proceeding under or by virtue of any of the statutes relating to Her Majesty's revenue of excise or customs, stamps, taxes, or post office) shall be brought, to order with consent of the parties or their attorneys, that the matter or matters of such appeal be referred to arbitration to such person or persons, and in such manner and on such terms as the said court shall think reasonable and proper; and such order may be made a rule of the Court of Queen's Bench on the application of either party; and the award of the arbitrator or arbitrators, or umpirage of the umpire, may, on motion by either party at the sessions next or next but one after such award or umpirage shall have been finally made and published, or after the decision of the Court of Queen's Bench on any motion for setting aside the same, be entered as the judgment of the court of general or quarter sessions in the appeal, and shall be as binding and effectual to all intents as if given by the said court: Provided always that the Court of Queen's Bench may, if it think fit, on application within the term next after the making and publication of such award or umpirage, either refer the case back again to the same arbitrator, arbitrators, or umpire, or wholly set aside the award or umpirage already made, and may, in the latter event, order the court of general or quarter sessions to enter continuances and hear the appeal.

18. In all cases where any order shall be made by any court of general or quarter sessions of the peace, it shall be lawful for the Court of Queen's Bench or for any judge of that court at chambers, either in term or vacation, upon the application of any person entitled to enforce such order, and upon production of a copy of such order under the hand of the clerk of the peace or his deputy, and upon proof of refusal or neglect to obey such order, to order and direct such order of the court of general or quarter sessions to be removed into the said court of Queen's Bench, and thereupon such order shall be of the same force and effect, and may be enforced in the same manner as a rule made by the said Court of Queen's Bench; and all the reasonable costs and charges attendant upon such application and removal shall be recoverable in like manner as if the same were part of such order.

Meadows White, Q.C. with him *E. U. Bullen*, for the respondents, showed cause.—The appellants are estopped from making this objection; by being consenting parties to the reference they are

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consenting parties to the taxation being had out of sessions according to the ordinary practice. In *Freeman* (app.) v. *Read* (resp.) (30 L. J. 123, M. C.; 9 C. B., N. S., 801), the judgment in which was based on *R. v. Shrewsbury and Hereford Railway Company* (25 L. T. Rep., O. S., 65), an application was made to justices to enforce payment of a rate pursuant to 12 & 13 Vict. c. 45, s. 5, and the rate was confirmed on appeal, subject to a case. Costs were agreed to be taxed out of court, and it was held that, although there was no express order of sessions for the payment of costs, such order was tacitly supplied by a rule of practice known to both parties; and, further, that it was not competent to the appellant to object that the taxation had taken place out of sessions, as that had been brought about by his own consent. They also referred to

R. v. Long, 1 Q. B. 740;

West London Railway Company v. Fulham Union, L. Rep. 5 Q. B. 361; 39 L. J. 178, Q. B.

M'Intyre, Q.C. and *W. Lawson*, for the appellants, supported the rule, and relied chiefly on *R. v. Long* (*ubi sup.*) in which case it was held that where the recorder of a borough confirmed an order of removal with costs under 4 & 5 Will. 4, c. 76, s. 82, but without specifying the amount, a taxation of such costs after the end of sessions was irregular, although the amount was submitted to the recorder (after the termination of sessions) and approved by him. They also cited

R. v. Middlesex Judges, 40 L. J. 109, M. C.;

Gay v. Matthews, 33 L. J. 14, M. C.

MELLOR, J.—I am of opinion that this rule ought to be discharged. It is clear to my mind that the object of the Act 12 & 13 Vict. c. 45, ss. 13 and 18, was to obtain the opinion of a skilled person in matters involving considerations of account and other difficult questions. The present was just the kind of case for the reference prescribed by the statute, and it was referred to Mr. Pownall, a gentleman thoroughly qualified to decide it. To him the appeal was referred, and he also had power, which he would not have had unless it had been given expressly by the reference, to award costs. This power he exercised in favour of the respondents. But it is now said that although the reference was had by consent of the parties, and by order of sessions, that the respondents are not to have their costs because they were taxed when the sessions were not sitting. I think it was never in contemplation of the parties that the costs should be taxed in sessions, but only that they should be taxed in proper form, which was done. The statute seems to show that although the judgment must be entered as the judgment of the court, it is not necessary that the court should give any particular direction as to the taxation of costs. The appellants, therefore, are precluded from taking the objection. It is in evidence, moreover, that it is the practice to tax costs out of sessions; and although it is suggested on the other side that there is not enough business at these particular sessions on which to found a practice, I think that is not sufficient.

LUSH, J.—I am of the same opinion. If these costs had been given under sect. 5, and nothing had been done by the parties to avoid the effect of that section, no doubt the taxation would have been invalid. [The learned judge read sect. 5 of 12 & 13 Vict. c. 45, and proceeded.] It has been decided (*Freeman v. Read*, *ubi sup.*) that these

words have the effect of making the taxation of costs the judicial act of the court, so that the taxation must, *prima facie*, be during sessions. The present case, however, arises under sect. 13 [section read]. Now it was one of the terms of the reference in this case that the costs were to be in the discretion of the arbitrator. In saying this the parties did not express all that they intended, but left something to be inferred by implication. The order of reference must be read as if it had expressly provided that the costs were to be taxed in the ordinary way by the clerk of the peace, and all objections, if any, to this implied term of the reference ought to have been made at the sitting of the court.

Rule discharged with costs.

Solicitors for the appellants, *Bircham and Co.*

Solicitors for the respondents, *Stocken and Jupp*, for *Lomer*, Southampton.

Monday, May 14, 1877.

REG. v. THE JUSTICES OF ESSEX.

Distress warrant for rate—Rule to justices—Unauthorized purposes—Failure to appeal—Excess of amount.

By a local Act of 1827 the owners of certain Abbey lands in Essex were empowered to make rates in respect of their lands, and to apply them to the repair of certain roads, causeways, and bridges which they had to maintain. They might enforce rates charged or imposed by virtue of the Act by distress warrant upon a defaulter provided he was first summoned to appear before a justice to show cause for his neglect or refusal to pay such rates. They might make a composition with the neighbouring trustees of roads for the payment of a certain sum of money annually or otherwise for repairing so much of the said roads as were in their district. Any person aggrieved by the rates might appeal to Quarter Sessions, and justices might amend without quashing the rate.

By a local Act of 1876 these owners were empowered to pay a large sum of money to a local board for the future repair of the roads in its district; and upon such payment and that of all other liabilities the owners were to be discharged from their duties to repair these roads, and the previous Act was to be repealed.

A month before the passing of the last Act, the said owners made a rate for an amount to cover certain liabilities under the Act of 1827, and also the money to be paid to the local board; but there was nothing in the rate itself to show it included this latter sum of money. The demand for payment referred to both the said local Acts, but did not give the date of the latter. The rate was not appealed against, but justices refused to issue a distress warrant against a defaulter on the ground that the rate was invalid.

Held, upon a rule to the justices, that the objection to the rate was not one which the justices could entertain, and that mere excess in amount was, under the circumstances, no ground for refusing a warrant.

THIS was a rule nisi obtained at the instance of the treasurer for the Stratford Langthorne Abbey landowners, calling upon two justices of Essex and the defendant Shea to show cause why the said justices should not issue their warrant to levy by distress and sale of the goods and chattels of the said defendant Shea the sum of 11. 5s.,

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being the amount due from him in respect of a rate or assessment made on the 6th July 1876, pursuant to an Act passed in the seventh and eighth years of the reign of his late Majesty King George IV., intituled "An Act to enable the persons interested in the lands and hereditaments heretofore parcels of the possessions of the Monastery or Abbey of Stratford Langthorne, in the county of Essex, to raise money for repairing and maintaining the bridges and other works liable to be repaired and maintained by such persons."

It appeared from the affidavit of the solicitor to the said treasurer that the owners, proprietors, lessees, and occupiers of divers lands, tenements, and hereditaments formerly parcel of the possessions belonging to the Monastery or Abbey of Stratford Langthorne, in the county of Essex, thereafter called the Abbey Land Owners, were by reason of their respective tenures or otherwise bound to support, maintain, and keep in repair two bridges situate and being at Stratford, in the county of Essex, and also to support and maintain and keep in repair certain parts of the road and foot causeway lying and being between the said bridges and the road to the extent of 100 yards beyond such bridges respectively.

By 4 Geo. 4, c. cvi., trustees were appointed to manage and repair the Middlesex and Essex turnpike roads, including portions of the said roads, bridges, and causeway.

By 7 & 8 Geo. 4, c. cviii., provision was made for the management of the said abbey lands and raising money for that purpose.

By sect. 13 it is enacted:

That it shall and may be lawful for the owners, proprietors, lessees, and occupiers of the lands, tenements, and hereditaments aforesaid, from time to time, at any general or special general meeting to be held under this Act, to make any rate or assessment for the purposes of this Act in respect of such lands, tenements, or hereditaments by a pound rate upon all such owners, proprietors, lessees, or occupiers according to the rents or values of the respective lands, tenements, or hereditaments, and according to the several interests of the owners, proprietors, lessees, or occupiers thereof respectively, and to apportion such rates according to such several interests and to moderate or regulate such rates with respect to any houses, new buildings, or improvements in such manner as shall be agreed on by the major part of the persons present at any such quarterly or special general meeting; and a table of such rates and assessments being from time to time made and signed by the persons or the major part of them present at any such meeting shall be good and binding upon all such owners, proprietors, lessees, and occupiers respectively, and upon all other persons concerned.

By sect. 14:

That all money which shall be collected and received from any such rate or assessments shall and may be applied in maintaining and keeping in repair the roads, causeways, and bridges aforesaid, and also in the payment of all arrears and sums of money due from the owners, proprietors, lessees, and occupiers of the lands, tenements, and hereditaments aforesaid in respect of any such roads, causeways, and bridges, and incurred at any time before the passing of this Act and remaining due and unpaid, and also in the reimbursing and repayment of any sum or sums of money to any person or persons who shall have paid and advanced, or shall pay and advance, any sum or sums of money for or on account or on behalf of such owners, proprietors, lessees, or occupiers respectively in respect of such roads, causeways, or bridges, or on whom any distress or distresses may have been made or may be made for any rates of composition for rates for any of the purposes aforesaid, and also in payment of the charges and expenses of making and collecting any such rates, and the paying, remunerating, and reimbursing any persons for work, labour, and

materials done, performed, and provided, and attendances given or to be done, performed, provided and given in respect of or relating to the maintaining or repairing of such roads, causeways, or bridges.

By sect. 15:

That if any owner, proprietor, lessee, or occupier of any messuage, land, tenements, hereditaments, upon or in respect of which any rate or assessment, or any arrears of rates or assessments heretofore made, or which shall be charged or imposed by virtue of this Act, shall neglect or refuse to pay the rates and sums of money which shall have been or shall hereafter be so rated or assessed as aforesaid, for the space of fourteen days after the same shall be due, and demand thereof made by notice in writing or in print, under the hand of the collector of the said rates, to be delivered to such tenant or occupier, or left at his or her dwelling house or usual place of abode, in case such occupier reside within the limits of this Act, or otherwise left upon the premises in respect of which such rate or assessment shall be made, then, upon proof thereof upon oath before any justice of the peace for the said county of Essex (which oath such justice is hereby empowered and required to administer), the same shall and may be levied and recovered by distress and sale of the goods and chattels of every person so making default by warrant under the hand and seal of such justice, such defaulter being first duly summoned by such justice to appear before him at a time and place to be mentioned in such summons, and to show cause for such neglect or refusal; and the overplus (if any) to be raised by such distress and sale shall be returned, upon demand, to the owner of such goods and chattels, after deducting all reasonable costs and charges previous to and attending such distress and sale, such costs and charges to be ascertained and directed by the said justice; and in default of such distress, it shall be lawful for such justice to commit such person to any house of correction for the county or place within which such offence shall be committed, there to remain without bail or mainprize for any time not exceeding three calendar months, unless payment shall be sooner made of such sum or sums of money as shall have been found to be due and in arrear upon all or any such assessment or assessments as aforesaid, together with all costs, charges, and expenses attending the recovery thereof, such costs, charges, and expenses to be ascertained and directed by the said justice.

By sect. 16:

That every warrant of distress for the non-payment of any rates or assessments to be made under this Act shall be in the words or to the effect therein set out. The warrant is to be addressed "To the collector or collectors," and "To all constables and other peace officers of the same county" of Essex.

By sect. 18:

And whereas it would be advantageous to the owners, proprietors, lessees, and occupiers of such lands, tenements, and hereditaments as aforesaid to be enabled to make a composition in money with the trustees for carrying into execution an Act passed in the fourth year of His Present Majesty's reign, intituled "An Act for more effectually repairing and improving the roads leading from Whitechapel Church, in the county of Middlesex, unto, through, and to the several parishes or places of Shenfield, Passingford Bridge, and Woodford, in the county of Essex, and for other purposes relating thereto; and upon the line of which turnpike road, the said bridges, roads, causeways, wharfing, and other works hereby authorised and directed to be repaired, maintained, and supported, are situate, for the repairs and amendments made by the said trustees since the 25th March 1823, of the portion of the said road which is to be repaired and repairable by such owners, proprietors, lessees, and other persons, and also for the repairing, maintaining, and keeping in repair all the road and foot causeway and the wharfing between such two bridges, and the said two bridges, to the repair of which such owners, proprietors, lessees, or occupiers are liable. Be it therefore further enacted, that from and after the passing of this Act it shall and may be lawful to and for the said owners, proprietors, lessees, and occupiers, at their first or at any quarterly or special general meeting or any adjournment thereof, under the provisions of this Act, to contract and agree and to come to a composition

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with the said trustees for the execution of the said recited Act, for the paying and discharging of such sum and sums of money as the said trustees may necessarily have incurred, expended, and been put to, in, about, touching, and concerning the requisite repairs and amendments of the said roads, since the 25th March 1833; and also to contract and agree and to come to a composition with the trustees for the execution of the said recited Act, for the paying to such trustees a certain sum of money annually, or otherwise, for and towards the repairing, maintaining, and keeping in repair all such bridges, road, foot causeway, and other works or either of them.

By sect. 34:

That it shall be lawful for the owners or proprietors, lessees, and occupiers of the lands, tenements, and hereditaments aforesaid, if they shall so resolve and order at any quarterly or special general meeting, to sue for the recovery of any rates or arrears of rates, if amounting in the whole to the sum of 5*l.* or upwards, and to be sued in any matter relating to this Act where the sum sought to be recovered shall amount to 5*l.* or upwards, in the name or names of any treasurer or clerk for the time being to be appointed under this Act; and also to prefer and prosecute or to order and direct the preferring and prosecuting of any information or indictment against any person or persons who shall wilfully dig up, spoil, destroy, injure, or damage any part of the road or causeway, or any wharfing, posts, rails, fences, or other things thereto belonging, or who shall wilfully pull down, destroy, injure, or damage any bridge, parapet, building, or erection belonging to, or which ought to be repaired, maintained, and kept in repair by such owners, proprietors, lessees, or occupiers, on behalf of such owners, proprietors, lessees, or occupiers; in all which proceedings it shall be sufficient to state generally that such matters, works, and things respectively were the property of such treasurer or clerk aforesaid; and no action, suit, information, indictment, or other process to be brought or commenced by or on behalf of such owners, proprietors, lessees, and occupiers by virtue of this Act in the name or names of any such treasurer or clerk shall abate or be discontinued by the death or removal of such treasurer or clerk or any of them, or by the Act of such treasurer or clerk or either of them, without the directions and consent of such owners, proprietors, lessees, and occupiers assembled at some quarterly or special general meeting this Act, or three or more of the committee of management under this Act; but such treasurer or clerk for the time being shall always be deemed to be the plaintiff in every such action, suit, information, indictment, and other process. Provided always that every such treasurer and clerk shall be reimbursed and paid out of the monies belonging to or to be raised by such owners, proprietors, lessees, and occupiers, all such costs, charges, and expenses as any such treasurer or clerk shall be put unto or become chargeable with or liable to by reason of his or their being so made plaintiff, prosecutor, or defendant as aforesaid.

By sect. 41:

Provided always and be it enacted that if any body, politic, corporate, or collegiate, or any person or persons shall think himself, herself, or themselves aggrieved by any rate or rates to be made, or by any thing which shall be done by virtue of this Act, or by any order or determination of any justice or justices of the peace in pursuance of this Act, it shall be lawful for such bodies or persons respectively to appeal to the justices of the peace at any general or quarter sessions of the peace to be held for the county where the matter complained of was done, within four calendar months next after the cause of complaint shall have arisen, every such appellant or appellants giving fourteen days' notice in writing of such appeal, and of the nature and matter thereof, to the person or persons appealed against or to the clerk or collector of the owners, proprietors, lessees, and occupiers aforesaid (as the case may be), and within seven days after the delivery of such notice entering into recognisance before some justice of the peace of the same county with two sufficient sureties to try such appeal and to abide the order of the said general or quarter sessions thereon; and the said justices upon due proof of such notice having been given, and of such recognisance having been so entered into, shall, and they are hereby authorised, empowered, and required in a sum-

mary way to hear and finally determine such appeal at such general or quarter sessions, or if they think proper may adjourn the hearing thereof to the next general or quarter sessions of the peace to be holden for the same county; and such justices shall and may, if they see cause so to do, by order of such sessions, mitigate at their discretion all or any penalty or forfeitures incurred under this Act, and may also award such satisfaction to be made to the party injured or such costs to either of the parties as they shall judge reasonable and proper; and the determination of such justices shall be binding and conclusive to all intents and purposes whatsoever.

By sect. 42:

Provided always, and be it further enacted: That on an appeal from any rate or assessment to be made for the purposes of this Act, the justices of the sessions where such appeal shall be heard shall and may amend the same in such manner as may be necessary for giving relief, without quashing or altering such rates or assessments with respect to the other persons mentioned in the same.

By 4 & 5 Will. 4, c. lxxix., it was enacted that the Abbey land owners and their successors for ever should pay to the said trustees the annual sum of 300*l.*, in full satisfaction and discharge of all and every liabilities of the said Abbey land owners in respect of the roads, bridges, and causeway.

Under 19 & 20 Vict. c. 26, the Local Board of West Ham execute the office of and are surveyors of the highways within their district, which include a portion of the said roads, bridges, and causeway.

By 30 & 31 Vict. c. lvi., the Abbey land owners were empowered to contract and come to a composition with the West Ham Local Board for the repairs of these roads, bridges, and causeway in their district.

The Board of Works for the district of Poplar execute the office of and are surveyors of the highways within their district, which includes a portion of the said roads, bridges, and causeway.

The Local Board of West Ham executed certain repairs upon the said roads, bridges, and causeway, for the cost of which an action was brought by them against the West Abbey land owners, which resulted, after some litigation and a long correspondence, in an agreement by the owners to pay the board 1000*l.*, and in the passing of an Act, which received the Royal assent on the 11th Aug., 1876.

On the 6th July 1876, after the said Act had passed through the Houses of Parliament, but before it received the Royal assent, the Abbey land owners, in quarterly general meeting, duly made a rate, pursuant to the provisions of their Act of 1827 (7 & 8 Geo. 4, c. cviii.), of 1*s.* 3*d.* in the pound.

The following is an extract from the Abbey land owners' rate-book of the assessment and rate so made:

6th July 1876.

At a quarterly general meeting, duly held this 6th July 1876, the following assessment and rate of 1*s.* 3*d.* in the pound was made by us, the under-signed owners, proprietors, lessees, and occupiers, being a majority of the persons present at this quarterly general meeting, in pursuance of, and conformity with, the provisions of the Act of Parliament made and passed in the seventh and eighth year of the reign of his late Majesty King Geo. 4, c. 108.

By the said Act referred to as having received the Royal assent on the 11th Aug. 1876, called the West Ham Local Board of Health Act 1876, and being 39 & 40 Vict. c. ccxx., after reciting the statutes previously referred to, and certain agree-

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ments with parties interested, it is enacted that (sect. 3):

It shall be lawful for the Abbey land owners, at their first or any quarterly or special general meeting, or any adjournment thereof, under the provisions of the said Act passed in the seventh and eighth years of the reign of King Geo. 4, c. cviii., to contract and agree and come to a composition with the West Ham Local Board for the paying of 1000*l.*, and also to contract and agree to come to a composition with the Poplar District Board for the paying of 100*l.* for and towards the further repairing, maintaining, and keeping in repair by the said board respectively of so much of the roads, bridges, and causeways as is situate within their respective districts.

By sect. 4:

The payment of the said sums of 1000*l.* and 100*l.* respectively, as aforesaid, shall be taken and accepted by the local board and the district board respectively in full satisfaction and discharge of all and every the liability whatsoever of the Abbey land owners with respect to the maintenance and repair of the roads, bridges, and causeway, and the Abbey land owners shall thereupon be relieved and discharged from any obligation to support, maintain, and keep in repair the roads, bridges, and causeways; and the said lands, tenements, and hereditaments of the Abbey land owners shall not, from and after the passing of this Act and the payment of the said several sums of 1000*l.* and 100*l.*, be liable to repair or contribute towards the repair of the roads, bridges, and causeway, or any other works described or referred to in the hereinbefore recited Act of the seventh and eighth years of the reign of King Geo. 4, c. cviii., and from and after the passing of this Act and the payment of the said several sums of 1000*l.* and 100*l.*, all such liability shall absolutely cease and determine. And the local board and the district board respectively shall thereafter support, maintain, and keep in repair the roads, bridges, and causeway so far as the same are situate within their respective districts; and they shall also, to the extent aforesaid, indemnify and keep indemnified the Abbey land owners from any liability with respect to the support, maintenance, and keeping in repair of the roads, bridges, and causeway.

By sect. 5:

The Abbey landowners shall have the same powers to make, recover, and levy rates or assessments for the payment of the said several sums of 1000*l.* and 100*l.*, and of all reasonable costs and expenses incurred by them with reference to this Act, and the carrying the same into execution, and winding up all matters outstanding with respect to the repairs of the roads, bridges, and causeway, and also for the payment of reasonable compensation to any person or persons who may be injuriously affected by the abolition of the rate known as the Abbey land rate, as they now have for making and recovering rates or assessments for the support, maintenance, and keeping in repair of the said roads, bridges, and causeway; and for such purposes as aforesaid, the rate books kept by the collector of the said Abbey land rate shall be *prima facie* evidence that the lands, tenements, and hereditaments therein described are Abbey lands, and are the lands, tenements, and hereditaments liable to payment of such rate; and upon payment of the sums hereby authorized to be raised, and of all outstanding liabilities under the said Act passed in the seventh and eighth years of the reign of His Majesty King Geo. 4, c. cviii., the said Act shall be, and the same is hereby repealed.

By sect. 6:

The said sum of 1000*l.*, when paid to the local board, shall be applied by them in paying the costs, charges, and expenses of this Act as hereinafter provided, and in diminution of any debt owing by the local board for moneys borrowed under the powers of the Local Board of Health for West Ham, in Essex, Extension of Powers Act, 1867; and the said sum of 100*l.*, when paid to the district board, shall be applied by them in diminution of the debt of 8000*l.*, borrowed by them of the Provident Clerk's Association, for the special purpose of paving the parish of Bow.

During Aug. 1876 the following notice was sent to some of the Abbey land owners, but it did not appear whether the defendant Shea had received such notice:

Stratford Langthorne Abbey Land Rate.

Pursuant to Act of Parliament of 7 & 8 Geo. 4, c. cviii., and West Ham Local Board of Health Act 1876.

Notice.

The Abbey land owners have agreed with the West Ham Local Board for paying 1000*l.*, and with the Poplar District Board for paying 100*l.*, upon payment whereof the liability of the Abbey landowners to repair the roads, &c., between Stratford and Bow will absolutely cease and determine. By the 5th section of the last above mentioned Act, the powers of the Abbey land owners to make, recover, and levy rates for payment of the said sums, outstanding liabilities, &c., are retained, and the rate-books kept by the collector are made *prima facie* evidence that the lands, tenements, and hereditaments therein described are Abbey lands, and liable to payment of the rate. The Abbey land owners, at their last meeting, estimated that the moneys to be raised by the present rate of 1*s.* 3*d.* in the pound would be sufficient for the purposes aforesaid, and to avoid the possibility of a further rate it is respectfully requested that the amount of your rate, as under, be paid on the first application, or forwarded to Mr. J. D. Sansom, the collector.

On the 12th Sept. 1876, the defendant Shea and other Abbey land owners were served with demands for the payment of the said rate of the 6th July. The amount demanded of the defendant Shea was 1*l.* 5*s.*, and the following was the form of demand:

Stratford Langthorne Abbey Lands.

Pursuant to Act of Parliament, 7 & 8 Geo. 4, c. cviii., and the West Ham Local Board of Health Act 1876.

6, Holly-terrace, Leytonstone-road, Stratford, E.,
12th Sept., 1876.

To Mr. Shea.

Sir,—I hereby demand payment of your Abbey land rate, made the 6th July last, amounting to 1*l.* 5*s.*, and unless the amount be paid to me within fourteen days from this demand, I am directed to take the requisite proceedings against you for recovery thereof.—I am, Sir, yours obediently,

J. DOWDING SANSON,
Collector of Abbey Land Rates.

On the back of this demand were set out extracts concerning the recovery of rates from the said Act of 1827, and also sect. 5 of the West Ham Local Board of Health Act 1876. The date of the passing of the latter Act did not appear upon the face or back of the said demand.

On the 4th Oct. 1876, in pursuance of directions by the Committee of the Abbey Land Owners, the solicitor of Thomas Wiseman Shipston, the said treasurer of the Abbey land owners, applied to the justices of Essex on behalf of the said treasurer for summonses against the defendant Shea and others for nonpayment of the said rates. The following was the information upon which this application was made:

Stratford Langthorne Abbey Land Rate.

Thomas Wiseman Shipston (complainant)
against

The within named defendants.

Metropolitan Police District in Essex, to wit.—Information of John Dowding Sansom, of 6, Holly-terrace, Leytonstone road, Stratford, in the county of Essex, taken on oath before me the undersigned, one of her Majesty's justices of the peace acting in and for the said district, this 4th day of Oct. 1876, who saith that the sums set opposite to the names of the following persons in the schedule hereto have been assessed against them respectively for Abbey land rate, and have not been paid, although lawfully demanded.

Sworn this 4th Oct. 1876, J. DOWDING SANSON.
Nath. Powell.

In the schedule was included the name of the defendant Shea, the amount against him being 1*l.* 5*s.*

The summonses were granted in pursuance of this application. No reference was made on the summons to any statute except that of 1827, viz., 7 & 8 Geo. 4, c. cviii.

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On the 24th Jan. 1877, these summonses all came on to be heard before the two justices of Essex, against whom this rule was obtained. Many of them were defended, but that against the defendant Shea was heard in his absence.

On the 28th Feb. the said justices delivered the following decision upon all the summonses which had been heard on the 24th Jan. :

"After the most careful consideration of these important cases we have come to the conclusion that our decision must be for the defendants. As, however, it is possible that ulterior proceedings may be taken upon it, it is desirable that we should mention the grounds upon which we have decided. There were several of the cases in which I believe that we should have been bound to hold that the notice of demand is bad; but as, underlying this, there is in our opinion general and fatal difficulty in the complainant's way, it is unnecessary to allude to this further. We consider that the information itself is bad, as not being laid in the name of the person or persons who are specially named in the Act as proper for this purpose, and it is not even stated in terms to be laid on behalf of the proper persons; and were this difficulty, which we do not see our way to get over, removed, we have not been able to avoid arriving at an opinion that the rate is bad upon the face of it. The minute book being put in and forming part of the evidence, we cannot but see that this rate is made and is intended to be devoted to purposes not provided for in the Act under which it purports to be made. Now it is contended by the complainants that this is not for us to consider, that it is matter of appeal, as in the case of a poor-rate. But this is not a poor-rate, and having regard to the opinion of Erle, C.J. in the case of *Pedley v. Davis* (10 C. B., N. S., 492), we think that we should not be doing right were we to grant orders for the recovery of a rate which we believe to be invalid. No doubt our decision places complainant in some little difficulty, and so far as we can we would assist him by stating a case for him to take elsewhere, if he should be so advised, but we must refuse, and for the above reasons, to make the order prayed. Neither do we make any order as to costs."

Graham and Castle, on behalf of the justices, showed cause against the rule.—This is not of the nature of a poor-rate; there is no publication and therefore the justices have more than a mere ministerial duty in issuing distress warrants. In the case of *Pedley v. Davis and Shipston* (10 C. B. N. S. 492), referred to by the justices, a justice was held to be liable for issuing a warrant under this very Act against a person who was found by a jury not to be an owner of Abbey Lands. Erle, C.J. in delivering the judgment of the court, cited *Newbould v. Coltman* (6 Ex. 195), as bearing a strong analogy, and said, "the question considered was whether the jurisdiction of the justices extended to inquire into the validity of the order of the board of guardians and of the appointment of the overseers, or was confined to enforcing payment of sums assumed to be legally due, and the decision is that the existence of a legal obligation to pay the sum claimed is a necessary preliminary condition to the magistrates having any jurisdiction at all; and therefore they have no jurisdiction to decide on the validity of the order, but if the order is legally made, and the party is in arrear, they may issue a warrant or not, as the

circumstances shall in their discretion seem to require. This reasoning is directly applicable to the 15th section above recited relating to rates on Abbey lands, under which the justice is directed to begin by inquiring whether the rated owner has refused to pay, not whether the rate is valid. This case answers many of the arguments relied on for the defendant here. If the question is not within the jurisdiction of the magistrate, his adjudication thereon is not conclusive for him in an action. If he has a discretion to grant or refuse a distress warrant, he may consider whether there is reasonable ground to doubt the validity of the rate; and if he does so doubt, he may exercise his discretion in refusing a distress warrant, and then the parties may proceed by rule or by indemnity to the justice, if they wish to try the validity of the rate, at the usual risk of costs; but if the justice refuses to issue a distress warrant because he doubts the validity of the rate, he does not therefore adjudicate thereon as on a matter within his jurisdiction for adjudication." [FIELD, J.—This was a rate duly made under an existing Act against which the right to appeal had not been exercised. How could the justices consider its validity upon an application for a distress warrant?] Here the rate was made for a purpose not then authorised, and the case is within the decision of *Richter v. Hughes* (2 B. & C. 499), where trustees had raised 32,000*l.* to build a chapel, which was 2000*l.* beyond the sum authorised by a local Act, and the plaintiff replevied upon a distress made for the payment of a rate to raise the interest. It was held upon demurrer that the plaintiff was entitled to judgment, inasmuch as the Act of Parliament only authorised the trustees to borrow a specific sum, and the rate having been made to pay the interest due upon the whole sum borrowed, was bad *in toto*, although the defect did not appear upon the face of it. This was a rate for purposes beyond the authority given by the Act under which the rate was professed to be made, and therefore there was no necessity to appeal against it as in the case of *Churchwardens of Birmingham v. Shaw* (10 Q. B. 868.) [FIELD, J.—All that could have been wrong in this rate was that in anticipation of a certain future liability it was larger than was immediately requisite. That is not an objection which justices can consider upon the issue of a warrant.] The rate on the face of it ought to have shown that its purpose was within its authority; in *Re Eastern Counties Railway Company and Overseers of Moulton* (25 L. J., M. C. 49), rates were held void for this reason. Coleridge, J. said at p. 51, "The objection to the first two rates does not rest on the statute, but on the well known common law principle, that when any parties are acting under a limited statutory authority, they are bound to show on the face of their proceedings that they are acting within that authority. Here this is not shown on the face of the two rates, which are therefore void."

Benjamin, Q.C., Philbrick, Q.C., and Petheram, appeared for the applicant.

MELLOB, J.—I think we need not call upon the counsel on behalf of the applicant for this rule. From the evidence it appears that the rate was perfectly good on the face of it. It must have been made under an Act of Parliament which was succeeded by another a few days afterwards; and the reference to the subsequent Act in the demand for payment must have been mere surplusage. It

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may be that part of the assessment was technically made before there was legal authority for it, but we can only say on that point that, if appealed against under the provisions of the Act, the rate might possibly have been set aside or amended. I think it cannot be said to have been vitiated by its heading, or by the reference to the two statutes at the back of the demand for payment. Nothing has been suggested to show that the magistrates ought not to have issued their warrant, and therefore the rule must be made absolute.

FIELD, J.—I am of the same opinion. The defendant being an owner or occupier of these Abbey lands was rated to an assessment made for certain purposes. The Act of 1827 (7 & 8 Geo. 4, c. 108), gives power to the owners and occupiers of these lands to raise money for purposes therein mentioned. A large amount of this assessment was to be devoted to the purposes authorised by that Act, but part of it no doubt was intended for the carrying out of arrangements by which all future liability of the Abbey land owners was to be abolished. It was necessary to have Parliamentary authority for these arrangements, and a bill for that purpose was awaiting the Royal assent. The rate was made before the bill was formally passed, but no reference to its purposes was made in the rate; and there was nothing in the rate itself to show that the money was to be raised for any other purpose than those authorised by the Act then in force. To the extent of the amount required for the lump sum payable under the 5th section of the subsequent Act, this rate could not on appeal have been supported; but it is new to me that a rate becomes a nullity because it raises a larger sum than is wanted. Unless it were a nullity on the face of it, the justices had no right to refuse these distress warrants.

Rule absolute.

Solicitors for the applicant, *B. and E. Bastard*.
Solicitors for the justices, *Richards and Walker*,
for *Clifton and Haynes*, Romford.

Wednesday, April 18, 1877.

HUGHES (app.) v. TREW (resp.)

Slaughter houses—Consent of corporation—Abandoned buildings—10 Vict. c. 14, ss. 17 & 19—25 & 26 Vict. c. clxxxvi., s. 65.

By a local Act of 1862 a company was empowered to erect a cattle market at Brecon, and by sect. 65 the company from time to time, if and when they should think fit, and with, but not without, the consent of the corporation testified by writing under the hand of the mayor or town clerk, might provide and maintain slaughter houses proper and sufficient for the slaughtering of cattle for the supply of the borough and its neighbourhood, upon such sites as they should think expedient.

In 1863 the corporation consented to the provision and maintenance by the company of slaughter houses proper and sufficient for the slaughtering of cattle for the supply of the borough and its neighbourhood, in pursuance of, and in accordance with, the above-mentioned sect. 65; the company built slaughter houses accordingly, but absolutely abandoned the use of them in the year 1864. The company subsequently built other slaughter houses a quarter of mile off, and the appellant was their lessee; but the corporation had always refused to give any further consent.

Justices refused to convict the respondent under sect. 19 of the Markets and Fairs Clauses Act 1847, for slaughtering cattle on premises in the borough other than those leased by the appellant.

Held, upon a case stated, that the slaughter houses occupied by the appellant had not received the consent of the corporation under sect. 65 of the local Act of 1862, and that the justices were right.

This was a case stated by three of Her Majesty's justices of the peace in and for the borough of Brecon, under the statute 20 & 21 Vict. c. 43, on the application in writing of the appellant, having duly entered into a recognisance to prosecute the said appeal.

1. Upon the hearing of a certain information or complaint preferred by the appellant against the respondents under sect. 19 of the Act 10 & 11 Vict. c. 14, "for that they, the said respondents, on the 22nd Sept. 1876, at the Chapelry of St. Mary, in the borough of Brecon, after a certain notice and a hand bill in that behalf had been duly published and posted by the Brecon Markets Company (being the undertakers within the meaning of the Markets and Fairs Clauses Act 1847), who had, therefore, under the powers of the Act 25 & 26 Vict. c. 186, intituled the Brecon Markets Act 1862, incorporated with the said first mentioned Act, erected and provided certain buildings within the limits of the said last mentioned Act for the slaughtering of cattle which were then ready for public use, that the said slaughter houses were so ready for public use, unlawfully did slaughter certain cattle for sale as human food, to wit, one beast and one sheep within the said limits there, in a certain place, to wit, the bowling alley at the back of the Swan premises, Ship-street, and adjoining St. Michael-street, other than the slaughter houses so made in pursuance of the said last mentioned Act." The said justices dismissed the said information or complaint, and ordered the appellant to pay to the respondents the sum of 4*l.* 18*s.* 6*d.* for their costs incurred by them in their defence in that behalf.

2. The following facts were either proved or admitted by both parties except the statements in paragraph 6, which the justices deemed necessary to set forth as information for the court in considering this case.

3. That the appellant was the lessee under the Brecon Markets Company of certain slaughter houses erected under the powers of the Act 25 & 26 Vict. c. clxxxvi., within the limits of the said Act.

4. That a notice was duly published in the *Brecon County Times* newspaper of the 17th June, 1876, which newspaper circulates within the borough of Brecon; and such notice, in the shape of printed handbills, was also posted in the market place and other conspicuous places within the said borough, such notice being as follows:

Brecon Markets Company.

Notice is hereby given, that the slaughter houses of the company in their Cattle Markets-place, in Hedrhudd, in the borough of Brecon, are ready for use; and notice is hereby also given that, after the expiration of ten days from the publication and posting of this notice, anyone slaughtering cattle contrary to the 19th section of the Markets and Fairs Clauses Act 1847, will be liable to a penalty of not exceeding 5*l.* for each offence.

Brecon, June 13, 1876.

5. A certificate under the hand of two justices

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of the borough of Brecon, to the following effect, was given in evidence, namely :

We, two of Her Majesty's justices of the peace for the borough of Brecon, do hereby certify that the slaughter houses of the Brecon Markets Company, situate in their Cattle Market-place, in Heolrhydd, in the said borough, are completed and fit for the use of persons resorting thereto, and for public use.

Dated this 12th day of June, 1876.

DAVID THOMAS, Mayor.
J. TALFORD JONES.

6. There was no evidence given that the two justices who had signed the certificate mentioned in the last paragraph had any proof adduced to them that the slaughter houses were completed and fit for public use; and there is no memorandum or minute in the minute book of the justices that any meeting of the justices was held for the purpose of receiving proof that the slaughter houses were completed and fit for public use, as required by the 32nd section of the 10 & 11 Vict. c. 14; and there was no evidence given that the slaughter houses, wherein it was sought to compel the respondents to slaughter, were proper and sufficient for the slaughtering of cattle therein for the supply of the borough and its neighbourhood, as required by the 65th section of the 25 & 26 Vict. c. clxxxvi.; and from the wording of the 32nd section of the 10 & 11 Vict. c. 14, the respondents were considered by the justices to be precluded from giving evidence that the two justices had not had adduced any proof that the slaughter houses were completed for public use, as required by that section.

7. The following letter, in the handwriting of the late town clerk of the borough of Brecon, was put in and proved :

J. R. Cobb, Esq.
(Solicitor to the Brecon Market Company),
Nythfa, Brecon.

Dear Sir,—Brecon Markets Act 1863. On the other half sheet I beg to hand you a copy of the resolution relating to the cattle market, slaughter houses, and tolls passed at the council meeting last night as arranged.

—Yours truly,

15th May 1863. STEPHEN B. EVANS, Town Clerk.

[COPY.]

Resolved on the motion of Mr. Alderman Thomas and seconded by Mr. Councillor James Williams, that the Corporation of Brecon consent to the removal of the Fridays Cattle Markets from the streets to a new market, to be established on the authorised site in Clawddygær, to the provision and maintenance by the company of slaughter houses proper and sufficient for the slaughtering of cattle for the supply of the borough and its neighbourhood, in pursuance of and in accordance with the 65th section of the Brecon Markets Act 1863; and also to the following reduction of tolls, viz.: On corn and seeds, one halfpenny per imperial bushel; sheep and pigs (including stallage), and so in proportion for any less number, one shilling per score; cattle threepence per head; calves, twopence per head; sucking pigs, one farthing per head.

8. The minute book of the corporation of the borough of Brecon, containing the minutes of the meeting of the corporation at which the resolution set out in the last paragraph was passed, was produced, and the resolution as set out in the last paragraph appeared upon the said minutes; but it appeared that the minutes of the meeting had never been signed by the mayor, or chairman of the meeting, or the town clerk.

9. The Markets Company in pursuance of the above resolution of the corporation subsequently erected slaughter houses at a place called Market-street, in the Borough of Brecon, in 1863; but, in consequence of their proximity to dwelling houses

or other reasons, the Markets Company absolutely abandoned the use of these slaughter houses in or about 1864.

10. After the abandonment of the slaughter houses in Market-street by the Markets Company they without any further consent from the corporation erected other slaughter houses in a place called Clawddygær (which is at least a quarter of a mile from the slaughter houses erected at Market-street), and which are the subject matter of these proceedings.

11. Between the years 1870 and 1874 the solicitor to the Markets Company repeatedly applied to the corporation to license their then intended slaughter houses in Clawddygær, which are the subject matter of the present proceedings; which licence the corporation from time to time refused on the ground of the insufficiency of the slaughter houses for the wants of the borough and its neighbourhood, as required by the 65th section of 25 & 26 Vict. c. 186.

12. The slaughter house in which it was proved the respondents had slaughtered as set forth in the summons was licensed by the corporation on the 13th Jan. 1874.

13. On the part of the appellant it was contended that the resolution of consent of the corporation in 1863, extended to and was a consent for the Markets Company at any time thereafter to erect other slaughter houses within the borough, without the further consent of the corporation, and consequently that the consent obtained to erect the slaughter houses in 1863 was an unlimited consent, and authorised the Markets Company to build slaughter houses when and where they thought proper until the licence of the corporation was revoked, and consequently extended to and authorised the said Markets Company to erect the slaughter houses in Clawddygær in 1871, and that the certificate of the two justices was conclusive evidence that the same had been completed, and was fit for public use.

14. On the part of the respondents it was contended that the resolution of the Corporation of Brecon was not a valid consent on the part of that body, inasmuch as the minute in the minute book had not been signed by the mayor or town clerk, as required by the 65th section of the 25 & 26 Vict. c. 186, and further that if the resolution was a valid consent, the same was not an unlimited consent as to time and place, and that the said licence had been exhausted by the erection by the Markets Company of the slaughter houses in Market-street in 1863, and that as the certificate of the two justices had been given without proof being adduced to them that the slaughter houses erected in Clawddygær in 1871, had been completed and fit for public use, was bad in law, and did not satisfy the requirements of sect. 32 of the 10 & 11 Vict. c. 14, or the 65th section of the 25 & 26 Vict. c. 186; and that until the requirement of these several sections of the statutes had been complied with the justices ought not to convict the respondents.

On considering the several facts of this case the justices were of opinion that the copy minute annexed to the town clerk's letter of the 16th May 1863, was a valid consent of the Corporation of Brecon, for the erection of slaughter houses in Market-street, in 1863, because the corporation allowed those slaughter houses to be erected by the Markets Company on the faith of the said

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consent, although that consent was not given in compliance with the requirements of the 65th section of the 25 & 26 Vict. c. 186, but they were of opinion that such consent was not an unlimited consent as contended for by the appellant's solicitors; but that it was exhausted and had become extinct upon the completion of the slaughter houses in Market-street in 1863, and therefore did not and could not extend to and authorise the Markets Company to erect the slaughter houses in Clawddygaer in 1871, and therefore they dismissed the summons.

The questions of law upon which this case is stated for the opinion of the court therefore are: First, whether the copy of the minutes annexed to the town clerk's letter was such a legal consent on the part of the corporation as is requisite and necessary by the 25 & 26 Vict. c. 186, for the erection of the slaughter houses in Market-street, in 1863; secondly, if the consent was sufficient for that purpose under the circumstances mentioned in paragraph 8, would that consent be considered an unlimited one, and extend to any slaughterhouse which the Market Company may thereafter erect in any part of the borough of Brecon, and consequently applicable to the one erected in Clawddygaer, in 1871?

H. Matthews, Q.C. (with him Edward Pollock), argued for the appellant, the lessee of the Brecon Markets Company. By sect. 65 of the Brecon Markets Act 1862 (25 & 26 Vict. c. 186), "The company from time to time, if and when they think fit, and with, but not without, the consent of the corporation, testified by writing under the hand of the mayor or town clerk, may provide and maintain slaughter houses, proper and sufficient for the slaughtering of cattle for the supply of the borough and its neighbourhood, upon such sites as they think expedient; but if any slaughter houses be provided, they shall be provided as near as conveniently may be to the Cattle Market-place provided under this Act, and the slaughter houses so provided shall be deemed part of that Market-place." The information was laid under sect. 17 & 19 of the Markets and Fairs Clauses Act 1847 (10 Vict. c. 14), by which (sect. 17) "Where by the special Act the undertakers shall be empowered to provide slaughter houses they may from time to time erect, on any land purchased by them under the provisions of this or the special Act, or any Act incorporated therewith, any buildings, or set apart and improve any buildings belonging to them for the slaughtering of cattle, and so soon as the same shall be ready for public use the undertakers shall give notice to that effect by the publication thereof in some newspaper circulating within the limits of the special Act, and by printed handbills posted on some conspicuous place within the said limits." (Sect. 19) "After the expiration of ten days from the publication and posting of such notice, no person shall slaughter any cattle or dress any carcase for sale as human food or food of man in any place within the limits of the special Act other than a slaughter house which was in use as such before and at the time of the passing of the special Act, and has so continued ever since, or the slaughter houses made in pursuance of this and the special Act; and every person who shall, after such notice as aforesaid, slaughter any such cattle, or dress for sale any such carcase within the limits of the special Act in any place

other than one of such slaughterhouses, shall be liable to a penalty not exceeding 5*l.* for every such offence." There is nothing in the local Act requiring a further consent of the corporation for a change of the site of slaughter houses, and it was assumed in a case concerning this very place that the consent for the previous building was sufficient under the 65th section; that case is *Anthony v. The Brecon Markets Company* (L. Rep. 2 Ex. 167; in error L. Rep. 7 Ex. 399), where the question was raised as to whether the Markets Company obtained this licence from the corporation or from the local board. The Exchequer Chamber held that it was granted in both capacities, but its sufficiency was not doubted. [FIELD, J.—That was an action by the lessee of the slaughterhouse erected in 1863, against his lessors, the Brecon Market Company, for their want of title; the decision of the Exchequer Chamber was merely that a proper licence had been given by the corporation for the erection of that slaughterhouse, which according to the present case, has been abandoned since 1864.] It appears from the case on appeal, as cited in Willes, J.'s judgment, at p. 402, that "the consent did not specify any particular slaughter houses, and at the time when the consent was given, the site had not been determined upon." He says with regard to the Towns Improvement Clauses Act 1847 (10 & 11 Vict. c. 34), at p. 406, "The true reading is that the licence to erect must *prima facie* be a licence to erect a slaughterhouse which shall be used as a slaughterhouse, and that there are not to be two separate licences, one for erection and another for use." Blackburn, J., in concurring with Willes, J., added at p. 408, "I quite agree that when the licence of the local board is required to erect a slaughter house, it is a licence to erect, and when erected to use; and that it is the same under the special Act." It was also held by the Master of the Rolls in *Bentley v. Botherham and Kimberworth Local Board of Health* (L. Rep. 4 Ch. Div. 588), that where a consent of ratepayers was required and obtained, it was not necessary that new powers should have a further consent. [FIELD, J.—There the Act of Parliament prolonged and extended the time limited for taking lands, and it was held that the previous powers to take with consent of ratepayers were also extended. That does not touch this point.] The first slaughterhouses may be said to have never been within the section 65 of the local Act at all; they were not "proper and sufficient for the slaughtering of cattle for the supply of the borough and its neighbourhood;" the consent therefore did not apply to them, and had never been exhausted.

B. T. Williams, Q.C. and W. Evans, appeared for the respondents.

MELLOB, J.—We need not trouble Mr. Williams. I cannot see any force in the argument that consent is not exhausted unless it has had some operation. It is abundantly clear that no licence was ever obtained for the erection of this particular slaughter house of the appellant. The building, for which the licence of the 14th May, 1863, was intended originally, and to which it was actually applied, was abandoned in 1864. I think the observations of Willes and Blackburn, JJ., are of great force as to the meaning of the consent required, but I cannot apply them to the erection of a second slaughter house after the abandonment of that for which the consent was intended.

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I cannot see how under this 65th section any such second slaughter house can possibly be erected without any consent of the corporation. I think it was the intention of the Legislature to impose some restraint upon the building of slaughter houses, and for that purpose the corporation had powers to interfere and to refuse consent to any place or building there might be ground for objecting to.

FIELD, J.—I am of the same opinion, and I think the decision of the magistrates should be affirmed. The case is somewhat peculiar, but I do not see how there can be a doubt about the question raised for our consideration. The scheme of the private Act was to make the company the holders of tolls for the satisfaction of their claims, but the old corporation was still to continue with certain powers as before. By the 64th section the company were authorised to build a market without any permission from the corporation; but by the 65th section, although the company were to have the profit of slaughter houses which they might build, the control of them was reserved to the corporation; the provision was not fulfilled, as has been suggested by the merely courteous application for the consent of the corporation, which might be dispensed with if refused. In *Anthony v. Brecon Markets Company*, the object of the 65th section is shown to be more than that; some force must be given to the affirmative words, and there must be a continuing consent when it is once given. But the consent in this case applied only to particular buildings which were afterwards abandoned, and the new buildings never obtained the requisite consent. The licence according to the terms of the resolution was limited to the authorised site in accordance with sect. 65 of the local Act; if the resolution had been general so as to give authority to build a slaughter house in any part of the borough, it would, I think, have been beyond the powers of the corporation. Such a consent as this required by statute ought to be a judicial Act, and exercised with careful discretion.

Judgment for respondent.

Solicitors for appellant, *Wilkins, Blyth, and Fanshawe.*

Solicitor for respondent, *C. R. James*, agent for Messrs. *C. F. and G. James.*

COMMON PLEAS DIVISION.

Reported by S. HARR, Esq., Barrister-at-Law.

APPEAL FROM INFERIOR COURT.

April 20 and May 4, 1877.

JONES v. WILLIAMS.

Game—Verbal permission of landlord to take—Trespass in pursuit of—Licence to kill—Conviction not drawn up—Change of opinion of bench—Game Act 1831 (1 & 2 Will. 4, c. 32), ss. 8, 23, 30, and 35.

Upon a parol demise of land there may be a parol reservation of the game upon it; and the landlord may give verbal permission to another person to take the game so reserved to him.

Such parol permission will justify what would otherwise be a trespass not only upon the land so demised, but also upon adjoining land, in pursuit of game.

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Two justices convicted A. of trespass in pursuit of game. B. was afterwards charged with the same offence, and acquitted by two of the magistrates who decided the former case and a third. The former conviction was then reversed by two of the three justices. No conviction having been drawn up, it was

Held, that there was a locus penitentie in the justices, which they took advantage of when they changed their opinion.

CASE stated by three Justices of the Peace of the county of Carnarvon (L. J. Parry, B. T. Ellis, and T. Jones, Esqs.), under 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of the court.

On 1st Jan. 1877 John Williams and Morris Roberts were on two separate fields, part of a farm called Bodwrog, in the parish of Llanbedrog in the said county. John Williams was on a ploughed field, walking backwards and forwards with two dogs, a greyhound and a sheep dog; and Morris Roberts was in another field with a dog and another man unknown. Each of the two were separately charged by the appellant with committing a trespass in pursuit of game under 1 & 2 Will. 4, c. 32, without the licence or consent of the owner of the land.

At a petty sessions, holden at Pwllheli, on 13th Jan., the two informations came on for hearing, the one against John Williams being taken first before L. J. Parry and B. T. Ellis, Esqs., when Williams was convicted, and ordered to pay a penalty of 5s. and costs.

The case against Morris Roberts was then taken; but before it commenced T. Jones, Esq. (the other justice) had taken his seat on the bench, he not having taken any part in the previous case. Morris Roberts produced an unstamped paper in the Welsh language, which, being translated, was—

December 26, 1876.—I do hereby give leave to Morris Roberts, Rhander Llangian, to course and shoot the whole of the rabbits, hares, or game, that is upon all my land everywhere. (Signed) Isaac Williams, Ship Inn, Llanbedrog.

The said Isaac Williams also gave evidence that he had signed the paper writing, and that he had given a verbal authority to Morris Roberts to course over all his land. It was proved that the respondents had started a hare on a farm belonging to Isaac Williams, which ran into the ploughed field at Bodwrog, and that the respondents ran after her with the dogs.

The bench were divided in opinion, two of them being for dismissing the case, and the other (B. T. Ellis, Esq.) for a conviction, and, in consequence, the case was dismissed; whilst, as the previous case was mixed up with it, the judgment in that also was reversed, and it was dismissed by the same majority. Neither of the respondents had taken out a game certificate.

The questions for the opinion of the court were:

1. Whether the authority granted to Morris Roberts in writing, and verbally, or either, was sufficient? and, if so, whether that was a justification for John Williams as well as Morris Roberts to enter upon the land of Bodwrog?

2. Whether Isaac Williams, who stated on oath that he had let the tenement verbally to his tenant, and reserved the game to himself, had any right to grant authority to another party to kill game?

3. Whether the two justices, L. J. Parry and

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MURPHY (app.) v. MANNING AND ANOTHER (resps.).

[Ex. Div.]

T. Jones, Esqrs., were justified in reversing the first judgment against John Williams, the other justice, B. T. Ellis, Esq., not concurring.

Mackey for the appellant.

Corbet Yale for the respondent.

GRAVE, J.—This is a case of some difficulty, because the evidence upon the points submitted to us is vague. The first question inquires whether, under sect. 30 of the Game Law of 1831, which relates to trespass in pursuit of game, the parol permission of a landlord—who has himself merely a verbal reservation of the game upon an estate which he has demised to somebody else—will save a person from a charge of such trespass. Next, whether a person having such a licence can be properly punished if found in fresh pursuit of game in another field. As to Morris Roberts, I think there was—to answer the first question categorically—a justification. As to John Williams, the case does not find whether he was acting in concert with Roberts, or whether he was there for his own pleasure; so we can arrive at no conclusion as to him. Upon the second question, I am of opinion that Isaac Williams had a right to grant authority to Roberts, supposing he himself had a reservation of the game; and, if so, Roberts could not be prosecuted as a trespasser under sect. 30. Another question arises as to him—whether he was in fresh pursuit of game. I am of opinion that he was. The third question asked of us relates to the proceedings. There was, in the first instance, a verbal conviction against Williams, which was not formally drawn up; and, in consequence, there remained, in my opinion, a *locus penitentie*. That being so, the convicting magistrates changed their minds. It may, therefore, be said that there was no conviction; but, if there had been, the subsequent proceedings would have been irregular. Whether the magistrates have now power to direct a new trial or not is a question upon which I have some doubt. At any rate, the conviction cannot stand.

LINDLEY, J.—The Game Act contains various provisions having different objects in view. Some of its sections relate to trespass, and others to licences. These people were not charged, under sect. 23, with not having licences, but with trespass under sect. 30. First, as to the case of Morris Roberts. It appears that one Isaac Williams demised a farm to a tenant, reserving the game upon it to himself. Sect. 8, and the decisions upon it, show that there may be such a thing as a parol reservation of game upon a parol demise. The property in the game thus remained in the landlord. He gave a licence to Roberts, who therefore was not a trespasser whilst on his land. But he was also charged with being in fresh pursuit of a hare upon the next field to Williams' land. This is a case specially provided for by sect. 35; and the magistrates properly dismissed the charge against him. As to John Williams' case, another point arises—namely, that the licence did not mention his name. But we have not before us sufficient evidence as to him. The important point is as to the proceedings. Of the two magistrates who were in favour of dismissing the case against Williams, only one had heard the evidence; whilst one magistrate who had heard it was in favour of upholding the conviction. No conviction, however, was drawn up, and therefore the proceedings may be said to have come to nothing. The bench changed their opinion of the

case, and they could not now be compelled by *mandamus* to record a conviction. Their action was not perhaps an acquittal, but it certainly did not amount to a conviction; it may be considered as only a part hearing.

Solicitors for the appellants, *Jones, Blawland, and Sons*.

EXCHEQUER DIVISION.

Reported by H. F. DICKENS, Esq., Barrister-at-Law.

Friday, Jan. 19, 1877.

MURPHY (app.) v. MANNING AND ANOTHER (resps.).

Cruelty to animals—Cutting cocks' combs—
12 & 13 Vict. c. 92, s. 2.

To perform an operation upon an animal which causes pain is to "cruelly illtreat, abuse, or torture" the animal, within the meaning of 12 & 13 Vict. c. 92, s. 2, unless that act be justified by showing that it was done for some lawful purpose, for some purpose legalised by custom, for the benefit of the animal itself, or for making it more serviceable for the lawful use of man.

Cutting off the combs of cocks, which does in fact cause great pain, cannot be justified either on the ground that it is done for the purposes of cock fighting or of winning prizes at an exhibition.

Case stated under 20 & 21 Vict. c. 43.

At a petty sessions held at Sittingbourne, in the county of Kent, on the 17th Jan. 1876, two informations were preferred by Murphy, inspector to the Rochester and Chatham Branch of the Royal Society for the Prevention of Cruelty to Animals, the appellant (1), against Manning, of Rochester, veterinary surgeon, for that he, on the 20th Nov. 1875, at Rainham, in Kent, did unlawfully and cruelly illtreat certain animals, to wit, three cocks, and (2) against Sayers, the owner of the said cocks, for unlawfully causing them to be so illtreated, contrary to the statute 12 & 13 Vict. c. 92, s. 2.

The appellants stated that on the 27th Nov. he went to the house of the respondent Sayers and told him he had received information as to the dubbing or cutting of the combs of some cocks, and asked to see the birds. He was taken to the back premises and shown three bantam cocks. Each of their combs had been cut off as closely as it could be done, and there were unhealed scabs, the effects of a wound, on each of their heads. Sayers told him he had been to the Crystal Palace, and was told there that unless the combs were off he could obtain no prize, which was the only reason for having it done. On the next day the appellant saw the respondent Manning, and asked him as to the cutting of the combs, and he said he did it at Sayer's request for the purpose of exhibition. The appellant asked if he (Manning) did not consider it caused pain, Manning replied that there was a measure of pain, but he did not think it very great, it was soon over, the birds winced their heads during the cutting and bobbed them two or three times. He mentioned that he had been in the habit of doing it more or less for forty years past. On cross-examination appellant said he could not say whether the birds were cocks or cockerels, he took them to be full grown birds.

The police constable stated that they looked as though they had been just recently out; they were full grown birds, duckwing.

James Broad, a member of the council of the

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Royal College of Veterinary Surgeons, stated that in his opinion great pain was caused to cocks in cutting their combs. The removal did not prevent the cocks from suffering disease, the only object was for fighting purposes. He knew of no other cause for cutting them. On cross-examination this witness admitted that he had never done it himself nor seen it done; that it might be done in a minute. There was no portion of the comb without a nerve which communicated with the spinal cord; it was a tissue of blood vessels.

William Henry Jones, another member of the College of Veterinary Surgeons, stated that in his opinion the cutting of the combs would cause pain. There were nerves separated in the cutting off the comb, the fact of their wincing showed this. On cross-examination this witness admitted he had never cut a comb or seen it done, and that blood was no proof of pain; that he had studied the habits of fowls.

Frederick Crook, one of the judges of the Crystal Palace Poultry Show, stated that it was detrimental to a cock to cut its comb. It depended upon the class in which a bird was entered whether or no it disqualified the bird. There were exhibition classes in which it was the practice to dub birds, and there were also classes in which it was the practice not to have them dubbed.

Harrison Weir stated that he was an animal painter and artist, and that he had spent a good deal of time in studying the habits of birds and animals, and in his opinion dubbing spoiled the look of the bird and must be very painful. On cross-examination he said he would not interfere with nature.

On behalf of the respondents it was contended that the combs of cocks were cut for the purpose of their being exhibited, and it was clear from the evidence of Crook that the habit and practice was for game cocks to be dubbed. That so far from the operation of dubbing being cruel, it was for the real benefit of the birds themselves, inasmuch as in case they quarrelled or fought with one another in the fowl pen or yard, they could not pull one another by the comb, in which way they often injured and hurt themselves, and that such an act did not come within the statutes.

George Barker was called on the part of the respondents, who stated that he was veterinary inspector to the Corporation of Gravesend, and had had sixteen years' experience in veterinary matters. He said that cutting the comb of a game cock would decidedly not create much pain. He called a comb a fleshy excrescence, and stated that it had never been proved that it contained nerves communicating with the brain. That he considered it an advantage to game birds to have their combs cut, as it prevented their fighting with one another. It was an ordinary practice, he said, to do it in farmyards in Lincolnshire, where he had out hundreds. It took a quarter of a minute, and the bird would eat directly, and did not appear to suffer. On cross-examination this witness said he was not a member of the College of Veterinary Surgeons. The comb, in his opinion, did not contain a nerve vein, there were blood vessels. In frosty weather the comb gets frost bitten. He did not consider it cruelty.

The justices being of opinion that the offences charged were not of the class of offences contemplated by the statute, dismissed the information.

The question for the court was, whether their decision was right.

Sect. 2 of 12 & 13 Vict. c. 92, is as follows:— "And be it enacted, that if any person shall, from and after the passing of this Act, cruelly beat, ill-treat, overdrive, abuse, or torture, or cause or procure to be cruelly beaten, ill-treated, over-driven, abused, or tortured any animal, every such offender shall for every such offence forfeit and pay a penalty not exceeding 5l."

Waddy, Q.C. (Morton Smith with him) for the appellant.—The case clearly falls within the provisions of sect. 2 of 12 & 13 Vict. c. 92, and the decision of the magistrates is erroneous. If the word "cruelty" does not govern the rest of the section, the case falls within the words "ill-treat, abuse, or torture;" and if the whole section is governed by the word "cruelty," the case likewise falls within its provisions. The definition of "cruelty" given in the lexicon, is "a barbarous act which causes unnecessary pain." Now in the case it is distinctly alleged that this "dubbing" is an operation that causes pain; the sole question then is, was the pain so caused unnecessary? This is laid down by Wightman, J., in the case of *Budge v. Parsons* (3 B. & S. 385), "The cruelty intended by the statute," said the learned judge, "is the unnecessary abuse of any animal." The previous Act of 5 & 6 Will. 4, c. 56, in which the section under discussion is based, contained the word "wantonly." That does not appear in the present Act, so it is unnecessary to show a malignant disposition. Now who can doubt that the pain caused here was "unnecessary pain?" If the cocks were dubbed for the purpose of preparing them for fighting, it was done for an illegal purpose, and was therefore unnecessary. If they were dubbed for the purpose of exhibition, it was done for the purpose of gain, and was equally unnecessary. Suppose a prize was offered for one eyed dogs. No one could say that a man would be justified in putting out one eye of his dog, simply to entitle himself to the chance of getting a prize. Such a case would clearly be within the statute, so would trimming sheep. Cutting horses stands on quite a different footing. No doubt pain is thereby caused, but it is not unnecessary pain, for it is necessary for man's purposes to make the horse useful and subservient to him.

Biron for the respondents.—Whether this "dubbing" is cruelty or not, is a matter of fact within the discretion of the magistrates, and they having given their decision on the question of fact, this court has no power to review it. The question in cases of this nature must always be, whether pain has been inflicted to such a degree as to amount to cruelty? That is a question of fact. But supposing this court has power to review their decision, I contend their decision was right. If the "dubbing" was done with a *bonâ fide* purpose of improving the birds it is not cruelty within the statute; and it is found in the case that "dubbing" does in fact improve the birds. But not only so, it is found also that the operation of dubbing is to the advantage of the birds themselves, for it prevents their injuring each other in the fowl pen by seizing one another by the combs. Rounding the ears of foxhounds might be said to be cruelty if the "dubbing" is held to be so. But that is clearly not within the statute, for it is done for the purpose of preventing the dogs from tearing their ears in the brambles

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when in pursuit of game. It is for the appellants to show that the act was purposeless, which they have failed to do.

Waddy, Q.C. in reply.

Kelly, C.B.—I am clearly of opinion that the decision of the magistrates was wholly incorrect, and that the respondents should have been convicted. The first question is, whether it is "cruel" to cut off the combs of cocks? Now no doubt some acts may be done to certain animals causing extreme pain, and yet these acts may be lawful, not because they are cruel, but because cruelty is inflicted on them for some lawful purpose, as, for instance, the case of cutting horses. The purpose and object may be such as to legalise acts which would otherwise be within the statute. I do not now enter into these questions, but it would be difficult to argue that such cases were not legal, though they do in fact inflict great pain. That pain is inflicted for good. Again, certain operations may be performed on sheepdogs, such as cutting their ears; but that is not the question now before us. It is enough for me to say that when the case comes before me I shall not be disposed to inflict punishment on any one simply because he had inflicted pain, if it were ordinary for him to do it, or if the purpose for which he inflicted the pain was legalised by custom. But when we come to look at this case I look at that, and that alone, and to that I will apply a few observations. First, then, with regard to the act itself. Does it inflict pain and torture? If it does, no one can doubt it is cruel, and that it is to "cruelly illtreat, abuse, and torture" the animal. One witness says there is no pain. That evidence, however, I disregard, for I entirely believe one of the witnesses in the case, who is a member of the Royal Veterinary College, when he said it gave great pain. In cross-examination, it was elicited from him that he had never done it himself, nor seen it done, but it does not need to see such an act as this done to know whether it is cruel or not. There are nerves within the comb the excision of which must cause extreme pain and torture, and if that be so, though it is quite impossible to measure the degree of pain, it must be very extreme. This is to be inferred also from the obvious effect on the animal when it is performed. Then it is said the operation only lasts half a minute. But in an operation of that duration very great pain may be inflicted. An operation of a few seconds may cause pain, and when it lasts for so long as half a minute great pain may result. It appears to me that very acute pain was inflicted. Then comes the question whether any reason or purpose can be assigned for it that can legalise or justify this act, which otherwise would be barbarity. Upon the evidence it appears to me that the object is to enable the animal to be used for cock fighting. That is illegal. No one can say, therefore, that that is a good object. There is no other in the case. They say it was for the purpose of exhibition; but that makes no difference. One class of animals exhibited is a class of fighting cocks; it cannot, therefore, be said that because taking off the combs makes the cocks more fit for cock fighting that that is an object to legalise the cruelty which results from an operation of that kind. There is, therefore, cruelty and abuse of the animal, and as it was done for no lawful purpose, and as it does not appear to fit the animal for any lawful purpose it

is an act which cannot be justified, and one therefore within the statute.

Cleasby, B.—The magistrates have, as I understand, found the facts, and referred to us as a matter of law whether the case is within the statute. If, instead of stating the case in that way, they had found as their conclusion of fact that pain was not inflicted under such circumstances or to such an extent as to amount to cruelty, there would have been no case for us to consider. But they have not so stated the case; therefore I think they have not drawn that conclusion. They thought, however, that the purpose for which the act was done was such that it was one of a class of cases not within the statute, and upon this they ask our opinion. I do not agree in that conclusion. Undoubtedly every treatment of an animal which inflicts pain, even the great pain of mutilation, and which is cruel in the ordinary sense of the word, is not necessarily within the Act. Many cases were put in the course of the argument in which it is clearly not so. Whenever the purpose for which the Act is done is to make the animal more serviceable for the use of man the statute ought not to be held to apply. As was said by Wightman, J. in *Budge v. Parsons* (3 B. & S. 382, 385), the cruelty intended by the statute is the unnecessary abuse of the animal. Neither cock fighting, nor the chance of a prize at an exhibition, is such a purpose as prevents the word "cruel" as used in the Act from applying.

Case remitted to the magistrates with this opinion.

Solicitor for the appellant, *Leslie*.

Solicitors for the respondents, *Dollman*, for *Hayward*, Rochester.

HOUSE OF LORDS.

Reported by A. H. POTTER, Esq., Barrister-at-Law.

Thursday, Feb. 22, 1877.

(Present: The LORD CHANCELLOR (Cairns), and Lords HATHERLEY, O'HAGAN, BLACKBURN, and GORDON.)

CORY AND OTHERS v. BRISTOW.

Poor rate—Moorings in the Thames—Rateability—Thames Conservancy Act 1857 (20 & 21 Vict. c. 147), s. 91.

To make an occupier rateable, his occupation must be actual, exclusive, and profitable, but an occupation may be actual and exclusive where the owner of the soil permits another to make a substantial erection upon it, for although the freeholder can at any time revoke the licence, yet until he does so, the occupation with regard to the erection is in the person who made it.

The Conservators of the Thames being owners of the soil and bed of the river, and having statutory powers to give and revoke licences to lay down moorings, granted to the plaintiffs permission to lay down moorings for two coal "derricks," subject to the conditions, "inter alia," that they should be worked to the satisfaction of the Conservators, and that if it should at any time be found inexpedient to allow the moorings to remain, the Conservators would cause them to be removed.

Under sect. 91, a week's notice must be given by the Conservators before causing such removal.

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The moorings consisted of four anchors and two stones; two of the anchors were made with one fluke each, and were such as are generally used for permanent moorings. In laying them down a hole was dredged out large enough to contain the whole of the anchor, at a depth of 7 ft. below the bed of the river, the stones were placed in similar holes; the derricks were attached by chain cables to both anchors and stones, and the holes were then filled up to the level of the river bed with ballast. The moorings thus formed, were as firm as moorings could be, and the derricks could only be moved by casting off the cables and leaving the anchors and stones behind.

Held (affirming the decision of the Court of Appeal), that the derricks were liable to be rated in respect of such moorings.

THIS was an action brought (in pursuance of 9 Geo. 4, c. 43, a local Act) against the defendant, a clerk to the churchwardens, &c., of Greenwich, to recover 500*l.* for damages sustained by the plaintiffs by the unlawful seizure and conversion by the churchwardens, &c., of a ship known by the name of the *Atlas*, and for money had and received to the use of the plaintiffs. The cause was tried before Brett, J., in Middlesex after Hilary Term 1874, when a verdict was found for the plaintiffs, subject to the opinion of the Court upon a special case stated as to whether the plaintiffs were occupiers of land in the parish of Greenwich.

The case was argued before the Court of Common Pleas (Lord Coleridge, C.J., Brett, J., and Denman, J.) on the 26th April 1875, when judgment was given for the plaintiffs (*ante* p. 37; 32 L. T. Rep. N. S. 797; L. Rep. 10 C. P. 504; 44 L. J. 288, C. P.).

Against this judgment the defendant appealed on the 11th Dec. 1875, when the Court of Appeal (James, Mellish, and Baggallay, L.JJ., and Blackburn, J.) reversed the judgment of the court below (*ante* vol. 9, p. 500; 33 L. T. Rep. N. S. 624; L. Rep. 1 C. P. D. 54), and it was against this decision that the plaintiffs now appealed.

The facts are fully set out in the reports of the case in the court below.

The resolution of the conservators by which permission was given to the plaintiffs to lay down the moorings was in the following terms:

Resolved "That permission be given to Messrs. Cory and Son to lay down moorings (at which they may place derrick hulks) immediately opposite the sluice next eastward of Angerstein's Wharf, East Greenwich, and 510 ft. from the river wall at the said sluice as per plan, the work to be done to the satisfaction of the Conservators of the River Thames, and under the inspection of the harbour master, and to remain under it, the following conditions being agreed to and observed by Messrs. Cory, viz., that the accommodation be assessed and the rent paid thereon; that the hulk be not used for the purpose of storing coals, that it be for the general use of the coal trade; that the barges to or from the hulk be in all cases towed by a steam tug to or from the Custom House, London; that all vessels leave the hulk immediately upon being discharged, and that sailing colliers, when discharged, be towed away to such part of the river as the harbour master may direct, and in all other respects be worked to the satisfaction of the Conservators under the inspection of the harbour master, and with the full understanding upon the part of Messrs. Cory that if at any time hereafter it shall be found by the Conservators inexpedient to permit the moorings of the derrick hulk to remain in that or any other part of the river, the Conservators will, under the powers vested in them by the 91st sect. of the Thames Conservancy Act, cause the same to be removed."

By sect. 91 of 20 & 21 Vict., c. 147, no mooring chains shall be put down or placed in any part of the river without the permission of the Conservators previously obtained. Every such mooring chain which shall be put down or placed shall be so continued only during the pleasure of the Conservators; and the conservators may, at any time, by giving one week's notice in writing, require such mooring chains to be removed; and in case default shall be made in such removal beyond the time to be mentioned in such notice, such mooring chain shall be treated by the Conservators as a nuisance, and removed accordingly.

Thesiger, Q.C. and *Patchett*, Q.C. for appellants. —The material sections of the Conservancy Act are the 44th, which gives the conservators power to make bye-laws for the navigation of the river; sect. 50, which vests in them all the estate and rights formerly possessed by the Crown and the Corporation of London in the soil and bed of the river; sects. 57 and 58, which relate to grant of licences by the conservancy for various purposes, and amongst others for the laying down of mooring chains; sect. 90, which enables the conservators to purchase private mooring chains; and sect. 91, which has been already referred to. Sect. 91 raises an *a priori* presumption that it would be improbable that the conservators would actually vest the soil of the river in a person who put down mooring chains—it is more probable that they would keep it subject to their own bye-laws, and grant a mere licence for the use of the bed of the river—and the informal nature of the document by which the authority was given points to the same conclusion—if they had intended to give a title such as would enable the Messrs. Cory to maintain trespass, they would have done so under seal; but that is not the case, there is simply a resolution of the Conservators, and this is communicated to Mr. Cory by letter—with the exception of the word "rent" there is nothing in the document which points to a tenancy. In the resolution the words are that "permission" be given—not "to occupy" but to lay down mooring chains. Not the words you would expect if the conservators were vesting any title to the bed of the river in the appellants:

Reg. v. Morrison, 1 E. & B. 150, and *Watkins v. Overseers of Milton-next-Gravesend*, 18 L. T. Rep. N. S. 601; L. Rep. 3 Q. B. 350; 37 L. J. 73, Mag. Cas.

In the latter case every word of the judgment of Blackburn, J. is applicable to the case now under discussion, and Lush, J. bases his judgment upon the documents in the case. [LORD BLACKBURN.—In that case the moorings belonged to the Conservators—here they are your own moorings.] It matters not whether the Conservators put them down as agents or put them down as their own and charge for them. The illustration of the lodger would be quite as apposite to the present case as to the case cited.

Allan v. The Overseers of Liverpool, 30 L. T. Rep. N. S. 93; L. Rep. 9 Q. B. 180; 43 L. J. 69, Mag. Cas.;

Inman v. West Derby Union, 30 L. T. Rep. N. S. 93; L. Rep. 9 Q. B. 180; 43 L. J. 69, Mag. Cas. and 89 Q. B.

were two cases very similar to the present one, and although the occupation in those cases had been for several years, it was held that they were not rateable. The same principle was maintained under the converse of the present circumstances in *London and North-Western Railway Company*

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v. *Buckmaster* (81 L. T. Rep. N. S. 835; L. Rep. 10 Q. B. 70; 44 L. J. 29, Mag. Cas.), though that case was stronger than the present, for the words "use and occupy" occurred there, and neither do here. It would be quite as convenient to rate the Conservators as Messrs. Cory. Moreover, the occupation in the present case is not a permanent one, and *Cory v. The Churchwardens of Greenwich* (27 L. T. Rep. N. S. 150; L. Rep. 7 C. P. 499; 41 L. J. 142, Mag. Cas.) is therefore in point.

Lancaster v. Eve, 32 L. T. Rep. O. S. 278; 5 C. B. 717;

Reg. v. Leith, 18 L. T. Rep. O. S. 221; 1 E. & B. 181; and

Forrest v. Overseers of Greenwich 30 L. T. Rep. O. S. 284; 8 E. & B. 890,

may be distinguished.

Brown, Q.C. and *Oswald*, for the respondent, were not called upon.

The LORD CHANCELLOR (Lord Cairns).—My Lords, the question raised by this appeal is whether the appellants are rateable to the relief of the poor of the pariah of Greenwich under an assessment which has been made against them. In the assessment the description of the property rated is thus given. First, "Moorings to which coal derrick and apparatus, *Atlas* No. 1, are moored to bed of river." Secondly, "Moorings to which coal derrick and apparatus, *Atlas* No. 2, are moored to bed of river." So that the subject matter in respect of which the appellants are said to be rateable is certain moorings by which a certain coal derrick is moored to the bed of the river Thames. Now, my Lords, in order to place the facts of the case upon a distinct footing, and to distinguish them from one or two authorities which have been very much pressed upon your Lordships I will direct your Lordships' attention to the statement in the case as to the nature of these moorings. With regard to *Atlas* No. 1 the case states that it is "moored or retained at the spot where she floats in the following way, viz., by two single fluke anchors on the side nearest the shore, by two stones on the channel side, and by two stream anchors, one at her head and the other at her stern." It is also stated that, having been formerly in another position than that which she now occupies, in moving her from the former position, the four anchors and the chain cables by which she had then been attached to the mooring were removed with her, and two of them were put down again in mooring her at her present moorings, and that those two are two of the four to which I have already referred. It is stated in paragraph 12 that the moorings as actually laid down for *Atlas* No. 1 consist of four anchors and two stones, and that of those anchors the two named in paragraph 8, that is to say the two which had followed her from the place where she previously had been moored, which had been taken on board and brought with her, these two are "small and of little importance," and it is not contended on the part of the defendant that any liability to be rated in respect of the soil occupied by them attaches to the plaintiffs. I ask your Lordships' attention to that, because it appears that there are two of these anchors which are part of the equipment of the ship, and followed her from her previous moorings, and are dropped at her present moorings, and it is not said that they constitute any moorings in respect of which rateability will arise. But the other two anchors are made with only one fluke each, and are such as are never used as anchors on board ship, but are

only used for permanent moorings. Anchors with one fluke could not be trusted to take the ground when dropped in the ordinary way. In laying down each of these anchors, a hole was dredged out, large enough to contain the whole of the anchor, and to a depth between 7 and 8ft. below the bed of the river. The anchor was then carefully laid on with the fluke downwards, and the hole was afterwards filled up to the level of the bed of the river with ballast, which lies all round and over the anchor, through which ballast the chain cable is led up to the derrick. Again, the two stones used are each of them about 7ft. long by 5ft. wide and 3ft. thick. In order to put each of these in their places, a hole was dredged out large enough to contain the stone and about 7ft. deep. The stone was then let down into the hole, and the hole then filled up to the level of the bed of the river with ballast. There is about 4ft. thickness of ballast on each stone, and about seventy tons of ballast are used in each hole, a chain cable is led up through the ballast to the derrick. The moorings formed by these two anchors and stones are as firm moorings as it is possible to place in the river. It is quite impossible that the derrick using them can weigh them in the ordinary way in which ships weigh anchor. If the derrick had to be moved, it could only be by casting off the cables and leaving these anchors and stones behind. Now, my Lords, by whom was this work done of embedding these moorings in the soil of the river? That is stated in the 11th paragraph, "Instead of themselves laying down the moorings contemplated by the said resolution" (to that I shall have afterwards to refer—it is the resolution authorising this work) "the plaintiffs caused and procured the necessary work to be done by the workmen of the said conservators, and paid the said conservators the whole of the costs and charges of the materials and labour expended in and about the same." Therefore your Lordships will take it just as if the present appellants had themselves by their own servants purchased the materials which were necessary for these moorings, and then by permission of those who could authorise them, laid the moorings down in the bed of the river. With regard to the other moorings there is some difference in the way in which they have been made. The 16th paragraph of the case states, "The material position of the moorings of *Atlas* No. 2 consists of two anchors, similar to the anchors mentioned in paragraph 12, but having iron instead of wooden stocks, which bury themselves by their own weight in the bed of the river, so that it was not necessary to dredge holes to receive them. But instead of the stones used for *Atlas* No. 1, two large fan-shaped screws have been used. These are screwed into the bed of the river to a depth of 10ft. in the manner shown upon the plan marked 'A' annexed hereto, which is to be taken as part of this case. These screws, together with the two single fluke anchors, form moorings as permanent as those used for *Atlas* No. 1, and it would be equally impossible for the derrick using them to weigh them in the ordinary way." These being the facts with regard to these moorings, I will ask your Lordships to observe how completely they differ from the facts in the case of *Cory v. The Churchwardens of Greenwich* (*subi sup.*). The facts of that case were these: There

was a derrick which, as regards that which was above water, appears to have been of the same character as those which I have just mentioned, and it was moored in the river, but it was moored simply in this way, "by two single fluke anchors on the side nearest the shore, and by two stones on the channel side, and by two stream anchors, one at the head and the other at the stern. The anchors and stones were merely dropped into the river, no force being used for the purpose of fastening either anchors or stones. Before dropping the stones, a small quantity of ballast was removed in the bed of the river, so that the stones might be flat." My Lords, under these circumstances it was held that the moorings were not immoveable from the bed of the river, that they were only, as the late Mr. Justice Willes expressed it, "part of the equipment of the vessel itself," and that therefore there were no moorings which could be said to be fixed to the soil of the river, and to be occupied as part of the soil by the plaintiffs. That, my Lords, I think puts aside that authority, and will enable your Lordships, having regard to the facts which are found in the present case, to arrive, as I think you will without hesitation, at the conclusion that you have here moorings which are clearly fixed into and bedded in the soil of the river Thames, just as much as if piles had been driven 10ft. or 20ft. deep into the soil, and that if you find any person in occupation of these moorings, and that occupation is a beneficial occupation, the person so occupying is occupying hereditaments within the statutes which create chargeability to the assessment to the poor. There arises, then, this other question. Who is the occupier of these moorings? In the first place, to whom do they belong? Unquestionably they belong to the present appellants. They do not belong to the conservators of the river; they were provided by the appellants out of their own money, and put down at their own expense. And this circumstance differs the present case most materially from the second case, which was much pressed in argument upon your Lordships. I mean the case within the jurisdiction of the conservators of the river, the case of *Watkins v. The Overseers of Milton* (*ubi sup.*). In that case there was a coal hulk which was moored in the river Thames for the purpose of containing coal which was put out of lighters into the hulk, and then again distributed in other lighters when wanted for use. This hulk was moored in the river Thames, in the parish of Milton, near Gravesend, and it was moored in this way. There were two screw piles driven into the bed of the river by the conservators, and belonging to the conservators, and a license was granted by the conservators to the owner of the hulk to moor or attach his hulk to these piles so driven into the bed of the river. It does not appear from the agreement in the case that there was an exclusive permission given to the owner of this hulk only, and if I were to judge by the agreement alone I should have said that it might have been in the power of the conservators either to have attached a vessel of their own, or to have allowed some other person to attach a vessel or hulk of his to the same screw piles. I see, however, that the learned judges assume that it ought to be looked at, and therefore I prefer to look at it as if exclusive permission had been given to the owner of the hulk to attach, as in point of fact for

several years he had attached, his hulk to the piles. But, my Lords, that case turns entirely upon this, that the owner of the hulk who was the person rated was not in occupation of these moorings. The moorings were not his, but were the moorings of the Conservators, who having these moorings belonging to themselves gave him the permission to attach his hulk to these moorings. The court held, and I will assume rightly held, because it does not bear in any way upon the facts of the present case that that was merely a permission to attach the hulk to the moorings of the Conservators, and that there was no occupation by the owner of the hulk of the moorings of the Conservators. My Lords, whether that case be rightly decided or not, it has no bearing upon the facts of the present case, where your Lordships find moorings put down by the appellants, and used by the appellants alone, and with regard to which either you must arrive, as it seems to me, at the conclusion that they are occupied by no person whatever, or if they are occupied by anyone, that they are occupied by the appellants. But, my Lords, it remains to look more accurately at what is the character of the occupation of the appellants, and how it is that they come to have the occupation of these moorings. For the purpose of rating, it might, indeed, be sufficient to look at the mere fact of occupation. They are found in occupation, and that is to them a valuable occupation, of this fixed property, and are therefore rateable to the relief of the poor, even though it might turn out that their occupation is a wrongful one, or one the propriety of which they cannot justify. But when your Lordships look at the circumstances under which they have come into that occupation, it appears to me that their possession of the moorings is a rightful one, and is itself to be designated according to the most accurate expression "an occupation" of the moorings. Their occupation arises in this way. The Conservators of the Thames have under the Act of 1857, carried over to them, and brought into their proprietorship, all the rights in the bed and soil of the river Thames which belonged to the Crown, or which were claimed by the Corporation of London. They are made the guardians, as it were, of the navigation of the Thames, and the protectors of the bed and soil, for the purpose of the navigation. They have certain very wide powers given to them for the protection of the navigation, and may make bye-laws for the same purpose. They have power to make piers and landing-places for the accommodation of the public, and they have powers to authorise riparian owners to make landing places, and wharves, and jetties, and to put down mooring chains and moorings for the better and more convenient enjoyment of access to their lands. In this particular case, the Conservators passed a resolution giving Messrs. Cory permission, not as a matter of favour or indulgence, but upon the proper assessment of rent by the proper officer as to the value of such permission, to occupy the moorings, in accordance with the terms of that resolution, and Messrs. Cory are warned at the end of their agreement that the Conservators will retain the statutory rights given them by the 91st section of the Conservancy Act, of causing the moorings, at any time they think fit, to be removed on giving a week's notice, but subject to that right of removing them by their statutory power at a

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week's notice, the moorings will be allowed to remain, the rent assessed upon them being regularly paid. Now, my Lords, as I read that, putting aside the words and looking at the real substance of the transaction, I cannot look upon it as otherwise than an exercise upon the part of the conservators of their Parliamentary powers, by giving to Messrs. Cory a right to lay down these moorings, and also a right, after the moorings are laid down, to occupy them through the instrumentality of this derrick, until, in the exercise of the same Parliamentary powers, and upon a week's notice being given, the Conservators shall remove them from their occupation. It therefore seems to me that your Lordships have here a fixed property, found in the occupation of the Messrs. Cory, to an occupation of which fixed property no person else can set up any claim, and that done by an exercise by the Conservators of powers which appear to me to provide for, and to authorise, if it were necessary to find authority for it, an occupation of that kind. On the whole, my Lords, I must say I am entirely satisfied with the unanimous judgment of the Court of Appeal, and I submit, therefore, to your Lordships that this being a case of error, judgment here also should pass for the defendant in error.

LORD HATHERLEY.—My Lords, I take the same view of the case as my noble and learned friend on the woolsack. There are two questions to which, as it appears to me, we must direct our attention, and to which, indeed, our attention has been most ably directed by Mr. Thesiger and Mr. Patchett. First, what is the nature of the interest conferred by the agreement or permission set forth in the case before us? Secondly, when we have ascertained the character of that interest, what is the nature of the occupation which has been exercised by the appellants in this case? As Lord Campbell expresses it in *Forrest v. The Overseers of Greenwich* (*ubi sup.*), as regards the nature of the occupation, the question is whether it be "a permanent and profitable occupation of land within the parish," which seeks to assess the person in respect of such occupation. As regards the interest of the person who is to be rated, it must be an interest in himself exclusively. On the first point, the argument turned upon the latter branch of the case, viz., whether the appellants had got such an occupation under this instrument as would make them liable to rating. I apprehend that in ascertaining the answer to that question, the courts have not meant by the term "exclusively" that the interest may not be determined on certain terms and conditions, but merely that the person so occupying should have the right, unattended by a simultaneous right of any other person in respect of the same subject matter. The common illustration in cases of this character is that of a landlord of an hotel or of a lodging house, in which case, although a person sleeping at the hotel may have the exclusive use of his bedroom for the night, or the exclusive use of a sitting room during the day, or a lodger the exclusive use of the chambers he occupies, still there is a concurrent right reserved by the landlord of the hotel or the person who lets the lodgings, of using the hotel or lodging house for whatever purposes he may think fit for managing the establishment and all purposes connected with it. That is not such an occupation on the part of the lodger as would make him liable to be rated. But

in the present case all the argument has turned upon this, that independently of the question whether or not this be a license or in the nature of a demise, inasmuch as there are certain bye-laws which may be made from time to time by the Conservators who have given this permission, and inasmuch as by the 91st section of the Act the power of any person to have this beneficial occupation may be determined on a week's notice, therefore there is not conferred on the Messrs. Cory the exclusive possession of these mooring chains, which they have been permitted to place in the river as is described in the case. I apprehend, my Lords, that it would be a confusion of ideas to say that it interferes with the exclusive possession any more than the right of re-entry on the part of a landlord in certain given events could be said to interfere in any way with the right of the tenant during the time he is holding. He is in beneficial occupation for a term, though that term is limited by certain contingencies which may possibly determine his interest at an earlier period. Now, my Lords, what is the effect of this agreement? A permission is granted to Messrs. Cory to lay down mooring chains according to the powers vested in the Conservators pursuant to the 58th section of the Act, and when laid down they are to remain. They are to do that at their own expense, and they are to do it to the satisfaction of the officers appointed for that purpose by the Conservators, a phrase which would not be used with respect to any work they were to do themselves. Independently of the bye-laws, and independently of anything arising upon the 91st section, the mooring chains are to remain, and during the whole of that time the Messrs. Cory are in exclusive possession, and in permanent possession, in the sense in which that word is used in cases of this description, and in profitable possession. I cannot find anything on the face of the instrument that can intimate any doubt at all upon that being the character of their possession the remaining of these mooring chains of which they are to make use being secured to them, subject only to those contingencies which they have agreed upon, but the possession being full and complete until these contingencies occur. It was observed by Mr. Patchett that in *Watkin's case* (*ubi sup.*) the Conservators did the work, and he said, so they did here, but that really is a transparent fallacy. They did not do any portion of the work here. It was simply that, instead of hiring another set of labourers, the Messrs. Cory hired the labourers of the conservators, which I apprehend they were at perfect liberty to do if the conservators were willing that they should be so employed, and they paid the conservators for those labourers whom they so employed in execution of the work. In other words, the Messrs. Cory did the work through the medium of a particular agency. That agency makes no difference in their position. The work was entirely done by the Messrs. Cory, and they having done this work all the other conditions in the agreement were also fulfilled, one of which was that the rent was to be assessed in the course provided by the Act, which was done, and it was assessed at a tolerably high figure. All that having been done, it seems to me that Messrs. Cory became the owners, and subject to the events which might determine the ownership under the permission, the sole and complete owners of this profitable tenement. Then arises the question.

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Are the Messrs. Cory the owners in the sense of being occupiers of land situate within the parish? My Lords, I can have no doubt upon that point, when I look at the nature and the character of these mooring chains. They are described in the papers before us, and the case is thereby at once distinguished from two or three of the cases which have been cited, one being with reference to a floating dock and another being with reference to an arrangement by which these mooring chains were sunk, as they were sunk here, but fixed so far less than here that they were capable of being moved like other anchors, whereas here they were sunk and fixed, and would have to be hauled up by machinery fixed in a derrick. That alters the present case from the case of a floating dock, which is, as it were, a vessel floating about upon the water, and which cannot be said to have any immovability whatever in any given parish, and so can hardly be subject to rates. The circumstance in the other case that the derrick itself by its own instrumentality could haul up the stones and mooring chains just as it could any anchor reduced it again to the case of a ship of which it could not be predicated that it occupied land situated within a parish. But here we are told by the case itself that the derrick cannot be removed at all except by slipping its chains and cables, because the stones and the rest of the apparatus are so fixed in the bed of the river as to prevent their being hauled up. It is not a nice question here as was said in part of the argument between the possibility of moving a more or less great weight, but these circumstances indicate the intention from the very first of all the parties to the agreement that it should be a fixed and permanent mooring chain subject only to such contingencies as might arise in the execution of the works of the conservators if anything should occur to require its removal. My Lords, I think that not one of the cases has been in the slightest degree brought up to such a case as we have here before us. I cannot have any doubt whatever that there is a permanent beneficial interest liable to be divested in certain given contingencies as I have described, that it is a valuable and exclusive interest and that it is an interest situate in the bed of the river within the parish of Greenwich, and, therefore, that it is liable to be rated.

LORD O'HAGAN.—My Lords, in this there is no real conflict about legal principles. All the judges of the courts below have agreed as to the grounds of rateability. The occupation to which it is attached must be an actual and exclusive and a profitable occupation. The only question is whether the Messrs. Cory had such an occupation? I think they clearly had, and were therefore liable to be rated. It is not necessary to consider the nature of the powers of the conservators for the purpose of the argument; but if it were, I have no doubt that they acted within those powers in their dealings with the appellants. Under the 50th section of the statute they had vested in them all the interests of the Corporation of London and the Crown in the bed and soil of the river Thames, with authority to make jetties, piers, and landing places, and to permit the construction of such moorings as are the subject of our inquiry. Exercising their statutable powers they entered into a bargain that for certain considerations the Messrs. Cory should have liberty to plant their moorings in the bed and soil of the

river with an understanding that if the conservators should at any time find it inexpedient to permit these moorings to remain they might cause their removal under the 91st section of the Thames Conservancy Act by giving a week's notice. The Messrs. Cory proceeded with their work, and completed a large and costly erection, digging down several feet in the bed of the river, filling the excavation with great stones, passing heavy chains through them, and piling on the whole some seventy tons of ballast. All this was done with their own money, and under their own control, and the erection so completed was their own property. The conservators did not spend a penny, or do an act in the course of construction, or meddle in any way with it when it was completed, it remained in the hands and under the full dominion of those who had created it, subject to the right of removal of the conservators when they might find it desirable to fulfil the statutable conditions for that purpose. In this state of undisputed facts it appears to me that the Messrs. Cory had an occupation of a very real and substantial kind, and an occupation which was not merely actual but rightful, fairly purchased and warranted by law. If the occupation was not in them it was in nobody, and I cannot, in my view of the circumstances, concur with some of the learned judges in holding that the occupation, actual or constructive, remained in the conservators. If by their permission a great stage had been put upon piles driven into the river's bed for 20ft. or 30ft., to which the Messrs. Cory could alone have access, as they alone had erected it, or if a great house had been built with the same licence, and in the same way, having its foundation in the river, the conservators might as well have been called the occupants of both, though neither belonged to them, and upon neither could they have entered for a moment. There was, therefore, in my judgment, an actual occupation in the Messrs. Cory, and if their occupation was actual, it was exclusive. The licence or permission, call you what you will, under which the moorings were created, was not to be capriciously determined at any instant, or without the formal notice prescribed by the statute, and until that notice was given, the conservators, if they had ventured to intrude upon them, would have acted illegally and been liable to answer in an action. For the time, and subject to the conditions, Messrs. Cory were exclusive occupants as completely as if their occupation had been of their own fee simple estate. If the occupation was actual and exclusive, it was confessedly profitable, and so had all the qualities needful to render the occupants subject to the rate. I need add nothing as to the authorities cited, as not one of them appears to me to sustain the appellant's contention. Mr. Thesiger ably urged the public importance of preserving to the conservators the control of the river, and the inconvenience of the construction which would recognise the exclusive occupancy of the appellants. But the contract is clear and specific, and the effect of its express provisions cannot be destroyed by any allegation of its interference with the interests of commerce. The conservators had a perfect legal right to do what they did; their bargain equally bound them and those with whom they dealt, and we must accept its terms and their consequences. Besides, unless the provision as

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to this statutable notice was a mere nullity, and this has not been asserted, it undoubtedly limited and suspended the control of the conservators over the bed of the river, and that result, if an evil one, could not be avoided on either view of the case. On the whole I am of opinion that the judgment of the Court of Appeal ought to be sustained.

LORD BLACKBURN.—My Lords, I am of the same opinion. Neither the Court of Common Pleas in this case, nor the Court of Appeal entertained any doubt that there was an occupation of land here, so that the parties might be liable to be rated. Upon that I will only make one remark to show that the case of *Cory v. The Churchwardens of Greenwich*, in which the Court of Common Pleas had upon this very same rate, and very same derrick, decided that it was not rateable, is really not in point of law in conflict with the decision of the present case, either as it was determined by the court below, or as it will now be affirmed by your Lordships. The manner in which the case was raised was different, and that made a difference in the result. In the former case, *Cory v. Churchwardens of Greenwich*, the churchwardens went before the stipendiary police magistrate and asked him to enforce the rate. Upon hearing the case, he thought that the Messrs. Cory were rateable, and he did enforce the rate. Then he was required to state a case for the Common Pleas, which case he stated, giving powers (I suppose by consent of the parties) to the Court of Common Pleas to draw all inferences of fact from the case so stated. How they came to be so stated as they were I do not know, but on the facts as appearing upon that case, the Court of Common Pleas, as then informed, drew the inference of fact that this derrick was no more occupying the land than any ship whose anchor has been dropped upon the ground and rides at anchor can be said in the legal sense of the term to have an occupation of the ground. If that representation of fact was right, the conclusion of law would follow, that the Messrs. Cory did not occupy any land and could not be rated. That much was clear, whether or not that conclusion was properly drawn from the evidence, as stated by the magistrate, is not a question now before your Lordships, and we need not form any opinion upon it. If the representation of fact was correctly made, the conclusion of law that the Messrs. Cory were not rateable would be perfectly irresistible. But now, my Lords, that having taken place, upon the very same rate, the parties raised the question in a different way, which also they had a right to do. The magistrate, after the decision of the Court of Common Pleas, of course refused to grant his warrant of distress, but the overseers had a right under the Act, which is commonly called Jervis's Act, to come and get a *mandamus*, or rather a rule in lieu of a *mandamus*, for the purpose of raising the question before a jury, and ultimately, as they have done here before this, the final Court of Appeal. That course having been taken, an action having been brought, the facts were more accurately determined, and what your Lordships have now to do is to see what is the effect of the facts as found and stated at the trial, not as found and stated by the magistrate previously. Taking the facts as they are found now, I apprehend that no one of your Lordships could for a moment doubt that here there was a complete occupation

of the soil (whoever it was that occupied it) by the derrick occupying by means of those moorings which were fixed in the soil, I think I may say quite as permanently as the foundations of an ordinary house would be fixed. No doubt they were capable of being removed and taken up, and so the foundations of a house would be, still it is clear that they were fixed and occupying the soil. My Lords, the only other question was, who was the occupier? Were the plaintiffs merely persons having an easement without occupying, or were they the rightful occupiers? Upon that, my Lords, I do not think it necessary, nor would it be becoming in me, as I was one of the judges in the court below, to say more than that I have not seen any reason to change the opinion which I then formed as one of the judges of the Court of Appeal, viz., that the plaintiffs are the occupiers, and that as such occupiers they are properly rateable, and that I understand to be the opinion of all your Lordships.

LORD GORDON concurred.

Appeal dismissed with costs.

Solicitor for the appellants, *Mark Shepherd*.
Solicitor for the respondent, *W. Bristolow*.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Reported by C. E. MALDEN, Esq., Barrister-at-Law.

April 20, 21, and May 14, 1877.

(Present the Right Hons. Sir JAMES COLVILLE, Sir BARNES PEACOCK, Sir MONTAGUE SMITH, and Sir R. COLLIER.)

THE MAYOR AND CORPORATION OF ESSENDON v.
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ON APPEAL FROM THE SUPREME COURT OF THE
COLONY OF VICTORIA.

Rateable property—Exemption—Local Government Act 1874—Racecourse—“Land used for public purposes”—Beneficial occupation by individuals. The *Victoria Local Government Act, 1874*, enacts (sect. 253) that “all land shall be rateable property, except land the property of her Majesty which is unoccupied or used for public purposes.” The respondent, as chairman of the *Victoria Racing Club*, held land used as a racecourse, under a demise from the Crown for ninety-nine years at a peppercorn rent, in trust for the club, and for the purposes of the *Victoria Racing Club Act 1871*, the reversion being in the Crown. The members of the club had certain privileges beyond the general public in the use of the land, and the club had a pecuniary interest in the rents and profits of it.

Held (reversing the judgment of the court below), that the land was not within the exemption, not being used solely for public purposes, without any beneficial occupation by individuals.

Hanna v. Seymour Road Board (2 W. W. & A. B. 93) approved.

Quære, first, whether the land was at the time, and for the purpose of rating, “the property of her Majesty:” secondly, whether a racecourse to be enjoyed by those only of the public who are able and willing to pay for admission can be deemed to be “used for public purposes.”

This was an appeal from a judgment of the Supreme Court of the Colony of Victoria (Stawell,

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O.J., and Stephen, J.) affirming a decision of the Court of General Sessions of the Peace for the Central Bailiwick, which had decided that the respondent was not liable to be rated under the Local Government Act, 1874 (38 Vict. No. 506) in respect of the Melbourne Racecourse, of which he was occupier as Chairman of the Victoria Racing Club.

The facts appear shortly in the headnote above, and are more fully detailed in the judgment of their Lordships, in which also the sections of the various Acts of the Colonial Legislature bearing upon the case are set out.

McIntyre, Q.C. and *J. D. Wood* appeared for the appellants, and argued that under the circumstances the land could not be considered the "property of her Majesty," being demised to the respondent and his successors for ninety-nine years, and even if it were so, it is not "used for public purposes," which must mean "national purposes," horseracing not being such a purpose, and the public not being admitted without payment, while the members of the club enjoy special privileges. To bring the land within the exemption it should be used exclusively for public purposes, which this land cannot be said to be, as the club makes a profit out of it. They cited

Reg. v. Ponsonby, 3 Q. B. 14;

Reg. v. Harrogate, 15 Q. B. 1012;

Mersey Docks v. Cameron, 12 L. T. Rep. N. S. 643; 11 H. L. 443;

Governors of the Poor of Bristol v. Watt, S. A. & K. 1.

Leith Harbour Commissioners v. Inspector of Poor, L. Rep. 1 H. L. So. App. 17;

Greig v. University of Edinburgh, L. Rep. 1 So. & D. App. 343;

Mayor of London v. Stratton (The case of St. Thomas's Hospital), L. Rep. 7 E. & I. App. 477;

Justices of Lancashire v. Overseers of Stretford, E. & B. 225.

Reg. v. Shee (4 Q. B. 2) as explained by *De la Beche v. St. James, Westminster* (4 E. & B. 335) is distinguishable; see also *Bell v. Orans* (29 L. T. Rep. N. S. 207; L. Rep. 8 Q. B. 481); and *Case v. Storey* (20 L. T. Rep. N. S. 618; L. Rep. 4 Ex. 319), as to what is a "public" place; and the Victorian case, *Hanna v. Seymour Road Board* (2 W. W. & A. B. 93).

Theisiger, Q.C. and *Erskine Pollock* (Poland with them) for the respondent, contended that the land came within the exemption in the Act as being common property used for a public purpose. The English decisions before the *Mersey Docks Case* (*sup. cit.*) were conflicting. See *Reg. v. Badcock* (6 Q. B. 787), but they have only a remote bearing, as this statutory exemption is wider than is allowed by English law. The whole character of the demise, and of the Victoria Racing Club Act, 1871 (35 Vict. No. 398) establishes that the land is used for a public purpose.

May 14.—Their Lordships gave judgment as follows: This appeal is from a judgment of the Supreme Court of Victoria, which affirmed the decision of a Court of General Sessions of the Peace, disallowing a rate, made by the Council of the Borough of Essendon and Flemington, on a racecourse vested in the respondent, as chairman of the Victoria Racing Club. The description in the rate is "Trustees of Racecourse—Racecourse," and the assessment is made on a net annual value of 2500*l*. The racecourse is held by the respondent under a demise from the Crown, in trust for the club, and for the purposes of "The Victoria Racing

Club Act 1871." The question to be decided is whether the racecourse falls within the exemption from rateability contained in the 253rd section of the Colonial "Local Government Act 1874." That section enacts, that "all land shall be rateable property," save "land the property of Her Majesty which is unoccupied or used for public purposes, land in the occupation of the Crown or the Government of Victoria," and land held or used under certain specified conditions to which it is not necessary to refer. The respondent contends that this racecourse is "the property of Her Majesty used for public purposes;" the appellants say that at the time of making the rate it was neither the Crown's property nor used for public purposes. The history of the racecourse and of the club is found in the preamble of "The Victoria Racing Club Act 1871." A grant from the Crown (21st Sept., 1859) was made of certain lands (said to contain 301 acres) to Mr. Ligar and four other persons, for twenty-one years, at a peppercorn rent, upon trust that it and the buildings to be erected on it should throughout the term "be set apart, maintained, and used as a public racecourse," subject to such reasonable rules and regulations for the admission of the public, and the price to be paid for such admission, as the trustees should in writing resolve on. Power was given to the trustees to raise money to be applied in furtherance of the purposes of the grant, and to charge the admission prices with the payment of the money so raised. The preamble further states that in 1864 the racing club was formed, and with the consent of the above trustees had "now" the control and management of the racecourse, and that the club had expended considerable sums of money in improving the course, and in erecting good and substantial buildings and fences on it, and proposed to expend further moneys to a considerable amount in erecting a new grand stand and other buildings. Such was the state of things when the Racing Club Act of 1871 was passed. It enacts (sect. 3) that the club may sue and be sued in the name of the chairman, and (sect. 6.) that execution may issue on judgments against the chairman upon the property of the club, except the land vested in or demised to him under the Act. Sect. 7 enacts that Ligar and the other lessees shall cease to have any interest under the grant of 1859, and that the land demised by it shall be vested in the chairman and his successors "in trust for the club," as if he and they were a corporation sole, for the term and upon the trusts mentioned in the grant. The 8th section empowers her Majesty to demise the same land and any contiguous land to the chairman and his successors for any term of years. In pursuance of the powers conferred by this section, the Crown, by a grant of the 8th Jan. 1872, demised the racecourse to the respondent and his successors for the term of ninety-nine years, at a peppercorn rent, to be held by them "in trust for the Victoria Racing Club, for the purposes of the Victoria Racing Club Act." The 10th clause of the Act is as follows: "The lands by this Act vested in or authorised to be demised to the chairman shall be held by such chairman and his successors in office only for the purpose of being maintained and used for a public racecourse, under and subject to the provisions of this Act, and any byelaws to be made under and by virtue hereof, and save as herein expressly provided, shall not be used, demised, or

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let for building purposes, or unless, with the permission in writing of the Board of Land and Works first had and obtained, for any other purpose whatsoever." It is unnecessary to consider whether the term of twenty-one years granted by the original lease has merged in the larger term, for the 11th section declares that the land so granted shall be "vested in the chairman for the purposes mentioned in the 10th section." Powers are given to the committee of the club to maintain the existing buildings on the land, and to erect such others as may, in their opinion, be expedient "for or in connection with the use of the land as a public racecourse" (section 12); also to make by-laws for the election of members to the club, and the expulsion of members, and for the management of the affairs of the club, and also for regulating all matters concerning the racecourse, "and the admission thereto and expulsion therefrom of members of the club, and the public respectively, and the charges to be paid for such admission, and for the general management of the racecourse, races, and race meetings:" (sect. 13.) It is to be observed that the Act provides for two classes of by-laws, one regulating the club, the other the racecourse. The 24th section enables the committee to prescribe by by-laws, the tolls and charges to be levied for admission to the racecourse, and the buildings thereon, and to demand and recover them from any person coming upon the land or buildings; but it contains a very material provision in favour of members of the club, viz., that "the committee may in any such by-law provide that members of the club shall be exempt, either wholly or to such extent as such by-law shall specify, from the payment of all or any of such tolls or charges." Provision is made that by-laws shall not be in force until a month after they have been notified to the Chief Secretary of Victoria, within which period they may be disallowed by the Governor in Council (section 14), and for their publication in the *Gazette*: (sect. 15.) The Governor in Council may repeal by-laws: (sect. 18.) Other sections provide that they shall be exhibited on the racecourse, and prescribe penalties for offences against them: (sects. 18-20.) Power is given to the chairman to let from year to year, or for a less time, any portions of the racecourse or the tolls demandable under the Act: (sect. 25.) Power is also given to the chairman to borrow on the credit of the rents, profits, tolls, and other revenue of the club, 15,000*l.*, and to mortgage the revenue to secure it, and to re-borrow to that amount; the money to be applied in the permanent improvement of the land for racing purposes, or in the erection and maintenance of buildings, or for rendering the land more convenient and useful for racing purposes: (sects. 26, 27, 28.) Provision is made for an annual audit of the accounts of the receipts and expenditure of the club by an auditor appointed by the Board of Land and Works; and such accounts are to be open to the inspection of the public: (38 and the following sections.) The 43rd section enacts that if the land shall, except with the consent of the Governor in Council, cease for twelve months to be used as a public racecourse, or to be applied to any other purposes, it shall revert to her Majesty for the benefit of the public: (sect. 43.) To this provision, however, there is attached a condition (material to be considered with reference to the

question to be now determined), that the Crown shall not be entitled to resume possession without previously paying to the chairman "in trust for the club" the value of all buildings then upon the land, to be determined in case of dispute under the Lands Clauses Consolidation Act: (sect. 44.) It is to be noticed that the Act assumes that the club may possess real and personal property other than the land derived from the Crown, and vests such property in the chairman and his successors, in trust for the club: (sect. 9.) It appears from the evidence stated by the Court of Sessions, that large sums have been expended by the club in erecting a grand stand, ranger's house, horse boxes, and other buildings, the grand stand alone having cost 14,000*l.* On the other hand, large profits have been derived from the race meetings, as much as 13,887*l.* having been received at one meeting, upon which there was a net profit of 4497*l.* Large profits also have been made by fees for the use of the racecourse as training ground, and by the sale of the right to sell liquor, and for sheep depastured on the racecourse. The receipts, it is stated, go to the funds of the club. It is also stated that "the members of the club have certain privileges, so far as the grand stand, saddling paddock, and hill are concerned, and pay 5*l.* a year." If this racecourse, with all the above conditions, had been held under a grant from a private owner, it could not have been disputed that it would be rateable. It is exempt only, if, being Crown property, it is used for a public purpose. In their Lordships' view, it is extremely doubtful whether it can be predicated of this land that it was, at the time and for the purpose of rating, the property of her Majesty. It was then vested in the respondent and his successors, for a term of ninety-nine years, with a modified power of sub-letting. The Crown had a reversion only, and was no longer the present and immediate owner of the land. If the proposition that the property is the Crown's be correct, it might have been affirmed with equal truth had the term been 500 years instead of ninety-nine years. By the interpretation clause of the Colonial "Local Government Act," the words "owner of any rateable property" are declared to mean "the person for the time being entitled to receive, or who, if the same were let to a tenant at a rack rent, would be entitled to receive the rack rent thereof;" and by the 290th section, unpaid rates, in default of payment by the occupier, may be recovered from such owner. It was conceded that if the respondent should let the land, the tenant, as occupier, would be liable to be rated; and it seems plain that if such tenant were in default, the rates might be recovered from the respondent as, within the meaning of the Act, the owner of the land. Undoubtedly if a grant were made by the Crown to its own nominee, as a bare trustee for exclusively public purposes, it might properly be held that the land, within the meaning of the exemption, was still the property of the Crown. But is that the character of the respondent's holding? In coming to the consideration of this question, their Lordships assent to what was suggested by Mr. Thesiger, in his able argument, that the two questions of property and public use in some degree run into each other. It is not easy, nor is it necessary to define, generally, what is meant by the words of the exemption "the property of the Crown used for public purposes," though

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land used for the public service, or as a public park, may be mentioned as instances which would clearly fall within them. But it may well be doubted, whether a racecourse to be enjoyed by those only of the public who are able and willing to pay for admission (all others being liable to be punished as trespassers—sect. 21) can be deemed to be so used. Their Lordships, however, do not think it necessary to decide the appeal on this point, being of opinion that, in order to bring the case within the exemption, the respondent ought to show that the land was used solely for public purposes, without any beneficial occupation by individuals; and this, they are of opinion, he has failed to do. The Chief Justice of the colony took this view of the exemption in a case where the tolls of a bridge had been let for seven years to a builder, to enable him, it was said, to repay himself the cost of building it. The bridge having been found to be the property of the Queen, Stawell, C.J., said, "The only question, therefore, is whether it was used for public purposes. To be deemed so, it must be purely and solely used for such purposes. Here the public had, no doubt, a right of passage over the bridge, but only on payment of a toll, so that it was not for public purposes only, it subserved a private purpose also, and was, therefore, rateable:" (*Hanna v. Seymour Road Board*, 2 W. W. & A. B. 93.) The respondent's trust is two-fold. He holds in trust for the club and for the purposes of the special Act. No doubt there is some indication in the Act that these purposes were of a public nature. The sanction of the governor in council required for the bye-laws, and the power given to the same authority to repeal them, the audit of the accounts by an auditor appointed by Government, and the direction that the accounts shall be open to the public, tend to show that in some sense the racecourse is what it is called, "a public racecourse;" but these are not conclusive tests, since some commercial companies of a public or quasi public nature have been made subject by statutes to not dissimilar conditions. But, together with the trust for these purposes, there is the trust for the club, and it is plain that there are many special privileges and profits to which the members of the club, as such, are entitled, differing in kind from any which the general public can enjoy. Nor were these privileges conferred without consideration. The members of the club had voluntarily expended large sums of their own money in buildings and other improvements before the land became vested in them, and proposed to spend further moneys for the same purpose. It was, therefore, not unreasonable that they should have special privileges, and an interest in the profits to be derived from the racecourse. Thus the 24th clause enables the committee, in framing the byelaws prescribing the tolls and charges to be taken on admission, to exempt the members of the club wholly or in part from such tolls and charges; and, although the byelaws have not been produced, it was not denied that this exemption has been made. There is nothing in the terms of the trust (if no byelaw was made to the contrary) to prevent the members of the club having access at all times to the racecourse and the buildings on it without payment; and they have, as stated in the case, certain privileges "so far as the grand stand, saddling paddock, and hill are concerned." It is true the members pay an

annual sum of 5*l.*; but this is obviously the subscription to the club, and in respect of it they, as members of the club, obtain privileges of an exclusive character, greatly coveted and valued by those engaged in racing pursuits, which constitute a beneficial enjoyment of the land beyond that of the general public. Further, the club, as a club, has a pecuniary interest in the rents and profits of the racecourse. The Act contains no express trust for the appropriation of these profits, but a trust may be implied from the 24th section that they should be applied to the maintenance of the racecourse, and the use of it for racing purposes. No provision is made for the appropriation of the surplus profits after these purposes are fulfilled, and their Lordships see no reason to suppose that they might not be properly applied to repay the moneys which the club may have expended for the buildings placed upon the land. This would obviously be a benefit to its members derived from the profits of the land. Not only so, but by express provision of the 44th section, on the contingency of the land reverting to the Crown in case it shall cease to be used as a racecourse, the club would receive a large pecuniary benefit in being paid the value of all the buildings on the land. It is evident that the cost of these buildings might have been defrayed entirely, or in great part, out of the profits derived from the racecourse. In addition to any moneys which the club, out of its own funds, may have spent on buildings, either before or after the Act, the 15,000*l.* which the respondent was empowered to borrow on the credit of the tolls and rents, may have been expended for the same purpose. All buildings thus placed on the land were to be maintained out of the profits of the racecourse, and the money borrowed to erect them might have been wholly repaid from the same source; yet in the event of the cesser of the term, the respondent would receive in money the full value of all those buildings. The only trust declared of this money is "for the club." Its members, therefore, would be absolutely entitled to it, subject to no obligation to apply it to any public purpose whatever. The judges below do not deny that a beneficial interest may accrue to the club in this respect; but say that as a forfeiture and consequent resumption are not to be presumed, "they are not to suppose that the value of the buildings will be received by the club." Such a contingency, however, might very possibly happen. Supposing the profits to be insufficient to maintain the racecourse, it is not likely the club would keep it open at a loss, and resumption might then take place. Besides, these provisions, coupled with those already commented upon, afford tests for determining whether or not the land was vested in the respondent as a bare trustee, for a public purpose only. The respondent's counsel sought to support their contention that the use of land as a racecourse was a public purpose by referring to the 6th clause of the Victoria Land Act 1869, which enables the governor to reserve from sale Crown lands which, in his opinion, are required "for any public purpose whatsoever," or "for the recreation, convenience, or amusement of the people;" but a comparison of this clause with the exemption clause of the Local Government Act does not assist the respondent. The words "for the recreation, &c., of the people" are not found in this

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exemption clause, and the introduction of them into the 6th clause of the Land Act, indicates that the previous words "for any public purpose" may have been used in a sense which would not include objects of this nature. It is unnecessary to refer at length to the English decisions. In this country the exemption of Crown property rests on the omission in the Poor Law Acts of any words to bind the Crown. In Victoria the exemption is defined and limited by express enactment. So the class of cases in England, which declared that land used for public purposes, and from which the occupiers derived no individual profit was exempt from rateability, derived their authority simply from being decisions of the courts. These decisions were swept away by the judgment of the House of Lords in the *Mersey Docks v. Cameron* (11 H. of L. Cas. 443), which determined in effect that, except in the case of the Crown, a liability to be rated attached upon every occupation from which benefit is derived, although the occupation was for purposes which might be deemed to be of a public nature. Even when the above-mentioned class of cases was considered to declare the law, Lord Campbell, in *Reg. v. Harrogate* (2 E. & B. 184), said, "You have to show that all the purposes to which the money was applied are public." Their Lordships will humbly advise Her Majesty that the judgment of the Supreme Court and the decision of the Court of General Sessions be reversed; and the Court of Sessions having reserved the question of the amount of the rate until the question of the liability of the respondent to be rated had been decided by the Supreme Court, they will further advise her Majesty to direct that the case be remitted to the Court of General Sessions, with a declaration that the respondent is liable to be rated for the racecourse, for the purpose of that court determining the amount of the assessment. Their Lordships think that each party should pay his own costs in the Supreme Court; and her Majesty will therefore be further advised to direct that the costs (if any) which may have been paid by the appellants to the respondent, under the rule of the Supreme Court of the 4th July 1876, be repaid by the respondent to the appellants. The respondent must also pay to the appellants the costs of the appeal to her Majesty.

Solicitor for the appellants, *Thomas Randall*.

Solicitors for the respondent, *Tamplin, Tayler, and Joseph*.

CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, June 9, 1877.

(Before Lord COLERIDGE, C.J., MELLOR, J., LUSH, J., DENMAN, J., and POLLOCK, B.)

REG. v. BELL AND JORDAN.

Larceny—Proof of ownership of property—Official liquidator of a trading company—Winding-up.

An indictment charged the prisoners with stealing brass, the property of H. The evidence was that the brass was the property of a trading company (limited), and that it was seen on the company's premises about twelve days before it was missed on the 24th March 1877; that the company was being wound-up; and that H. was the official

liquidator. A copy of the *London Gazette*, dated 19th May 1877, was produced, which stated that at a special meeting of the company duly convened, and at a subsequent special general meeting (April 25th) a resolution was passed for winding-up the company voluntarily, and that H. and S. were appointed liquidators at the special general meeting.

Held, that this evidence did not prove that the brass was the property of H. as laid in the indictment.

CASE reserved for the opinion of this Court at the West Riding Yorkshire quarter sessions.

1. These prisoners were tried before me at the Spring General Quarter Sessions of the Peace, for the West Riding of the county of York, holden at Wakefield, on the second day of April 1877, on an indictment which charged John Bell with feloniously stealing, on the 23rd March 1877, 600 weight of brass, the property of Henry Hart; and Patrick Jordan with feloniously receiving, on the said last mentioned day, the same property.

2. In order to prove that the said Henry Hart was the owner of the property, the subject of the indictment, William Varney was called as a witness, and swore that he had been the secretary of the Cardigan Iron, Steel, and Wire Company (Limited) down to the time of the winding-up of the said company, as mentioned in the notice in the *London Gazette* set out below. That the said company carried on business at Brightside-lane, Sheffield; that the said Henry Hart was the official liquidator of the said company, and that he (witness) saw the brass mentioned in the indictment safe on the 12th March 1877, at the said place of business in Brightside-lane, and that he missed it on the 24th March 1877. He also produced a copy of the *London Gazette* of the 19th May 1876, in which appeared the following notice.

The Cardigan Iron, Steel, and Wire Company (Limited).

Notice is hereby given that at a special general meeting of members of the Cardigan Iron, Steel, and Wire Company (Limited) duly convened and held at the Cutlers-hall, Sheffield, in the county of York, on the 4th April 1876, and at a subsequent special general meeting of members, also duly convened and held at the Cutlers-hall, in Sheffield aforesaid, on the 25th April 1876, the following resolution was duly passed and confirmed.

That the agreement dated the 13th March 1876, and made between the Cardigan Iron, Steel, and Wire Company (Limited), of the one part, and Joseph Agnes and Edwin Parker and William Booth and Joseph Croft and Francis Day and James Booz Cave and Humphrey Turner and Benjamin Jones, of the other part, be and is hereby confirmed, and that the company be wound-up voluntarily in accordance with the terms of such agreement.

And at the said subsequent special general meeting the following resolution was duly passed.

(2.) That Messrs. Henry Hart and Robert Henry Sharp be and are hereby appointed liquidators of the Cardigan Iron, Steel, and Wire Company (Limited).

E. H. SHARP, Chairman.

3. The certificate of incorporation of the said company was not produced, and no other evidence, verbal, or documentary was given or tendered to prove that the said Henry Hart was the owner of the property mentioned in the indictment.

The counsel for the prisoners objected to the production of the said copy of the *London Gazette* as evidence of the matters stated in the above notice, inasmuch as it was not made evidence of the truth of its contents; nor was it the proper evidence of the voluntary winding-up of a limited joint stock company or of the appointment of an

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official liquidator in such winding-up under the provisions of the Joint Stock Companies Act 1862 and 1867, or either of them, or any other statutory enactment; and that the *London Gazette* is not evidence of the truth of the contents of a notice inserted in it except by virtue of some statutory enactment.

1. That there was no evidence to go to the jury of the existence of the Cardigan Iron, Steel, and Wire Company (Limited), no certificate of incorporation being produced.

2. That the copy of the *London Gazette* produced was not evidence in this case, and did not prove the existence of the said company.

3. That if there was evidence to go to the jury of the existence of the said company, that it ought to have been proved that Henry Hart was the official liquidator of the said company, that there was no evidence to go to the jury of this, and that the copy of the *London Gazette* produced did not prove this.

I declined to stop the case and left it to the jury, and they returned a general verdict of guilty against both prisoners, but I deferred passing sentence until the opinion of the Court for the Consideration of Crown Cases Reserved could be had upon the points submitted on behalf of the prisoners, and granted bail.

The opinion of the Court is, therefore, requested.

1. Whether the prisoners were properly convicted, or

2. Whether the conviction ought to be quashed upon the objections, and the points or any of them submitted by the counsel for the prisoners at the bar.

HENRY LEATHAM, Deputy Chairman.

No counsel appeared to argue on either side.

Lord COLERIDGE, C.J.—It appears to us to be clear that there was no evidence which could be fairly left to the jury to show that the brass stolen was the property of the prosecutor Hart, or that he had ever dealt with it as his property. The evidence was sufficient to show that he might have had a title to the property, but fails to show that he had ever taken possession of it.

The rest of the court concurred.

Conviction quashed.

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

Reported by H. PRAY, Esq. Barrister-at-Law.

Tuesday, April 24, 1877.

(Before JAMES and MELLISH, L.JJ., and BAGGALLAY, J.A.)

HOLME v. GUY.

Charity—Endowed school—Dismissal of schoolmaster—Action of ejectment by governors of school against master—Consent of Charity Commissioners—"Suit or other proceeding"—Charitable Trusts Act 1853 (16 & 17 Vict. c. 137), s. 17. An action by the governors of an endowed school against the schoolmaster, whom they had dismissed, praying for an injunction to restrain him from teaching in the school, and from remaining

in occupation of the school house or the land belonging thereto, is not a "suit, petition, or other proceeding" within the meaning of the 17th section of the Charitable Trusts Act 1853, so as to render it demurrable on the ground of the governors having commenced the action without having previously obtained the sanction of the Charity Commissioners.

Decision of Jessel, M.R., affirmed.

This was an appeal from the decision of Jessel, M.R.

The hearing in the court below is reported *ante* (p. 306), where the facts of the case are sufficiently stated.

The Master of the Rolls held that the action, which was brought in the Chancery Division by the governors of the Ashby Endowed Grammar School against the master, whom they had dismissed, praying for an injunction to restrain him from teaching in the school, or for remaining in occupation of the school house and land belonging thereto, was not a "suit or other proceeding" within the 17th section of the Charitable Trusts Act 1853, so as to render it necessary for the governors to obtain the consent of the Charity Commissioners before commencing the action.

From this decision the defendant appealed.

Ince, Q.C. and Shebbeare, for the appellant.—The words of the 17th section of the Charitable Trusts Act are very wide, and require a certificate of the Board of Charity Commissioners to be obtained before the institution of any suit "for obtaining any relief, order, or direction, concerning or relating to any charity, or the estate, funds, property, or income thereof." The present action is clearly one for obtaining relief concerning a charity within the meaning of the section. [MELLISH, L.J.—According to your construction of the section, it would take away all the power of the trustees in dealing with the charity. JAMES, L.J.—The case made by the statement of claim is, that the defendant, having been dismissed, is a mere trespasser. The action is therefore a mere action of ejectment, and it surely cannot be contended that the 17th section of the Act was intended to apply to an action of that kind.] The language of the section is imperative. It forbids the institution of any suit until the sanction of the Charity Commissioners has been obtained. They referred to

Braund v. Earl of Devon, 19 L. T. Rep. N. S. 181; L. Rep. 3 Ch. 800;

The Attorney-General v. Hinman, 2 Jac. & W. 270;

The Charitable Trusts Act 1860 (23 & 24 Vict. c. 136), s. 14.

Fischer, Q.C. and Cutler, for the respondents, were not called upon.

JAMES, L.J.—I do not think that this is a case in which it was requisite for the governors of the school to obtain the certificate of the commissioners before commencing the action. It is obvious, from the nature of the 17th section of the Act (16 & 17 Vict. c. 137), that it was never intended to interfere with the rights or powers of the trustees of a charity in their character of owners of property, or to interfere with their rights as masters employing servants. The object of the section in question was to prevent strangers from commencing expensive suits or other proceedings in Chancery for the purpose of raising a complaint against the management of a charity, or of preventing anyone from coming

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in, as is indicated in Sir Samuel Romilly's Act, or as in this case, for the purpose of complaining against the trustees for improperly dismissing a schoolmaster. Proceedings of this sort are not such proceedings as strangers ought to take unless the Charity Commissioners are first satisfied that they should be taken. But the object of the section was not to prevent the trustees of a charity from bringing an action of ejectment against a tenant holding over, or to prevent an action on the covenant against a tenant who will not pay his rent, or to prevent the taking of proceedings by way of distress against a defaulting tenant, or to prevent them from taking proceedings against a man who, as here, has been dismissed from his office, and yet will persist in presenting himself there, and in thrusting himself on the property of the charity—the object of the section was not to prevent the trustees of a charity from taking such proceedings as these without having first obtained the sanction of the Charity Commissioners. These are actions at law to which the Act of Parliament was not intended to apply. It may be said that there is a case to be tried, that the allegations in the statement of claim are not well-founded, and that the schoolmaster is entitled to retain his office, on the ground that he was not properly dismissed. That case cannot, however, be raised by demurrer, but must be raised by way of defence to the statement of claim. The order of the Master of the Rolls must, therefore, be affirmed, and the appeal dismissed with costs.

MELLISH L.J., and BAGGALLAY J.A. concurred.

Appeal accordingly dismissed with costs.

Solicitors for the appellant, *Kynaston and Gasquet.*

Solicitors for the respondents, *Johnston and Harrison.*

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Reported by A. H. POYNER, Esq., Barrister-at-Law.

Friday, Feb. 16, 1877.

(Before MELLOR and LUSH, JJ.)

THE DISS URBAN SANITARY AUTHORITY v.
ALDRICH.

Justice of the peace—Power to state case—20 & 21 Vict. c. 43, s. 2—Public Health Act 1875 (38 & 39 Vict. c. 55), s. 305.

The power of justices to grant or refuse an order enabling a local authority to enter lands under sect. 305 of the Public Health Act of 1875 is wholly discretionary, their decision being, therefore, final.

The plaintiff applied to the justices under sect. 305 of the Public Health Act for an order authorising them, as the local authority, to enter upon certain lands of the defendant for the purposes of the Act. The application was dismissed, but the justices stated a case under 20 & 21 Vict. c. 43, s. 2, for the opinion of this court.

Held, that the justices had no power to state a case, as this was not the determination of a complaint within 20 & 21 Vict. c. 43, s. 2.

The plaintiffs intended to construct a certain sewer under powers given to them by the Public

Health Act 1875, and upon the report of their surveyor that it was necessary to enter upon defendant's land for that purpose, they served the defendant with notice to that effect; he refused to allow them to enter, whereupon they applied to the justices in petty sessions for an order authorising them "to enter into, through, or under the defendant's land, for the purpose of laying down an extension sewer for the purposes of the Public Health Act 1875. By sect. 305 of the Act, "if no sufficient cause is shown against the application, the court may make an order accordingly." The justices dismissed the application, but stated a case for the opinion of the court, as to whether they were right in law in doing so.

Wills, Q.C. (Hannen with him), for the defendant, raised the preliminary objection that the court had no jurisdiction, as the case was not within 20 & 21 Vict. c. 43, s. 2, which gives the justices power to state a case. It enacts that, "After the hearing and determination by a justice or justices of the peace of any information or complaint which he or they have power to determine in a summary way, by any law now in force, or hereafter to be made, either party to the proceedings before the said justice or justices, may, if dissatisfied with the said determination as being erroneous in point of law, apply in writing . . . to the said justices to state and sign a case setting forth the grounds of such determination," &c. Here there was neither an information nor complaint. The application was merely for a licence to enter defendant's land. The justices "may" make the order—it is not "shall" make the order—whether they make the order or not rests wholly on their discretion. There is no cause of "complaint" against a man because he insists upon his own rights.

Lumley, for the plaintiffs.—The functions of the justices under sect. 305 are not purely discretionary, but they are to a certain extent judicial. They have to determine whether the entry is necessary or not for the purposes of the authority. The justices having exercised a judicial function, 20 & 21 Vict. c. 43, s. 2, does apply. Besides, there is a complaint, for the defendant obstructs by his refusal the works of the local authority. [LUSH, J.—But the defendant has not done any wrong.] The 16th section gives the sanitary authority the right of entry for the purpose of making sewers, and this right is obstructed. [LUSH, J.—If they have the right, what necessity is there for this application?] The Act gives a right to enter under sect. 16, and the defendant refuses to allow that right to be exercised; the application is then made to the justices to enforce the right.

MELLOR, J.—If that were a "complaint" the word would apply to nearly every case in which the magistrates exercise jurisdiction. We have no jurisdiction to hear this appeal.

Appeal dismissed.

Solicitors for plaintiffs, *Sole, Turners, and Knight.*

Solicitor for the defendant, *Oldman.*

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REG. v. W. COOPER.

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CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, June 9, 1877.

(Before Lord COLERIDGE, C.J., MELLOR, J., LUSH, J., DENMAN, J., and POLLOCK, B.)

REG. v. W. COOPER.

False pretences—Proof—Construction of a letter. An indictment for false pretences alleged that the prisoner falsely pretended that he was a dealer in potatoes, and as such dealer in a large way of business, and in a position to do a good trade in potatoes, and able to pay for large quantities of potatoes as and when the same might be delivered to him.

The only evidence thereof was the following letter from prisoner to prosecutor: "Please send me one truck of Regents and one truck of Rocks as sample, at your prices named in your letter. Let them be good quality, and then I am sure a good trade will be done for both of us. I will remit you the cash on arrival of goods and invoice."

Held, that the false pretences alleged were proved, the letter reasonably conveying to the mind the construction put upon it in the indictment.

CASE reserved for the opinion of this Court at the West Riding of Yorkshire Quarter Sessions.

At the General Quarter Sessions of the Peace for the West Riding of the county of York, holden at Wakefield, on the 2nd April 1877, the defendant William Cooper, was indicted for and convicted of having obtained 8 tons 15 cwt. and 2 qrs. of potatoes, the property of one John Gellatly, by false pretences. Copies of the indictment and of the letter of order for the potatoes, signed by the prisoner and addressed to John Gellatly containing the alleged false pretence, are subjoined.

"West Riding of Yorkshire to wit. The jurors for our Lady the Queen upon their oath present that William Cooper, on the 17th Jan. 1877, at the parish of Sheffield, in the West Riding of the county of York, unlawfully, knowingly, and designedly did falsely pretend to one John Gellatly that he the said William Cooper then was a dealer in potatoes, and as such dealer in potatoes, then was in a large way of business, and that he, the said William Cooper, then was in position to do a good trade in potatoes, and that he, the said William Cooper, then was able to pay for large quantities of potatoes, as and when the same might be delivered to him, by means of which said false pretences, the said William Cooper, did then unlawfully obtain from the said John Gellatly, eight tons, fifteen hundred weights and two quarters of potatoes, of the goods and chattels of the said John Gellatly, with intent thereby then to defraud, whereas in truth and in fact, the said William Cooper was not then a dealer in potatoes, and was not then as such dealer in potatoes in a large way of business, and whereas in truth and in fact the said William Cooper was not then in a position to do a good trade in potatoes, and whereas in truth and in fact the said William Cooper was not then able to pay for large quantities of potatoes as and when the same should be delivered to him as he, the said William Cooper, well knew at the time when he did so falsely pretend as aforesaid; to the great damage and deception of the said John Gellatly, to the evil example of all others in the like case offending, against

the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her Crown and dignity.

"And the jurors aforesaid, upon their oath aforesaid, further present that the said William Cooper afterwards, to wit, on the 17th Jan. 1877, at the parish aforesaid in the Riding aforesaid, did incur a certain debt and liability to one John Gellatly, to wit, a debt and liability to the amount of 32l. 16s. 8d., as and for the price of certain potatoes supplied to him, the said William Cooper, by the said John Gellatly. And the jurors aforesaid upon their oath aforesaid do further present that the said William Cooper in incurring the said debt and liability, unlawfully, knowingly, and designedly did obtain credit from the said John Gellatly under false pretences, to wit, by falsely pretending to the said John Gellatly that he, the said William Cooper, then was a dealer in potatoes, and as such dealer in potatoes then was in a large way of business, and that he, the said William Cooper, then was in a position to do a good trade in potatoes, and that he, the said William Cooper, then was able to pay for large quantities of potatoes as and when the same might be delivered to him, whereas, in truth and in fact, the said William Cooper was not then a dealer in potatoes, and was not then as such dealer in potatoes in a large way of business, and whereas, in truth and in fact, the said William Cooper was not then in a position to do a good trade in potatoes and whereas, in truth and in fact, the said William Cooper was not then able to pay for large quantities of potatoes as and when the same should be delivered to him, as he, the said William Cooper, well knew at the time when he did so falsely pretend as aforesaid; to the great damage and deception of the said John Gellatly, to the evil example of all others in the like case offending, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown, and dignity."

The following was a copy of the letter of the prisoner to the prosecutor:

Hamerton, Sheffield, Jan. 17th, 1876.

Dear Sir,—Please send me one truck of Regents and one truck of Rocks as sample at your prices named in your letter. Let them be good quality, then I am sure a good trade will be done for both of us. I will remit you cash on arrival of goods and invoice. Yours truly, WILLIAM COOPER.

P.S.—I may say if you use me well I shall be a good customer. An answer will oblige saying when they are put on.

It was amply proved in evidence that the prisoner when he ordered the Regents and Rocks, which are kinds of potatoes, had no intention of paying for them; that he held from time to time a stall in the public market, for which he paid by the day, and also dealt as a huckster carrying about fruit in a small cart drawn by a donkey; and several of the witnesses, though very well acquainted with him and his trade, were ignorant of his dealing in potatoes. The potatoes were sold by the prisoner in part at the railway station at a less cost than they would have stood to him, and as to the other part, when on receipt of a telegram from the seller inquiries were made by the railway people, the prisoner, who was at the railway station filling his sacks, left the potatoes and his sacks, and could not be heard of for several weeks, though the police were in active search of him.

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It was contended by the prosecution that the letter of order of the prisoner amounted to a representation that he was a person trading in a considerable way, and that the order given was on a scale consistent with his ordinary transactions. Whereas his ordinary dealings were on a very small scale, to which the large order for potatoes was disproportionate, and that consequently the prisoner had misrepresented his real character and position, and thereby had made the false pretence alleged in the indictment. The falsehood of the pretence, supposing this construction be correct, being amply proved by evidence.

I left the case to the jury, holding that the contention of the prosecution was consistent with law, but leaving it to them, that if they thought the letter did not prove the false pretence, as alleged in the indictment, the prisoner should be acquitted.

The jury convicted, and the prisoner was admitted to bail, to appear to receive sentence at the next Quarter Sessions to be held at Bradford on the 2nd July next.

The opinion of the Court for the Consideration of Crown cases reserved is requested, whether upon the facts proved the defendant was properly convicted upon this indictment.

WM. ALDAM,

Chairman of Quarter Sessions for the West Riding of Yorkshire.

S. Tennant, for the prisoner.—The conviction cannot be sustained. The letter of the 17th Nov. was the only evidence in proof of the false pretences alleged in the indictment. There was no light thrown upon that letter by any other evidence. It is consistent with the statements in the letter that the prisoner never had up to that time, dealt in potatoes, but that he was about to commence dealing in them. The words "sample" and "a good trade will be done" all have reference to the future. To sustain the conviction the false pretences charged must be necessarily contained by implication in the letter. The words "I will remit you the cash on the arrival of the goods" do not necessarily import present ability to pay for them. Where a person obtained money by the false pretence that he was going to pay his rent, it was held not to be a false pretence within the statute: (*Reg. v. Lee*, L. & C. 309; 9 Cox C. C. 304.) In *Reg. v. Jennison* (L. & C. 157; 9 Cox C. C. 158), where a married man obtained money from a woman by falsely representing himself to be unmarried, although there was no express statement by him to the woman that he was unmarried, yet that was necessarily conveyed by his promise to marry her. In *Reg. v. Burrows* (11 Cox C. C. 258), on an indictment for fraudulently obtaining goods in a market by falsely pretending that a room had been taken at which to pay the market people for their goods, the jury found that the well-known practice was for buyers to engage a room at a public-house, and that the prisoner pretending to be a buyer, conveyed to the minds of the market people that she had engaged such a room, and that they parted with their goods on such belief; yet it was held that there being no evidence that the prisoner knew of such a practice, and the case being consistent with a promise only on her part to engage such a room, and pay for the goods there, a conviction could not be sustained. The cases of

Reg. v. Giles, L. & C. 502; 10 Cox C. C. 44; and *Reg. v. Hasleton*, L. Rep. 2 C. C. R. 134; and 13 Cox C. C. 1,

were also cited.

Lockwood, for the prosecution.—It is sufficient if, upon the evidence produced, the false pretences will reasonably bear the construction imputed by the indictment. They need not be the necessary implication from the acts and conduct of the accused—the test is, what conclusion would a man reasonably draw from them? In *Reg. v. Barnard* (7 C. & P. 764), the wearing of a commoner's cap and gown at Oxford naturally suggested that the person wearing them was a student at the university. So here, the giving of a large order by the prisoner, and the suggestion that a good trade might be done, naturally conveyed the idea that the prisoner was in a large way of business. So the promise to remit cash on the arrival of the goods naturally imports that the prisoner was able to pay for them. In *Reg. v. Giles Blackburn*, J. said, "It is not necessary that the false pretence should be made in express words, if the idea is conveyed." Taking the whole of the defendant's letter together, the idea was conveyed that the prisoner was a dealer in potatoes, in a good way of business, and able to pay for the potatoes he ordered on their arrival.

Tennant was heard in reply.

Lord COLERIDGE, C.J.—The question for the court, as I understand the case, is whether there was evidence upon which the false pretences alleged in the indictment could fairly be sustained. The indictment alleges that the prisoner falsely pretended that he was a dealer in potatoes, and as such dealer, then, was in a large way of business, and that he was in a position to do a good trade in potatoes, and that he then was able to pay for large quantities of potatoes as and when the same might be delivered to him, and that a large quantity of potatoes was obtained by means of those false pretences. It is not contended by the prisoner's counsel that if the false pretences were truly alleged in the indictment they were negatived by the evidence. The question is whether the letter set out in the case, which was the only evidence of the false pretences, sustains the allegations thereof in the indictment. At first I was under the impression that it was enough for the prisoner to show that the false pretences alleged to be conveyed by the letter to the prosecutor did not necessarily arise from the letter, but that if the letter would bear an innocent construction the charge would not be made out; but upon consideration I am satisfied that that was a mistaken view, and that it was a question for the jury whether the false pretences alleged did or did not reasonably arise from the letter. I have no desire to protect persons who conduct their business in a loose and careless manner, but at the same time we must be guided in our decisions by the principles of the criminal law. The true principle applicable to this case was well enunciated by Blackburn, J., during the course of the argument in *Reg. v. Giles*, "it is not requisite that the false pretence should be made in express words if the idea is conveyed." The question in all these cases is what was intended to be conveyed to the mind of the prosecutor by the acts, silence, or conduct of the prisoner. If a particular idea is intended to be conveyed to his mind, and was conveyed, and if it be false, the statute is

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complied with. In the present case the prisoner by his letter did mean to tell the prosecutor, or at least it may reasonably and consistently be read to tell, what the indictment alleges to be the false pretences whereby the potatoes were fraudulently obtained. I am of opinion, therefore, that the conviction was right, and should be affirmed.

MELLOR, J.—I am of the same opinion.

LUSH, J.—The substantial question is whether there was any evidence upon which the jury could reasonably find that the false pretences alleged were made by the prisoner. The falsity of the pretences alleged was abundantly proved, and the only question is, whether there was evidence of the pretences as alleged, in other words, were those pretences, or either of them, proved to have been made by the prisoner. There must be a false pretence of an existing fact which may be proved by the act or words of the prisoner, or by both combined. If it is to be proved by words, it is not necessary that the words should bear but one meaning—it is sufficient if they are fairly capable of bearing the meaning imputed to them in the indictment. In this case the question is whether the prisoner intended, by his letter to the prosecutor, to convey the meaning put upon it in the indictment, and did the prosecutor so understand the letter? If so, the letter is just as much evidence of the false pretences charged as if the very words had been in the letter. I am of opinion that this letter is capable of the meaning imputed to it by the allegations of the false pretences in the indictment. If a man orders goods by a letter in those terms without any further explanation, that letter is fairly capable of the meaning of it imputed in the indictment. The jury found that it was capable of that meaning, and the letter was read by the prosecutor in that sense. I therefore think the conviction should be sustained.

DENMAN, J.—I agree with the judgment of the court, but I still entertain considerable doubt about one part of the case. I doubt whether we are not going too far in holding that the letter contains a representation of facts. There is one statement in the letter which, when construed by one of the decided cases may amount to a false statement of fact, and in that view I think the conviction may be upheld, but upon no other part of the letter do I think that there is any representation of a fact. It appears to me that if the letter had said merely, "Please send me one truck of Regents," &c., &c., it would not have been sufficient to establish the false pretences alleged. Then as to the latter clause, "I will remit you the cash on arrival of the goods," that appears to me to be a mere promise and not a statement that the prisoner had actually then the means of remitting cash. But there is an intermediate statement. "Let them be good quality, then I am sure a good trade will be done for both of us," which may be considered to be a statement of fact. In *Reg. v. Giles* the prisoner pretended that he had power to bring the prosecutor's husband back, and that was held to be a statement of fact. That warrants us in holding that where a man is not in a position to do what he professes he will do at a given time, he is making a false statement of fact. The indictment charges that the prisoner falsely pretended that he then was able to pay for large quantities of potatoes, as and when the same might be delivered to him, and that pretence,

I think, is proved by the letter. I am, therefore, warranted in agreeing with the judgment of the court.

POLLOCK, B.—Having heard the whole of the argument, I have come to the conclusion that the conviction should be affirmed. It is not sufficient for the prisoner to show that the letter might bear another meaning, if it is reasonably capable of bearing the meaning imputed to it in the indictment. It is the duty of the prisoner to show by special circumstances that it bore the construction he contends for. I think that the false pretences charged may be fairly inferred from the letter, and that the conviction should be affirmed.

Conviction affirmed.

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Reported by J. M. LELY, Esq., Barrister-at-Law.

Friday, April 13, 1877.

LONDON SCHOOL BOARD v. MURPHY.

Education—Neglect of child to attend school—Prosecution of parent under bye law—Habitual neglect of parent proved—Elementary Education Act 1870 (33 & 34 Vict. c. 75), s. 74—Elementary Education Act 1876 (39 & 40 Vict. c. 79), s. 11.

Where a parent habitually neglects to provide instruction for his child, it is not in the discretion of the local authority to proceed against the parent for a fine under one of their bye laws, but they are bound to apply, under the Education Act of 1876, to a court of summary jurisdiction for an order compelling the child to attend some certified efficient school.

By a bye law made under the powers of the Education Act of 1870, s. 74, the parent of every child of not less than five, nor more than thirteen years of age is required to cause such child to attend school, and by another bye law under the same section every parent not observing the bye law is liable to a penalty of 5s., which penalty is by virtue of the same section recoverable in a summary manner.

By sect. 11 of the Elementary Education Act 1876, it is enacted that "if the parent of any child above the age of five years habitually and without reasonable excuse neglects to provide efficient elementary instruction for his child, it shall be duty of the local authority to complain to a court of summary jurisdiction," which court "may order that the child do attend some certified efficient school willing to receive him."

The child of the defendant having failed to attend school, the prosecutors summoned him before a stipendiary magistrate under their bye law. The facts proved at the hearing of the summons amounted in the opinion of the magistrate to an "habitual neglect" on the part of the parent within the meaning of the 11th section of the Act of 1876. Thereupon the magistrate dismissed the summons under the bye law, but offered to grant a summons under the Act.

Held, that the magistrate was right, and a rule calling upon him to act under the bye law discharged.

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THIS was a rule under 11 & 12 Vict. c. 44, s. 5, calling upon John Bridge, Esq., stipendiary magistrate of the Wandsworth and Hammersmith Police Court, to show cause why he should not grant a summons against one J. Murphy for unlawfully neglecting to cause his child to attend school, in contravention of a bye law made by the London School Board under the authority of the 74th section of the Elementary Education Act 1870.

The facts were that the School Board had applied to the magistrate for a summons against J. Murphy under a bye law made by them as above stated. The magistrate had asked certain questions of the School Board Officer who applied for the summons, and coming to the conclusion from the answers to such questions that the parent had habitually neglected to provide education for the child, refused to grant the summons applied for, on the ground that the offence came within the meaning of the 11th section of the Elementary Education Act 1876.

The following sections of the Education Acts are material:

Elementary Education Act 1870 (33 & 34 Vict. c. 75), s. 74:

Every School Board may from time to time, with the approval of the education department, make bye laws for any of the following purposes: (1.) Requiring the parents of children of such age not less than five years, nor more than thirteen years, as may be fixed by the bye laws, to cause such children (unless there is some reasonable excuse) to attend school. . . . (4.) Imposing penalties for the breach of such bye laws. . . . Any proceeding to enforce any bye law may be taken, and any penalty for the breach of any bye law may be recovered, in a summary manner. . . .

Elementary Education Act 1876 (39 & 40 Vict. c. 79), s. 11:

11. If either—

- (1.) The parent of any child above the age of five years, who is under this Act prohibited from being taken into full time employment, habitually and without reasonable excuse, neglects to provide efficient elementary instruction for his child; or
- (2.) Any child is found habitually wandering or not under proper control, or in the company of rogues, vagabonds, disorderly persons, or reputed criminals;

It shall be the duty of the local authority, after due warning to the parent of such child, to complain to a court of summary jurisdiction, and such court may, if satisfied of the truth of such complaint, order that the child do attend some certified efficient school willing to receive him and named in the order, being either such as the parent may select, or, if he do not select any, then such public elementary school as the court think expedient; and the child shall attend that school every time that the school is open, or in such other regular manner as is specified in the order.

An order under this section is in this Act referred to as an attendance order.

Any of the following reasons shall be a reasonable excuse:

- (1.) That there is not within two miles, measured according to the nearest road, from the residence of such child, any public elementary school open which the child can attend; or
- (2.) That the absence of the child from school has been caused by sickness or any unavoidable cause.

Sec. 50:

Where any act, neglect, or default is punishable under this Act, and also under any other enactment or any bye law made a School Board or other local authority for the time being in force, proceedings may be instituted in respect of such act, neglect, or default under this Act, or such other enactment or bye law, in the discretion of the authority or person instituting the proceedings, so that proceedings under one enactment or bye law only be

instituted in respect of the same act, neglect, or default; and any bye law made either before or after the commencement of this Act by any School Board or other local authority under sect. 74 of the Elementary Education Act 1870, if otherwise valid, shall not be rendered invalid by reason that it is more stringent than the provisions of this Act; and nothing in this Act shall prejudice the effect of or derogate from any provision relating to the committal of children to industrial schools or the employment of children contained in any previous Act of Parliament which may be more stringent in its provisions than this Act.

The following bye laws (*inter alia*) had been made by the prosecutors:

No. 2. The parent of every child of not less than five years nor more than thirteen years, is required to cause such child to attend school, unless there be some reasonable excuse for non-attendance.

No. 7. Every parent who shall not observe or shall neglect or violate these bye laws or any of them shall, upon conviction, be liable to a penalty not exceeding 5s. including costs, for each offence.

Ottaway showed cause, and argued that the words of the 11th section of the Elementary Education Act 1876, were imperative, and left no option to the School Board to proceed under the bye law against a person guilty of "habitual neglect" within the meaning of that section; and that it followed from this that as soon as the "habitual neglect" under the 11th section was proved, the jurisdiction of the magistrate to convict under the bye law was gone.

Holl, Q.C. (*Fullarton* with him) in support of the rule, argued that the School Board had a discretion to proceed under the bye law or the 11th section of the Act of 1876, and that the School Board, and not the court of summary jurisdiction, were the proper judges whether a particular parent ought to be proceeded against under the bye law or the statute, and they relied strongly on the express words of sect. 50 of the Act of 1876, by which bye laws under sect. 74 of the Act of 1870, were preserved intact.

COCKBURN, C.J.—I am of opinion that the stipendiary magistrate was right. The only question is, whether the School Board might have proceeded under the bye law, or whether they were bound to proceed under the 11th section of the Elementary Education Act of 1876. Now it seems to me that the offence under the bye law and the statute are perfectly distinct, the offence under the bye law being an isolated offence, and the offence under the statute being an habitual one. If the offence under the statute be proved, the magistrate obtains power to deal with the child in the manner pointed out by the statute, but not otherwise. The School Board, however, maintain that they may adopt whichever mode of proceeding they please, and this contention is attempted to be supported by a reference to the 50th section of the Act of 1876, by which the powers of the School Board to proceed under the bye laws is expressly preserved. At first I was much struck by the argument founded upon this 50th section, but upon consideration I think that the words of the 11th section are too forcible and express for that argument to prevail. The 11th section does not deal with one act, but with a series of acts, and provides that "it shall be the duty" of the local authority to proceed against the parent in the manner and for the purposes pointed out. Words like these leave not one atom of discretion in the local authority. What happened here was that the School Board sought to prove an offence under the bye law, and in fact proved

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an offence under the statute. That being so, it became their duty to proceed under the statute, and it became the duty of the magistrate to dismiss the summons under the bye law. The protection of the child is the main object of this legislation, and that object would not be attained by granting a summons under the bye law.

MELLOR, J.—I am of the same opinion. I had at first some doubt whether the School Board had not a discretion to proceed under the bye law. But when I consider the whole policy of the Education Acts, I see that the bye law applies to ordinary, and the statute applies to extraordinary, cases. The great object of these Acts is to secure the education of children, and that object is sought to be attained, in the case of parents unable or unwilling to have their children educated, by the wide and important provisions of the 11th section of the Act of 1876. As soon as the magistrate found that an offence under the statute was proved, he was justified in dismissing the summons under the bye law, inasmuch as the School Board have no power to free themselves from the obligations imposed by the 11th section.

Rule discharged.

Solicitors for the School Board, *Gedge, Kirby, and Millett.*

Solicitors for the Magistrate, *Walker, Martineau, and Co.*

April 25 and May 2, 1877.

REG. v. CUMBERLEGE AND OTHERS.

Vestry clerk, remuneration of—Preparation of valuation list—Disallowance by auditor—Union Assessment Committee Act Amendment Act (27 & 28 Vict. c. 39), s. 7—Vestry Clerks Act (13 & 14 Vict. c. 57), s. 7.

By the Vestry Clerks' Act, sect. 7, the vestry clerk is to make out, when required by the vestry, the poor rate, and to assist the churchwardens or overseers in preparing and making out all other parochial assessments or accounts. And by the Union Assessment Committee Act Amendment Act, s. 7, the overseers of a parish may charge any expense incurred by them, with the consent of the vestry, in making out any valuation list upon the poor rate.

The vestry of the parish of St. Paul's, Covent Garden, having charged in their accounts the sum of 100l. paid to their vestry clerk for preparing the valuation list, the poor law auditor disallowed the charge on the grounds (1), that the preparing of the vestry list was among the statutory duties of the vestry clerk, for which his salary, under the statute, was to be taken as payment; and (2) that the charge was excessive, in the absence of particular evidence that any person had received any part of the 100l.

Held, by Lush, J., that the valuation list was not an assessment, that the amount charged might have been and had been sanctioned by the vestry, that the claim of the vestry clerk was not restricted to disbursements out of pocket, and that a rule to quash the disallowance upon certiorari ought to be made absolute.

This was a rule to quash on certiorari the disallowance by Hugh Lloyd Roberts, Poor Law Auditor of the Metropolitan Poor Law Audit District, of the sum of 100l. paid to John Claxton Button, Vestry Clerk of the Parish of St. Paul,

Covent Garden, in the County of Middlesex, in accordance with the resolution of the vestry of the parish for his services in preparing the valuation list, and to quash also the surcharge of the said sum of 100l. upon the Reverend Samuel Francis Cumberlege, George Bell and William Barringer.

The following are extracts from the return to the writ of certiorari:

The following entries appeared on the payments side of the account of the parish of Saint Paul, Covent Garden, for the half year ending 25th March, 1876:

	£	s.	d.
February 7. John C. Button, preparing, &c., valuation list	100	0	0
March 25. Messrs. Shaw and Sons' Subscription to the Justice of the Peace	1	4	6

The following was the certificate of disallowance entered in the book of account of the parish:

I do hereby certify that in the account of the half year ended at Lady Day, 1876, of the Vestry Churchwardens and Overseers of the Parish of St. Paul, Covent Garden, I have disallowed the sum of 101l. 4s. 6d. as payments illegally made out of the funds of the said parish.

And I find that Samuel Francis Cumberlege, clerk in holy orders, George Bell, and William Barringer, Esquires, authorised the making of a portion of such illegal payments, to wit, of the sum of 100l., and I do hereby surcharge upon them the sum of 100l., and I do hereby further certify that the said sum of 100l. is due from them.

And I find that Samuel Francis Cumberlege, clerk in holy orders, George Bell and James Richmond and John Coutts, Esquires, authorised the making of the remainder of such illegal payments, to wit, the sum of 1l. 4s. 6d.; and I do hereby surcharge upon them the sum of 1l. 4s. 6d., and I do hereby further certify that the sum of 1l. 4s. 6d. is due from them.

As witness my hand this 31st day of July, 1876.

(Signed) H. LLOYD ROBERTS,

Auditor of the Metropolitan Audit District.

The following was the statement of reasons entered in the book of account of the parish of Saint Paul, Covent Garden, with respect to the disallowance of the sum of 100l.:

In the account of receipts and payments with respect to the poor rates for the half year ended at Lady Day, 1876, of the Vestry, Churchwardens, and Overseers of the Poor of the Parish of Saint Paul, Covent Garden, I disallowed the sum of 101l. 4s. 6d., which sum is composed of the undermentioned items, entered and charged in the said account as and for payments made out of the poor rates of the said parish, to wit:

	£	s.	d.
Mr. John C. Button, the Vestry Clerk of the said Parish, for preparing the valuation list	100	0	0
Messrs. Shaw and Sons Subscription to the Justice of the Peace	1	4	6
	2101	4	6

A statement of my reasons being required with respect to the sum of 100l., a portion of such disallowance, I now state that I made such disallowance because the said sum is charged in respect of work and labour performed by Mr. Button, the vestry clerk of the said parish, which come within the official duties imposed upon vestry clerks by the statutes in that behalf made and provided; and because the vestry clerk of the said parish was bound, as part of his official duties, to have performed the duties in respect of which such sum was charged without any fee or recompense beyond the annual salary of 150l. which he enjoys and receives as such vestry clerk, and because the said vestry, churchwardens, and overseers were not authorised in law to make such payment and charge the amount thereof upon the poor rates of the said parish, and because no statements of particulars, with vouchers of payments, were produced to me with regard to the payment of any part of such sum of 100l. by the said vestry clerk to any other person or persons.

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And I surcharge the sum of 100*l.* upon Samuel Francis Cumberlege, clerk in holy orders, George Bell, Esquire, and William Barringer, Esquire, because they authorised the making of the illegal payment.

Dated this 3rd day of August, 1876.

(Signed) H. LLOYD ROBERTS,
District Auditor.

From the affidavit of Mr. Button it appeared that at a meeting of the said vestry, duly convened for and duly held on the 16th April 1875, and at which meeting *inter alia* the business had relation to the making of the valuation list for the parish, it was duly resolved "That the churchwardens and overseers be appointed a committee for the purpose of preparing the Valuation List 1875, assisted by the vestry clerk, and that they be authorised to employ such assistance as they may deem necessary for that purpose;" and that such resolution was duly recorded in the minute book of the meetings of the said vestry.

At the time the said resolution was so come to, Mr. Button received from the vestry definite instructions to prepare the said list on behalf of the said committee, and to do all such things as might be necessary, and to employ such assistance as he might think needful in the matter, for saving the committee labour and time in connexion therewith, and to bring forward the subject of his remuneration at a future time, when the vestry would be in a position to judge of the amount and value of the labour performed by him in the matter.

At a meeting of the said vestry duly held on the 7th Feb. 1876, and of the holding of which said meeting, and the purposes thereof, notice had been duly given, it was by express resolution resolved, "That this vestry (being the body of persons performing the duties of overseers so far as regards the duties of assessment, making and collecting of rates for the relief of the poor of this parish) hereby acknowledging that the expenses incurred and labour bestowed by the clerk to this vestry, of, and occasioned by, and incident to, and incurred in making the Valuation List 1875, for this parish, were incurred, undertaken, and bestowed, with the consent, by the direction, and under the authority of this vestry, by virtue of its express resolution for such purpose so intended, come to at a vestry meeting held on the 16th April last, after due notice given, hereby expressly resolves that the sum of 100*l.* be paid to Mr. John C. Button, the clerk to this vestry, as special remuneration to him in respect of such his expenses and labours, and this vestry authorises such sum to be charged upon the poor rate of this parish." Such meeting was attended by numbers of the vestry equal to two-thirds of the entire elective strength of the vestry, and after going very fully into and discussing the question of the amount to be paid to him by way of remuneration, the said resolution was, with the exception of the vote of one number, carried unanimously. The said resolution was duly recorded in the minute book of the meetings of the said vestry, and the said sum of 100*l.* was thereupon paid to Mr. Button by the cheque in respect of which the surcharge now complained of was made.

Such payment was supported before the auditor by production of the notices of the meetings of the vestry above referred, and of the minute book containing the resolutions of the said vestry above set out, and by a receipt, as follows :

St. Paul, Covent Garden, London, W.C.,

7th Feb. 1876.

Received of the vestry (the Valuation List 1875), one hundred pounds—100*l.*

JOHN C. BUTTON.

The item having been objected to, Mr. Button, after some verbal explanations, wrote to the auditor, prior to the actual disallowance, in the following terms:

Vestry Clerks' Office, St. Paul, Covent Garden,
London, 29th July 1876.
Valuation List, 1875.

Dear Sir,—Before you proceed to allowance or disallowance of the 100*l.* charged in the accounts of this vestry for the half year ending Lady Day last as a payment to me for valuation expenses, I desire to lay before you in writing an epitome of the verbal explanation given by me to you on Thursday last. The labour, &c., was undertaken pursuant to resolutions of the vestry, and a general and fair estimate thereof may be formed from the following outline:—Perusing, collating, and extracting information, and making calculations from Government returns, many attendances and inquiries for the purpose of obtaining additional information, and the viewing of properties, and in various attendances upon owners, affording them explanation to enable them to make returns, finally digesting and reducing information into shape and drafting new list at the suggestion of the Government authorities, attendances on the surveyor of taxes, going through the entire list and returns with him, with a view to bring figures into accord.—Subsequently attending the vestry committee, going through calculations and entire list again with them, and obtaining their approval of and sanction to list as submitted, and ultimately preparing list in duplicate, and obtaining signatures, &c.—Attendances before assessment committee to support list when such committee determined not to revise, on the ground that such list was invalid.—Attendances on Local Government Board, and upon clerk to assessment committee, discussing the matter in all its bearings, and afterwards obtaining from vestry full power to take all needful steps to maintain validity of list, as a preliminary step to proceedings to uphold list, searching, perusing, and consulting Acts of Parliament, and other matter, to enable me to exhaustively prepare case for opinion of counsel.—Preparing case, with usual attendant legal expenses, and ultimately obtaining counsel's opinion that the list was perfectly valid, further attendances upon and correspondence with clerk to assessment committee, submitting opinion, and such committee determined likewise to take counsel's opinion; several attendances upon its clerk, going into, and affording him such information as he required, many of the facts being otherwise out of his reach, to enable him to prepare case, and when drafted, going through same with him in long conference, and finally settling same.—Attendances upon revision, upon the committee determining to proceed with list, and upon appeals. The performance of the above cost out of my own pocket upwards of 40*l.*, in obtaining the services of a skilled accountant, to verify figures and calculations, &c., and in payment of proportionate part of the salary to a clerk, whose services were for a considerable time exclusively devoted to the preparation of list, beyond fee to counsel, 6*l.* 16*s.*, besides various minor items of incidental expenses. The whole of the above facts and circumstances were within the knowledge, or brought under the notice of the vestry, at the time of its deliberation upon the amount I should receive; considerable discussion ensued on that occasion, and the vestry, being largely attended, ultimately resolved (some members proposed I should receive more, one less) that 100*l.* would be reasonable remuneration, such sum to cover services rendered in preparation of list, and all legal charges connected with sustaining the same. The first resolution was passed 16th April 1875, and matters were not complete till end of November. If you require any further information, I shall be happy to afford it.—I beg to remain, dear Sir, yours faithfully,

H. Lloyd Roberts, Esq.

JOHN C. BUTTON.

The statements in the above letter were corroborated by the chairman of the Vestry meeting, and Mr. Button's affidavit concluded as follows :

It is not true, as stated by the said auditor in his said "reasons," that no statement of particulars, with

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vouchers of payment, were produced to him with regard to the payment of any part of such sum of 100*l*. I produced to him the case for opinion of counsel referred to in paragraph 6 of this my affidavit, with usual receipt thereon for the fee of 5*l*. 16*s*. referred to in my letter to him above set out, and although I explained to him it was not customary for solicitors to take receipts from clerks for their wages, I offered to procure a receipt from the clerk referred to in my said letter, and to verify the payment in any manner he might think proper.

Notwithstanding the ground stated by the said auditor in his said "reasons" that this work and labour performed by me in respect of which I was paid the sum disallowed, comes within the official duties imposed upon me as vestry clerk as aforesaid, and that I was bound, as part of such my duties, to perform the duties in respect of which the allowance was made without fee or recompense beyond my annual salary. I am enabled to state as a fact, from inquiries to that effect made by me, that in various instances the said auditor, as the auditor of the accounts of various metropolitan parishes, has allowed the expenses incurred in the preparation of the valuation list 1875, of such parishes respectively, the clerks to the vestries of such parishes respectively holding their appointments as such by virtue of the same statute under which I hold the appointment of Clerk to the Vestry of St. Paul, Covent-garden, aforesaid. In some of such instances a resolution under the statute 27 & 28 Vict., c. 89, sect. 7, was alone relied upon in support of the items allowed by the said auditor, in others details were likewise produced to the said auditor, and in some of such instances it was disclosed on the face of the accounts and documents laid before the same auditor that such, or portions of such, voted moneys were paid to the vestry.

A. Glen (McIntyre, Q.C., with him) for the auditor, showed cause, and argued that the disallowance was right, on both grounds stated by the auditor. He cited

Ex parte Melish, 8 L. T. Rep. N. S. 47;

Reg. v. Gwyer, 2 A. & E. 216;

Reg. v. Glyde, 2 M. & S. 323 N.;

Reg. v. Chorlton upon Medlock, 33 L. T. Rep. N. S. 526; L. Rep. 1 Q. B. D. 62; 45 L. J. 33, M. C.

A. Wills, Q.C. (Lettis Glyn with him) for the vestry, supported the rule, and argued that the disallowance was wrong on both grounds. This audit is not between the vestry clerk and the parish, but between the overseers and the parish, and the services in respect of which the overseers made the payment disallowed, are entirely outside the statutory duties of the vestry clerk, as may be seen by reference to 13 & 14 Vict., c. 57, sect. 7.

Our. adv. vult.

May 2.—The written judgment of the court (LUSH, J.) was delivered by that learned judge as follows:—This is a rule to quash the disallowance by the Poor Law Auditor of the Metropolitan Audit District of a sum of 100*l*., charged in the accounts of the Vestry of St. Paul's, Covent-garden, as a payment made to their vestry clerk for preparing the valuation list required by the 32 & 33 Vict., c. 67, and the surcharge of that sum upon the members of the committee who authorized the alleged illegal payment. The reasons stated by the auditor for the disallowances are, "That the work came within the official duties imposed upon vestry clerks by statute, and for which they are therefore remunerated by the salary assigned to them: and because 100*l*. is an excessive charge, no statement of particulars with vouchers of payment having been produced with regard to the payment of any part of such sum to any other person." The 7th section of the Union Assessment Committee Amendment Act, 1864 (the 27 & 28 Vict., c. 39) enacts that "when the overseers of any parish incur any expense in making out any valuation list, &c., with the con-

sent of the vestry given by express resolution, after due notice they may charge such expense, so far as the same may be authorized by the vestry, upon the poor rate." The first resolution passed by the vestry on the subject appointed the churchwardens and overseers a committee for preparing the valuation list 1875, assisted by the vestry clerk, and the committee were clearly authorized to employ such assistance as they might deem necessary for that purpose. It is stated by the vestry clerk in his affidavit, and is not questioned, that at the time the resolution was come to be received from the vestry definite instructions to prepare the said list on behalf of the committee, and to do all such things as might be necessary and to employ such assistance as he might think needful in the matter for saving the committee labour and time in connection therewith, and to bring forward the subject of his remuneration therefore at a future time, when the vestry would be in a position to judge of the amount and value of the labour performed by him in the matter. After the list was made, which, as appears by the affidavit, involved a considerable amount of labour and expense, the vestry passed the following resolution: "That this vestry hereby acknowledging that the expenses incurred and labour bestowed by the clerk to this vestry of and occasioned by and incidental to, and incurred in making the valuation list, 1875, for this parish, were incurred, undertaken, and bestowed with the consent, by the direction, and under the authority of this vestry by virtue of its express resolution for such purpose so intended come to at a vestry meeting held on the 10th April last, after due notice given, hereby expressly resolve that the sum of 100*l*. be paid to Mr. John C. Button, the clerk to this vestry, as special remuneration to him in respect of such his expenses and labour; and this vestry authorises such sum to be charged upon the poor rate of this parish." These resolutions satisfy all the requirements of the 7th section of the Act. The expense was incurred with the consent of the vestry, given by express resolution after due notice, and the amount charged is the precise amount authorised by the vestry to be paid. The question therefore is whether the duty of preparing the valuation list is a duty attaching to the office of vestry clerk as such, for, if it is, the payment of 100*l*., or any part of it, for the service was a mere gratuity, and the vestry had no authority to charge it upon the poor rate. As no duties other than those prescribed by the Vestry Clerks' Act, the 13 & 14 Vict. c. 57, have been imposed on the vestry clerk of this parish, we must look to the 7th section of that Act in order to determine whether this particular work is included either in terms or by reasonable intendment within the range of his duties. That section requires him, amongst other things, to "make out when required by the vestry the church rate, and procure the same to be signed and completed, and when there is no collection of poor rates, or assistant overseer to make out the poor rate, and procure the same to be allowed and to make all the subsequent entries in the rate-book, and to give the notices thereof required by law"; also "to assist the churchwardens or overseers in making out all other parochial assessments or accounts, and in examining the accounts of the collectors of such assessments." These are the only words to be found in the Act upon which an

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argument can be founded, and I think it is plain that they do not bear the construction contended for. The valuation list is not an "assessment" which in this clause is evidently used as synonymous with "rate." It is only a draft or proposal, which, when adopted and settled by the assessment committee, is to become the basis of an assessment. That the word assessment could not have been intended to include a valuation list is clear, for no such thing had been thought of at the time the Vestry Clerks' Act passed. The work in question is in truth a new duty imposed by the Assessment Committee Act, not a substitute for, but an addition to the former duties of overseers for which no provision is made other than this, that the overseers are responsible for its being done, and are authorised to charge the expense of doing it upon the poor rate. It is, of course, implied that the expense they incur must be reasonably proportioned to the service they require. It is the duty of the auditor to see that the authority to charge is not made a pretext for extravagance or favouritism. Nothing of the kind is suggested here, nor

does the auditor find that the amount allowed by the vestry is more than the services required and performed are fairly worth, or than the vestry would have had to pay if they had employed a stranger. His reason for disallowing it is that it was part of the duty of the vestry clerk to do it, and that it was included in his salary. In this I am of opinion that he was mistaken. His reason for not allowing even the expenses out of pocket might have been sufficient if the vestry clerk were entitled only to what he had been obliged to expend. But they are not put forward as a separate charge, and they were taken into account by the vestry in assessing the gross sum, and there is nothing to show that that was not a reasonable allowance to cover both the work and the outlay. The rule must therefore be made absolute with costs.

Rule absolute.

Solicitor for the prosecutors, *J. O. Button.*

Solicitors for the defendant, *Frankish and Buchanan.*

ERRATA.—In the case of *The Mayor of Essendon v. Blackwood* (ante, p. 579), 1st col., line 32 from top, for "S. A. and E.," read "S. A. and E.;" 1st col., lines 34 and 35 from bottom, for "E. and B. 225," read "E. B. and E. 225."

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